

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

RODNEY RIGSBY, CATHERINE CONRAD
and QUINCY M. NERI,

Plaintiff,

v.

CHRIS MISCIK, BRUCE BERNDT, BERNDT, CPA,
MICHAEL RILEY and AXLEY BRYNELSON, LLP,

Defendants.

ORDER

14-cv-23-bbc

Pro se plaintiffs Rodney Rigsby, Catherine Conrad and Quincy Neri are proceeding on the following claims in this case: (1) defendants Axley Brynson, LLP, Michael Riley and Chris Miscik infringed plaintiffs' copyright related to litigation documents that they drafted for Miscik's state court case involving injuries he sustained in a car accident; (2) defendant Miscik breached his contract with plaintiffs by failing to pay them for their legal assistance; and (3) defendants Bruce Berndt and Berndt, CPA, breached their fiduciary duty to plaintiffs by hiding the settlement money that defendant Miscik received for his car accident. Now before the court is a motion filed by defendants Axley Brynson, Riley and Miscik to amend their answer to assert new affirmative defenses for plaintiffs' copyright claim (joint authorship and fair use) and breach of contract claim (accord and satisfaction, lack of meeting of the minds and statute of frauds). Dkt. #184.

Although defendants filed their answer more than eight months ago, “a delay in raising an affirmative defense only results in waiver if the other party is prejudiced as a result.” Schmidt v. Eagle Waste & Recycling, Inc., 599 F.3d 626, 632 (7th Cir. 2010). See also George v. Kraft Foods Global, Inc., 641 F.3d 786, 789 (7th Cir. 2011) (“[D]elay alone is not a reason to deny a proposed amendment, and that delay must be coupled with some other reason, such as prejudice to the defendants.”). In this case, I see no prejudice to plaintiffs in allowing defendants to amend their answer.

The deadline for filing summary judgment motions is only a few weeks away, but that is unlikely to be a problem for plaintiffs under the circumstances of this case. Some of the new defenses (accord and satisfaction, lack of meeting of the minds) overlap substantially with the elements of plaintiffs’ claims, so plaintiffs should be prepared to address those. Others such as fair use are primarily legal in nature, so they should not require additional discovery. In fact, plaintiffs do not identify any additional discovery that the new defenses would require them to conduct. To the extent that plaintiffs wish to serve discovery requests related to the new defenses, defendants have agreed to respond to those requests within 15 days of service. Dfts.’ Br., dkt. #194, at 5. Further, if defendants move for summary judgment on the new defenses and plaintiffs need additional time to file a response related to those defenses, plaintiffs are free to request an extension of time under Fed. R. Civ. P. 56(d).

In their opposition brief, plaintiffs allege that they will be prejudiced by the defenses, but they do not provide examples of ways in which they will be prejudiced. Rather, the vast

majority of their brief is devoted to irrelevant issues, such as their complaints about discovery disputes and defendants' conduct in other lawsuits. As a result, regardless whether defendants could have raised the defenses earlier, their delay is not a ground for denying their motion.

Another ground for denying a motion for leave to amend a pleading is that it is clear that the new claims or defenses cannot succeed. Bethany Pharmacal Co. v. QVC, Inc., 241 F.3d 854, 861 (7th Cir.2001). With one exception, defendants have made an adequate showing that their new defenses have a factual and legal basis. With respect to fair use, defendants have cited authority for the proposition that using documents in litigation may qualify as fair use. Ty, Inc. v. Publications International Ltd., 292 F.3d 512 (7th Cir. 2002); H.R. Rep. No. 94-1476, 65 (1976). With respect to joint authorship, defendants have cited emails between defendant Miscik and plaintiff Rigsby suggesting that the two of them were collaborating in the preparation of the legal documents at issue. Barber Decl. exhs. 10-13, dkt. #186. With respect to accord and satisfaction, defendants cited testimony from Rigsby that he accepted \$2500 as payment for his legal assistance to Miscik. Id. at exh. 7. With respect to meeting of the minds, defendants cited testimony from Conrad that she and Miscik never reached an agreement regarding how she was going to be compensated, id. at exh. 9, and testimony from Neri that she should not recall whether she had any agreement with Miscik, id. at 8.

Plaintiffs argue that these defenses fail for a number of reasons, but their arguments are nonsense. E.g., Plts.' Br., dkt. #192, at 7 ("Defendants' new proposed defenses for

breach of contract fail as Plaintiffs' work product of an 'Offer of Settlement' was filed in the state court case 12-cv-260 for \$1,100,000 . . . so Miscik at all times knew the amount he was entitled to."). Because their arguments have no merit, it is not necessary to discuss them.

The only exception is the statute of frauds defense. Defendants seek to raise this defense because plaintiff Conrad testified that, under her oral agreement with defendant Miscik, he was not required to pay her until after his lawsuit settled, which she "expect[ed] . . . to take more than a year." Id. at exh. 9. They cite Wis. Stat. § 241.02(1)(a), which requires an agreement to be in writing if "by its terms [the agreement] is not to be performed within one year from the making thereof." However, the rule in § 241.02(1)(a) applies only if it is impossible to perform the contract within a year. Arnold Joerns Co. v. Roberts, 114 N.W.2d 416, 418, 16 Wis.2d 333, 336 (Wis. 1962) ("The statute [of frauds] is not . . . applicable to an agreement which by its terms is capable of being performed within one year."); Nelsen v. Farmers Mutual Automobile Insurance Co., 90 N.W.2d 123, 132, 4 Wis. 2d 36, 52 (1958) ("If, by possibility, an agreement may, by its terms, be executed within [one year], it is not within the statute."). Conrad's testimony suggests that she contemplated the possibility that the agreement could take more than a year to be performed, but her testimony does not show that the terms of the agreement *required* the contract to be performed more than a year later. Accordingly, I am denying defendants' motion for leave to amend their answer to assert a statute of frauds defense.

ORDER

IT IS ORDERED that the motion filed by defendants Axley Brynselson, LLP, Michael Riley and Chris Miscik to file an amended answer, dkt. #184, is GRANTED with respect to their proposed defenses of fair use, joint authorship, accord and satisfaction and meeting of the minds. The motion is DENIED as to their statute of frauds defense.

Entered this 9th day of January, 2015.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge