IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PHYLLIS JOHNSON,

Plaintiff,

v.

MERITER HEALTH SERVICES EMPLOYEE RETIREMENT PLAN and MERITER HEALTH SERVICES, INC.,

Defendants.

OPINION & ORDER

10-cv-426-wmc

Before the court is defendants Meriter Health Services Employee Retirement Plan and Meriter Health Services, Inc.'s motion for leave to amend their answer to include a counterclaim for reformation (dkt. #238), which the court will deny because defendants have failed to demonstrate good cause for such a late amendment.[1]

BACKGROUND

Plaintiffs filed this case on July 30, 2010. (Dkt. #1.) After receiving extensions, defendants answered on January 13, 2011. (Dkt. #19.) In its preliminary pretrial conference order, the court set a deadline of March 31, 2011, for amendments to pleadings. (Dkt. #31.) Plaintiffs filed a motion for leave to extend the time to file an amended pleading until April 7, 2011, and that motion was granted. (Dkt. ##33, 38.) Plaintiffs filed an amended complaint -- which is the operative pleading -- on April 7,

[1] While this motion was pending, plaintiff file a motion for leave to file a supplement in further opposition to the present motion. (Dkt. #272.) The court will deny this motion as moot, finding sufficient support in the parties' initial submissions to deny defendants' motion.

2011, and defendants filed an answer to the amended complaint on April 28, 2011. (Dkt. ##39, 43.)

More than two full years later, on April 18, 2013, defendants filed the present motion for leave to amend their answer, seeking for the first time to include a counterclaim for reformation. (Dkt. #238.) In their motion, defendants explain that while they have denied "plaintiffs' allegation that [] the Plan redesign effective January 1, 2003 was not properly authorized or adopted," "[t]he proposed Counterclaim directly addresses plaintiffs' claim of technical defects in the Plan amendment process, requesting the Court confirm the Plan terms to how it has been administered as to participants since 2003." (*Id.* at ¶¶ 5-6.)

OPINION

In support of their argument that the proposed amendment is timely, defendants contend that (1) document discovery was only just completed and (2) the proposed claim will not require further document discovery and occurs before depositions in this case. (Defs.' Mot. (dkt. #238) ¶¶ 4, 6; *see also* Defs.' Br. (dkt. #240) 1-2 ("After reviewing the extensive evidence that has emerged during discovery, defendants have determined that it is appropriate and necessary to assert a Counterclaim for Reformation in the event the Plan redesign is deemed to not have been properly adopted."). In their motion and opening brief, defendants argue this is enough to justify their request for leave to amend under Federal Rule of Civil Procedure 15(a)(2). However, since the court issued a scheduling order in March of 2011 pursuant to Federal Rule of Civil Procedure 16(b),

including a deadline for amendments to pleadings, the Rule 15 standard is inapplicable. Instead, as plaintiff points out in response to defendants' motion, once an amendment deadline is set by the court, a party seeking to amend bears the burden of showing "good cause" for further amendments. *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005) (citing Fed. R. Civ. P. 16(b)).

In reply, defendants adopted the appropriate standard, arguing that there is good cause to grant leave to amend because (1) "[t]his a complex case and Meriter's determination that an amendment to its answer was appropriate came after the review and production of hundreds of thousands of pages of hard copy and ESI documents spanning a period of more than 20 years;" and (2) the "proposed amended will not cause any prejudice to plaintiffs." (Defs.' Reply (dkt. #256) 1.) The court is not persuaded by either proffered reason.

Taking them out of order, the lack of prejudice to plaintiffs does not constitute good cause for an amendment more than two years after the deadline for amendments to the pleadings. While the schedule for this case has been extended and we are still eight months from the May 2014 trial, this case has a long history, and a counterclaim for reformation of the Plan has never been part of the equation. The court treats defendants' hyperbolic contention that amendment would require depositions of two dozen or more Board members to understand their subjective intentions with slightly more than a grain of salt, but the court accepts at face value that allowing a counterclaim for reformation at this late stage in a complicated case would undoubtedly prejudice

plaintiff's counsel, who after all have made decisions about discovery, allocation of resources and strategy without factoring in a counterclaim.

This leaves defendants' claimed reason for the delay -- that they had to review significant document discovery in order to understand the need for and the contours of counterclaim reformation -- which the court rejects. First, the document discovery Meriter reviewed was not documents produced by plaintiffs or third parties, but rather documents in Meriter's *own* possession. Any delay in reviewing documents central to the 2003 claimed amendment of the Plan is defendants' own fault, nor would defendants have to scour every document over a twenty-year period to determine whether a counterclaim for reformation is warranted. Second, plaintiffs alleged in their amended complaint, filed April 7, 2011, that the Plan was not properly amended. (Am. Compl. (dkt. #39) ¶¶ 101-15.) At that point, defendants had enough not only to answer with a denial (which they did), but to consider carefully whether to assert a counterclaim for reformation in the alternative, particularly when the deadline for leave to amend had already passed.

Since defendants have failed to offer any credible reason for the delay, the court will deny leave for amendment.[2] That said, reformation is an equitable remedy. While the court denies defendants leave to proceed with a formal counterclaim, depending on

[2] As plaintiffs extensively argue, the court may also deny leave for amendment if such an amendment would be futile. In light of its ruling, the court need not address the merits of a reformation claim, though a review of the arguments suggests plaintiff may well have the upper-hand. The use of a court's equitable powers to amend a plan under ERISA appears limited to cases where the amendment aids the *beneficiaries* of the plan, not the plan administrator or sponsor.

the facts established at trial, the court still may determine reformation of the Plan is warranted as part of any remedy it might fashion. That door remains open.

ORDER

IT IS ORDERED that:

1) Defendants Meriter Health Services Employee Retirement Plan and Meriter Health Services, Inc.'s motion for leave to file to amend their answer to include a counterclaim for reformation (dkt. #238) is DENIED; and

2) Plaintiff Phyllis Johnson's motion for leave to supplement in further opposition to defendants' motion for leave to amend answer to include a counterclaim for reformation (dkt. #272) is DENIED as moot.

Entered this 22nd day of August, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge