IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff and Counter-Defendant,	)	No. 13 CH 23386
v.	)	Hon. Sophia H. Hall
LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204,	)	Calendar 14
Defendant and Counter-Plaintiff.	)	

DEFENDANT LT'S REPONSE TO THE TTO'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Defendant Lyons Township High School District 204 ("LT"), pursuant to 735 ILCS 5/2-615, respectfully asks this Court to deny the motion for leave to file a second amended complaint of Plaintiff Township Trustees of Schools ("the TTO").

The TTO represents its proposed amendment as a simple update of its claims, and asserts that no further discovery is necessary. Those representations are not correct. The TTO's proposed amendment would add an entirely new count to the complaint, Count II, which seeks more than $500,000 in additional damages for new and unexplored disputes over the TTO's invoices issued from 2015-17. The TTO has sat on these claims for years. As the TTO knows from the contemporaneous letters that LT sent to the TTO during these years, and the frequent oral discussions between the parties over the past three years, the disputes over the 2015-17 invoices involve, in LT's view, improper or unsubstantiated charges from the TTO. Indeed, one of the main disputes is whether the TTO can charge LT for a share of the multi-million tab for attorneys' fees that the TTO has run up in this very case.

By contrast, the currently pending dispute between the parties over the TTO's pro rata invoices in the earlier years concerns agreed-upon setoffs to the TTO's invoices – which the TTO's Board voted unanimously to approve, and which the TTO now denies. Thus, the current dispute over the TTO's invoices in the pending complaint involves factual and legal issues that are distinct from the disputes presented for resolution in the proposed new Count II.

LT asks this Court to recognize that the TTO could have sought to include its new claim years or even months ago, but chose not to do so. The TTO waited to try to amend its complaint until all discovery, including expert discovery, in this case was done and the parties had shifted to summary judgment proceedings.

Because the proposed Count II raises new factual and legal issues, if the motion to amend is granted, LT would be entitled to conduct a full range of discovery on Count II. Given how slow the TTO has been to respond to discovery requests in the past, and how frequently the TTO did not meet even Court-ordered deadlines, the additional discovery that LT would need to conduct on Count II realistically will take six months to one year. If the motion to amend is granted, LT also would see leave to file counterclaims relating to recent misconduct by the TTO that LT uncovered in the course of this case.

This case already has suffered through too many delays. These delays play into the TTO's strategy to use this case as a shield against legislation to permit LT to leave the TTO's jurisdiction. The parties, finally, are on the verge of completing summary judgment proceedings and readying this 2013 case for a jury trial. LT respectfully asks this Court to deny the TTO's motion for leave to file its second amended complaint, and to require the parties to move expeditiously toward the resolution of the pending claims.

Procedural History

In 2013, the TTO filed a one-count complaint against LT. In 2014, after motion practice on both sides, this Court directed the TTO to file a first amended complaint.

The TTO's first amended complaint, filed on October 24, 2014, contains a single count for declaratory relief. Count I asserts three factual claims. First, the TTO alleges that from 1993-2012, the TTO intentionally and knowingly paid an accounting firm for the annual audit expenses of LT, which the TTO now claims was improper. Second, the TTO alleges that from 1994-2012, the TTO somehow made erroneous allocations of investment income to LT, based on the TTO's own internal calculations and determinations, and LT should have to re-pay those contested amounts. Third, the TTO alleges that for fiscal years 2000-13, LT did not pay the pro rata expenses of the TTO in full. As the complaint ignores, but as this Court well understands, the TTO contends that LT improperly applied to the TTO's annual invoices an offset for the costs of LT's business functions, an arrangement that the Boards of both parties considered and approved.

In 2015, the parties conducted more motion practice over the pleadings, and also engaged in prolonged written discovery exchanges. The slow progress of this case continued through the first half of 2016. In July 2016, LT retained new counsel. Over the next several months, LT resolved the TTO's motion to compel production of documents, streamlined LT's motion to compel, persuaded the Court to grant a majority of LT's motion, required the TTO to produce documents (after the TTO missed two Court-ordered deadlines), started taking depositions, updated and streamlined its counterclaims and affirmative defenses, and got the TTO to file responsive pleadings (after two missed deadlines).

Over the past several months, the parties obtained a deadline for completing depositions (which the TTO had extended), finished deposing all fact witnesses, and completed expert

discovery. On May 24, 2017, the parties completed their final deposition (of LT's expert witness). All that remained to resolve this 2013 case were summary judgment motions and the jury trial. At no point during this long process did the TTO ask to file a new claim.

Meanwhile, in the real world, on May 10, 2017, House Minority Leader Jim Durkin introduced a bill in Springfield to allow 7 of the 13 school districts and cooperatives within the TTO's jurisdiction, including LT, to leave the TTO. (5/26/17 Chi. Trib., attached hereto as Exhibit 1.) The Chicago Tribune article explained how the TTO has used the pendency of this case to block prior legislation to free LT from the TTO. (*Id.*)

On May 30, 2017, the TTO filed its motion for leave to file a proposed second amended complaint. The TTO described this amendment as an "update" to its claim for damages on the pro rata invoices. The TTO stated that it wanted to include in its new claim "certain admissions" in LT's first amended counterclaim filed in March 2017. (TTO Motion at 1.) The TTO further claimed that "[n]o new fact discovery will be necessary because Township Trustees have already produced the relevant documents for the fiscal years in question." (*Id.* at 4.)

The proposed second amended complaint attached to the TTO's motion contains a new Count II. The proposed Count II takes one fiscal year from the current Count I, the 2013 fiscal year, and joins it with new claims for full payment of the invoices for fiscal years 2014-16 totaling over $500,000. Because the TTO bills one year in arrears, the proposed new claim includes a demand for payment of an invoice that the TTO just sent to LT on May 10, 2017, and is not yet due. (*Id.* Ex. 1,p. 12.)

Also, on May 31, 2017, LT filed its motion for partial summary judgment on the TTO's first amended complaint. On June 1, 2017, this Court set a briefing schedule and hearing date on

this motion. The Court also directed the TTO to file all summary judgment motions on the first amended complaint and LT's pending counterclaim by July 10, 2017.

Factual Background on the Proposed Count II

The TTO fails to inform the Court of the reasons why LT paid part but not all of the TTO's invoices for the fiscal years 2014-15 in part. These reasons are set forth in contemporaneous letters that LT sent to the TTO, and were repeatedly discussed in direct communications between the parties over a period of years, all of which the TTO ignores in both its motion for leave to amend and its proposed second amended complaint.

In a letter dated October 13, 2015 (attached hereto as Exhibit 2), LT stated that it had received the TTO's pro rata invoice for the fiscal year 2014 for $252,053.43, and approved a payment in the amount of $242,321.00. The $9,731.26 difference between the invoiced and paid amounts is based on LT refusal to pay for certain expenses that include the attorneys' fees of the law firm handling this litigation for the TTO, as well as the financial software that is beyond the scope of the TTO's statutory authority to purchase, and to which LT had no access – less a credit the TTO was supposed to give, but did not give in that invoice, for Healy-related recoveries.

LT's letter of October 13, 2015, also made certain requests for information and documentation to the TTO, which by statute serves as LT's fiscal agent. The TTO did not comply with these requests.

In a letter dated September 23, 2016 (attached hereto as Exhibit 3), LT stated that it had received the TTO's pro rata invoice for the fiscal year 2015 for $395,094.69, and approved a payment in the amount of $236,482.00. The $158,611.91 difference between the invoiced and

paid amounts is based – again – on LT's refusal to pay a portion of TTO's legal fees in this case, and the financial software that LT cannot access.

Again, LT's letter of September 23, 2016, also made certain requests for information and documentation to the TTO. Again, the TTO did not comply with these requests.

As for the TTO's invoice for the 2016 fiscal year, the TTO admits that it just sent this invoice to LT. In a letter dated May 10, 2017 (attached hereto as Exhibit 4), the TTO submitted an invoice for $322,352.21, and asked for payment by June 28, 2017 (still eight days from now).

LT responded to the current invoice in a letter dated June 20, 2017 (attached as hereto as Exhibit 5). LT asked the TTO to explain and document certain of the charges in the TTO's invoice, and to provide detail on the investment income that the TTO referenced in its billing materials. LT's letter also repeated its requests for financial information and documentation that LT made of the TTO in March and April 2017, and which, to date, the TTO has ignored.

The TTO's invoices for fiscal years 2014-16, which the TTO issued from 2015-17, involve factual issues that, in fact, were not explored in the discovery process for the claims that occurred in the 1993-2013 time period. For example, because the TTO failed to raise these claims, LT did not explore the nature and amount of the attorneys' fees that the TTO has asked LT to pay; the documentary support for the disputed charges included on the TTO's recent invoices; the TTO's justification for charging LT for the attorneys' fees, consultants, experts, and personnel costs associated with its case against LT; the details and documentation involving the software that LT cannot access; the information and documentation on recent billings that LT formally requested in 2015-17 from the TTO, but has not received; and the TTO's factual and legal grounds for ignoring LT's requests for information and documentation on an ongoing basis.

Argument

I. THE TTO'S REQUEST TO ADD A NEW CLAIM AT THIS LATE DATE SHOULD BE DENIED.

Under Illinois law, "plaintiffs do not have an absolute and unlimited right to amend." *Hayes Mech. v. First Indus., L.P.*, 351 Ill.App.3d 1, 6 (1st Dist. 2004). "Further, the decision to grant leave to amend a complaint rests within the sound discretion of the circuit court." *Id.* at 7.

The Supreme Court of Illinois, in *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill.2d 263, 273 (1992), established a four-part test for amendment: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Id.* The plaintiff seeking to amend must meet all four of the *Loyola Academy* factors. *Id.* at 276; *Hayes Mech.*, 351 Ill.App.3d at 7. The primary consideration is whether amendment would further the ends of justice. *Hayes Mech.*, 351 Ill.App.3d at 7.

Here, the TTO cannot satisfy any of the four factors of the *Loyola Academy* test. First, there is no defect in the first amended complaint that needs to be corrected through amendment. The TTO is not trying to fix its claims in the existing Count I, and has repeated Count I essentially verbatim in the proposed pleading. Nor is the TTO attempting to assert a new legal theory based on the same facts and circumstances already at issue. Instead, the TTO wants to expand the scope of the complaint by adding a new Count II.

Second, there is no real question that LT would suffer both prejudice and surprise by virtue of the addition of the proposed Count II. The TTO seeks to add more than $500,000 in additional damages to its pro rata expenses claim. The TTO touts LT's supposed "admission" in LT's Counterclaim that the TTO could, and did, cancel the agreement on offsets in 2013, and implies

that LT had no other reason not making full payments for the fiscal years 2015-16. Yet the TTO knows full well, from correspondence with LT and repeated oral communications with LT, that LT always recognized the TTO's ability to cancel the offset agreement in 2013, and that LT has different and reasons for not paying the 2015-16 fiscal year invoices in full. The prejudice and surprise to LT derives from LT not having an opportunity to conduct discovery on this new, half-million dollar claim.

Third, the TTO's proposed amendment is not timely with respect to this case. The parties have completed written, oral, and expert discovery, and LT filed a motion for partial summary judgment against the pending complaint. At the status hearing on June 1, 2017, the Court asked LT to confirm that it had no other summary judgment motions directed toward the pending first amended complaint (which is correct). The Court also directed the TTO to respond to LT's motion and file any summary judgment motions on the pending claims by July 10, 2017.

Obviously, our current schedule in this case precludes LT from conducting any discovery on the TTO's new Count II; from filing additional counterclaims against the TTO based on the more recent disputes that LT has with the TTO; or from filing for summary judgment on additional legal issues that relate to the proposed Count II – such as the TTO's right to charge LT for an approximately 25 percent share of the TTO's attorneys' fees incurred in this case.

Fourth, the TTO had many previous opportunities to amend its complaint. The TTO received partial payments from LT in October 2015 and September 2016. The TTO could have sought to include those damages a new Count II at those times. Even in September 2016, the TTO still had to produce documents to LT after the Court granted LT's motion to compel. LT could have been given leave to issue discovery requests, which the TTO could have been ordered to answer promptly. LT did not take the first deposition in this case until October 25, 2016, and LT

did not depose the designated representative of the TTO until February 27, 2017. Certainly, there was no valid reason for the TTO to delay its attempt to amend until after it issued its May 10, 2017 invoice for fiscal year 2017, given that the invoice is not even due per the TTO's own deadline. The real motive seems to be for the TTO to further delay this case, and thereby forestall the current legislative efforts in Springfield to free LT from this $300,000-plus annual burden.

Accordingly, all four factors of the *Loyola Academy* test support the denial of the TTO's request to add the proposed Count II. The pending summary judgment proceedings, and the forthcoming jury trial, should proceed on the first amended complaint. If the TTO wishes to add a new claim for over $500,000 based on different factual issues, it will have to do so in a second, and separate, lawsuit.

II. IN THE ALTERNATIVE, IF THE TTO IS ALLOWED TO ADD A NEW CLAIM, LT IS ENTITLED TO FULL DISCOVERY, LEAVE TO SUBMIT NEW COUNTERCLAIMS, AND LEAVE TO FILE ADDITIONAL SUMMARY JUDGMENT MOTIONS IN RESPONSE TO THE PROPOSED COUNT II.

In the alternative, in the event that this Court grants the TTO's motion to amend, LT respectfully asks this Court for leave to file written discovery, conduct oral discovery, and engage experts as needed to address the allegations of Count II and LT's defenses to this new claim. LT has due process rights under the Illinois Constitution, as well as statutory rights to engage in discovery, that must be respected. *Paul H. Schwendener, Inc. v. Larrabee Commons Partners*, 338 Ill.App.3d 19, 32 (1st Dist. 2003) ("The amendment of pleadings to state a new claim after the close of discovery usually requires reopening of discovery."). LT owes a duty to the citizens in its district to properly respond to a new claim seeking more than $500,000. LT cannot agree to forego discovery, waive its right to an expert, give up its right to file for partial summary judgment on Count II, and just "wing it" at the forthcoming jury trial.

Also in the alternative, LT further asks for the Court to bar the TTO from conducting written, oral and expert discovery on the new Count II. TTO's motion represents that the TTO does not need discovery. LT also requests leave to assert counterclaims against the TTO based on recent disputes between the parties, some of which LT uncovered in the course of this case. LT, in the further alternative, seeks leave to file summary judgment motions after the discovery on Count II and LT's amended counterclaims is completed.

Of course, these several requests for alternative relief underscore the fundamental problem with the TTO's motion. Further written and oral discovery, new counterclaims, and a second round of summary judgment motions probably would delay the resolution of this case by six months to a year. But that long and unreasonable delay is the necessary result of adding the proposed Count II to this case.

Conclusion

For all of the reasons set forth in this response, LT respectfully asks this Court to deny TTO's motion for leave to amend.

Respectfully submitted,

LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204

By /s Jay R. Hoffman
Its Attorney

Jay R. Hoffman
Hoffman Legal
20 N. Clark St., Suite 2500
Chicago, IL 60602
(312) 899-0899
jay@hoffmanlegal.com
Attorney No. 34710

CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on June 20, 2017, he caused the foregoing pleading to be served by email on the following attorneys:

Gerald E. Kubasiak
kubasiak@millercanfield.com
Barry P. Kaltenbach
kaltenbach@millercanfield.com
Gretchen M. Kubasiak
kubasiakg@millercanfield.com
Miller, Canfield, Paddock and Stone, P.L.C.
Suite 2600
225 W. Washington St.
Chicago, IL 60606

s/Jay R. Hoffman