FILED
COURT OF CLAIMS
OF OHIO

2014 JUN 24 AM 10: 31

IN THE COURT OF CLAIMS
STATE OF OHIO

GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*	)	CASE NO.: 2014-00469-PR
	)	JUDGE: PATRICK M. McGRATH
Plaintiffs,	)	**DEFENDANT BUEHRER GROUP ARCHITECTURE & ENGINEERING, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO AMEND COMPLAINT**
v.	)	
BUEHRER GROUP ARCHITECTURE & ENGINEERING, INC., *et al.*	)	
Defendants.	)	

ORIGINAL

Now comes Defendant, Buehrer Group Architecture & Engineering, Inc. ("Buehrer"), by and through counsel, and hereby respectfully moves this Honorable Court to deny the Motion for Leave of Plaintiff/Counterclaim Defendants Ohio School Facilities Commission and Grand Valley Local School District Board of Education to File a First Amended Complaint. The motion is not based upon newly discovered evidence; it does not seek to add an additional party or even to correct a typographical error. Instead, the sole purpose of the proposed amendment is to defeat Buehrer's pending Motion for Judgment on the Pleadings. As such, the request is improper as a matter of Ohio law.

"While Civ. R. 15 encourages liberal amendment, 'motions to amend pleadings pursuant to Civ. R. 15(A) should be refused if there is a showing of bad

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faith, undue delay, or undue prejudice to the opposing party.' " *Nationwide Mut. Ins. Co. v. Am. Elec. Power,* 10th Dist. Franklin No. 08AP-339, 2008-Ohio-5618, ¶ 18, quoting *Turner v. Central Local School Dist.*, 85 Ohio St.3d 95, 99, 706 N.E.2d 1261 (1999). Further, " '**[a]n attempt to amend a complaint following the filing of a motion [to dismiss] raises the spectre of prejudice**.' " (Emphasis added.) *Brown v. FirstEnergy Corp.,* 159 Ohio App.3d 696, 2005-Ohio-712, 825 N.E.2d 206, ¶ 6 (9th Dist.), quoting *Johnson v. Norman Malone & Assoc., Inc.* 9th Dist. Summit No. 14142, 1989 WL 154763, *5 (Dec. 20, 1989). As such, a party is not " 'permitted to sit by for this period and bolster up their pleadings in answer to a motion [to dismiss].' " *Id.* quoting *Johnson*, 1989 WL 154763, at *5. This prohibited conduct is exactly what Plaintiffs attempt to do with their proposed amended complaint in this case.

It is anticipated that Plaintiffs may attempt to argue that because this case has been pending for less than a year and because no trial date has been established, their delay in seeking to amend the Complaint is not prejudicial. Such an argument is not well founded.

For example, in *Kilko v. Haverfield*, 8th Dist. Cuyahoga No. 94920, 2010-Ohio-6364, ¶ 6, the plaintiff filed his original complaint in March, 2009. Defendant filed a dispositive motion in August, 2009, and a month later, plaintiff filed leave to amend his complaint. *Id.* at ¶ 14. As noted by the appellate court, "[t]his factor weighs heavily against permitting amendment." *Id.* Thus, it is not the length of

time that a case has been pending, but the purpose of the requested amendment that controls this analysis.

In this case, Plaintiffs do not attempt to hide the fact that they are seeking to amend their Complaint for the sole purpose of defeating Buehrer's dispositive motion. They boldly proclaim that the granting of their request is a good thing because it will render Buehrer's Motion for Judgment on the Pleadings "moot." (*See* Plaintiffs' Motion to Amend at 5.) This is the exact behavior that warrants the denial of Plaintiffs' request as a matter of law. *See Satterfield v. St. Elizabeth Health Ctr.*, 159 Ohio App.3d 616, 2005-Ohio-710, 824 N.E.2d 1047, ¶ 27 (7th Dist.) (upholding denial of leave where party "waited to amend its [claims] until after [the parties] had filed their motions for summary judgment" and "[i]t seemed that appellant sought to amend its [claims] in an attempt to avoid summary judgment"); *Trustees of Ohio Carpenters' Pension Fund v. U.S. Bank Natl. Assn.*, 189 Ohio App.3d 260, 2010-Ohio-911, 938 N.E.2d 61, ¶¶ 25-26 (8th Dist.) (affirming trial court's denial of a motion to amend where plaintiff sought to file a new claim after a dispositive motion was submitted); *Penix v. Avon Laundry & Dry Cleaners*, 8th Dist. Cuyahoga No. 91355, 2009-Ohio-1362, ¶¶ 65-66 (concluding that trial court did not err in denying motion for leave to amend where motion was filed after defendant's dispositive motion); *McConaughy v. Boswell Oil Co.*, 126 Ohio App.3d 820, 830-831,711 N.E.2d 719 (1st Dist.1998) (affirming denial of motion to amend where motion was made following the filing of dispositive motions); *Jones v. R/P Int'l Tech., Inc.*, 1st Dist. Hamilton No. C-940567, 1995 WL 566622, *5 (Sept. 27, 1995)

(affirming denial of plaintiff's motion to amend where motion was filed after defendant's dispositive motion).

There is no new evidence that has come to light during the course of discovery to warrant this amendment. In fact, Plaintiffs freely admit that the basis for the new allegations that they wish to include in their proposed Amended Complaint consist of reports they received in June and October of 2011. (Plaintiffs' Motion to Amend at 3.) If Plaintiffs have been in possession of these reports since 2011, why were they not included in their original Complaint filed in 2014? What has changed that suddenly these 2011 reports are so critical that they warrant an amendment to the pleadings? The answer is simple; these reports serve no other purpose than to attempt to defeat Buehrer's Motion for Judgment on the Pleadings. This is exactly the prejudicial conduct that Ohio's appellate courts rely upon in affirming the denial of untimely and prejudicial motions to amend.

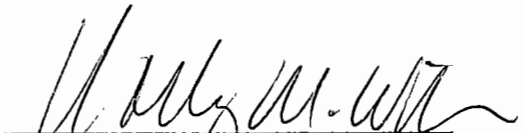
Separate and apart from the prejudice to Buehrer, Plaintiffs' request to amend their pleading should also be denied because, even with the proposed amendments, Plaintiffs claims against Buehrer are still time-barred as a matter of law.

As explained thoroughly in Buehrer's Reply in Support of its Motion for Judgment on the Pleadings, Ohio law does not recognize a "discovery rule" in professional negligence cases. (*See* Buehrer's Reply in Support, pp. 11-14.) Thus, even if Plaintiffs were permitted to amend their Complaint to add allegations that they did not "discover" their alleged damages until 2011, their claims against

Buehrer are still untimely as a matter of law. As such, it is Plaintiffs' Motion to Amend that is moot, not Buehrer's Motion for Judgment on the Pleadings.

For all the foregoing reasons, Defendant Buehrer Group Architecture & Engineering, Inc., respectfully requests that this Court deny the Motion for Leave of Plaintiff/Counterclaim Defendants Ohio School Facilities Commission and Grand Valley Local School District Board of Education to File a First Amended Complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following by regular U.S. mail/and or electronic mail this 23 day of June 2014:

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June 23, 2014

VIA FEDEX
Clerk of the Court
COURT OF CLAIMS OF OHIO (CLA)
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, Ohio 43215

Re: *Grand Valley Local School District Board of Education, et al.., v. Buehrer Group Architecture & Engineering, Inc., et al.,* in the Court of Claims of the State of Ohio; Case No. 2014-00469-PR

To whom it may concern:

Enclosed please find the original and one copy of 1) *Defendant Buehrer Group Architecture & Engineering, Inc.'s Motion for Leave to File Reply in Support and Reply in Support of Civ R. 12(C) Motion for Judgment on the Pleadings* and 2) *Defendant Buehrer Group Architecture & Engineering, Inc's Opposition to Plaintiffs' Motion to Amend Complaint.* Please file in your usual and customary manner and return a time-stamped copy to the undersigned in the enclosed postage-prepaid envelope. Thank you.

Very truly yours,

Reminger Co., L.P.A.

Holly Marie Wilson

HMW/bg
Enclosures

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