

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

DON PETER MILLER and
JANE E. MILLER,

Plaintiffs,

AMERICAN ART CLAY CO INC.,
METROPOLITAN LIFE INSURANCE
COMPANY, RED DEVIL, INC.,
RT VANDERBILT COMPANY, INC.,
DAP PRODUCTS, INC.,
MINNESOTA CLAY CO. USA and
UNION CARBIDE CORPORATION,

Defendants.

ORDER

12-cv-516-bbc

Plaintiffs Don Peter Miller and his wife, Jane Miller, filed this case on July 19, 2012, seeking to recover for injuries caused by Don Miller's exposure to asbestos-containing products allegedly made by defendants American Art Clay Co Inc., Red Devil, Inc., RT Vanderbilt Company Inc., DAP Products, Inc., Minnesota Clay Co. USA and Union Carbide Corporation. On October 12, 2012, Don Miller died as a result of mesothelioma. Following his death, Cary Miller and Western National Trust Company were appointed co-representatives of his estate.

On November 29, 2012, a preliminary pretrial conference was held at which the court ordered amendments to pleadings to be filed and served no later than January 25, 2013. On December 13, 2012, defendant Red Devil, Inc. filed a suggestion of death under Fed. R. Civ.

P. 25. Dkt. #32. Under that rule, a party has 90 days to substitute an appropriate entity for a deceased party. On March 21, 2013, after more than 90 days had passed, Red Devil filed a motion to dismiss the case on the grounds that plaintiff failed to substitute an appropriate entity for Don Miller. Dkt. #39. Defendants American Art Clay Co. Inc., Minnesota Clay Co. USA., Vanderbilt Company, Inc. and Metropolitan Life Insurance Company filed motions to join Red Devil's motion to dismiss. Dkt. ##43, 46, 49, 51. I will grant the motions to join.

On March 27, 2013, plaintiffs filed a motion to substitute Cary Miller and Western National Trust Company as co-representatives of Don Miller, dkt. #45, and a motion to amend their complaint to include a wrongful death claim and the substituted parties. Dkt. #44. Defendants oppose the motion for substitution and motion to amend on the ground that both are untimely. The motion for substitution falls outside the 90 days allowed for substitution under Fed. R. Civ. P. 25, and the motion to amend the complaint falls outside the January 25, 2013 deadline for amendments to pleadings provided in the pretrial conference order. Dkt. #31.

I am granting plaintiffs' motion to amend their complaint and their motion to substitute parties. Although the motion for substitution was filed two weeks late (the 90 day deadline passed on March 13, 2013), the Court of Appeals for the Seventh Circuit has explained that "the 90 day time period was not intended to act as a bar to otherwise meritorious actions, and extensions of the period may be liberally granted." Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1297 (7th Cir. 1993). In Continental Bank, the court

affirmed the district court's decision to allow substitution more than eight months after a party's death. Id. As for the scheduling order, the Federal Rules provide that courts may also amend scheduling orders if the parties show "good cause." Fed. R. Civ. P. 16(b)(4).

In this case, plaintiffs' counsel explains that his failure to file a motion for substitution was "inadvertent," and a result of his failure to calender his deadlines properly. Although this is not a compelling excuse, I conclude that it is appropriate to allow substitution and the amendment. This case would have continued with plaintiff Jane Miller's independent claims regardless whether Don Miller's claims were dismissed. If I dismissed Don Miller's claims at this point, his estate would likely file a new case asserting a wrongful death claim against defendants. It would be much more efficient to resolve all of the related claims against defendants related to Don Miller's asbestos exposure and death in one lawsuit.

Moreover, plaintiffs' motion to substitute was only two weeks late and plaintiffs corrected their error as soon as it was raised by defendants. There will be no undue prejudice to defendants as a result of the substitution. Plaintiffs had demonstrated their intention of continuing with the case despite Don Miller's death by participating in the preliminary pretrial conference, so there should be nothing surprising about the substitution. Further, ample time remains in the schedule. Dispositive motions are not due until November 1, 2013, discovery is open until April 25, 2014 and trial is scheduled for June 2, 2014.

Defendants' only argument about prejudice is that plaintiffs will not be able to prove their claims now that Don Miller has died. However, it is not clear why this is a problem

for defendants; rather, this appears to be a problem for plaintiffs. If defendants believe that plaintiffs lacks evidence to prove their claims, they are free to file a motion for summary judgment making that argument.

ORDER

IT IS ORDERED that

1. The motion to substitute parties, dkt. #45, and motion to amend their complaint, dkt. #44, filed by plaintiffs Estate of Don Peter Miller and Jane Miller are GRANTED.
2. Defendant Red Devil, Inc.'s motion to dismiss, dkt. #39, is DENIED.
3. The motions to join defendant Red Devil, Inc's motion to dismiss filed by defendants American Art Clay Co Inc., dkt. #43, Minnesota Clay Co. USA, dkt. #46, RT Vanderbilt Company Inc., dkt. #49, and Metropolitan Life Insurance Company, dkt. #51, are GRANTED.

Entered this 18th day of June, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge