STATE OF NORTH CAROLINA

CLEVELAND COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 608

DOUGLAS BROWN,

Plaintiff,

v.

ARTHUR D. SECOR; SECOR GROUP, LLC; JOSEPH CHRISTOPHER ROSSO; and SOUTHGROUP REAL ESTATE MARKETING, LLC,

Defendants.

ORDER ON PLAINTIFF'S MOTION TO AMEND

1. On November 28, 2018, Plaintiff Douglas Brown moved for leave to amend his complaint. (ECF No. 135.) Defendants oppose the motion. After full briefing, the Court held a hearing on January 24, 2019. Having considered all matters of record and the arguments of counsel, the Court **DENIES** the motion.

2. Brown originally filed this suit on April 15, 2016, alleging that Defendants induced him to invest more than $2 million in three real estate projects in 2013. Brown alleges that his investment has since vanished. He initially alleged claims for fraud and breach of contract, among others.

3. In November 2016, Defendants moved for partial judgment on the pleadings. (ECF No. 24.) Before the Court had a chance to rule on the motion, Brown moved to amend his complaint to add several new claims, including claims for securities violations. (ECF No. 30.) In March 2017, the Court granted Brown's motion to amend in part while also permitting Defendants to renew their Rule 12 motion. (ECF No. 53.) In an opinion issued in July 2017, the Court granted judgment

on the pleadings as to certain claims but denied the motion as to claims for unjust enrichment, fraud, securities fraud, and unfair or deceptive trade practices. (ECF No. 88.)

4. The parties have had numerous discovery disputes, requiring several extensions of the discovery period and related case management deadlines. In the July 2017 Opinion, the Court directed Defendants (other than Rosso Group, LLC) to produce tax returns and to produce unredacted copies of relevant banking records. (*Brown v. Secor*, 2017 NCBC LEXIS 65, at *39–40 (N.C. Sup. Ct. July 28, 2017).) In a subsequent Order, the Court directed Brown to produce copies of his own tax returns. (ECF No. 102.) And in May 2018, the Court directed Defendants to provide complete responses to interrogatories that requested information about the disposition of funds from sales related to one of Brown's real estate investments. (ECF No. 124.) Fact discovery closed in July 2018, and expert discovery closed in November 2018.

5. After the close of all discovery, Brown moved for leave to amend his complaint for a second time. The proposed second amended complaint adds a few new factual allegations, one new cause of action for fraudulent conveyances, and an alter-ego or veil-piercing theory against Defendants. (Pl.'s Br. in Supp. 2–4, ECF No. 136.) Brown also proposes to add a new defendant, JSR Land Partners, LLC, for purposes of the claim for fraudulent conveyances. (*See* Pl.'s Reply Br. 1–2, ECF No. 142.)

6. Rule 15(a) of the North Carolina Rules of Civil Procedure provides that courts should freely give leave to amend pleadings "when justice so requires." A motion for leave to amend is addressed to the sound discretion of the trial court. *E.g., Draughon v. Harnett Cty. Bd. of Educ.*, 166 N.C. App. 464, 467, 602 S.E.2d 721, 724 (2004). "Acceptable reasons for which a motion to amend may be denied are undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment." *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994) (citation and quotation marks omitted); *see also, e.g., JPMorgan Chase Bank, N.A. v. Browning*, 230 N.C. App. 537, 541, 750 S.E.2d 555, 559 (2013).

7. Brown's motion, coming as it does after the close of discovery, pushes the limits of the liberal regime for amending pleadings. Brown insists that his motion is timely because the new allegations and claims stem from information learned during discovery. (Pl.'s Br. in Supp. 2.) As to the new theory of veil piercing, Brown contends that the documents produced by Defendants and the depositions of Art Secor, Kim Fulp, and Defendants' expert (Andrew Barbee) all revealed that Defendants ignored corporate formalities. (Pl.'s Br. in Supp. 3–4.) To support the claim for fraudulent conveyances, Brown points to documents showing personal transfers of funds to Art Secor and Joseph Rosso, along with the depositions of Secor, Rosso, and Barbee. (Pl.'s Br. in Supp. 4–5.)

8. Even taking all of this as true, however, it is clear that Brown unreasonably delayed in bringing his motion. The relevant documents appear to have been

produced long before Brown sought to amend his complaint in November 2018. The banking records that allegedly show disregard of the corporate form would have been produced shortly after the Court's July 2017 Opinion, which required Defendants to produce unredacted financial records. (*Brown,* 2017 NCBC LEXIS 65, at *40.) Likewise, the suspicious transfers of funds to Secor and Rosso were, at least in part, the subject of the Court's May 2018 Order compelling Defendants to provide complete interrogatory responses as to the disposition of certain funds. (ECF No. 124.)

9. As a result, later deposition testimony appears to have corroborated what Defendants already knew. Even if that were not the case, though, the relevant depositions all took place months before Brown filed his motion. Brown stresses the importance of the deposition testimony of Kim Fulp, in which she purportedly discussed how Defendants jointly operated and acted as a single unit under the moniker "LW Land." (Pl.'s Br. in Supp. 3–4.) But Fulp's deposition took place on May 29, 2018—six months before Brown's motion to amend. Secor's deposition, which Brown also relies on, took place just a few weeks later. Brown could have—and should have—filed his motion at that point, while discovery remained ongoing, rather than waiting until the close of discovery.

10. Brown also points to the deposition of Barbee, Defendants' expert, noting that this deposition did not take place until November 2018. By the time of Barbee's deposition, though, Brown already held in his hands—and had for several months—all the facts necessary to bring his motion. Brown provides no basis to conclude that Barbee's deposition was a necessary antecedent to filing his motion to amend.

11. The Court concludes that the delay in filing the motion to amend was not only unreasonable but also prejudicial. By waiting until the close of discovery, Brown leaves Defendants with an untenable choice in the event the motion is granted: either seek to reopen discovery and delay an already aged case or press on to defend new claims and allegations with no additional discovery. It seems clear to the Court that the current Defendants would have approached discovery (especially expensive expert discovery) differently if this motion had been made and granted earlier. Moreover, it would be manifestly unfair to add JSR Land Partners as a defendant in this matter without also giving it the opportunity to conduct some discovery. *See Hassett v. Dixie Furniture Co.*, 333 N.C. 307, 317, 425 S.E.2d 683, 688 (1993) (affirming denial of amendment when addition of new claim would cause delay and prejudice defendant); *see also Freese v. Smith*, 110 N.C. App. 28, 33, 428 S.E.2d 841, 845 (1993) ("We do not agree because the addition of a new legal theory may well have changed defendant's approach to discovery.").

12. In short, Brown has offered no reasonable explanation for its delay in bringing this motion, which, if granted, would materially prejudice Defendants. These reasons, taken together, support denying the motion.[*] *See Micro Capital Investors, Inc. v. Broyhill Furniture Indus.*, 221 N.C. App. 94, 102, 728 S.E.2d 376,

[*] Defendants also argue that the amendment would be futile, at least in part, but this argument appears to be based on a misunderstanding. In their opposition brief, Defendants proceed on the assumption that Brown intended to add JSR Land Partners as a defendant for all claims, including claims the Court dismissed in its July 2017 Opinion. (*See* Defs.' Opp'n 3–4, 7, 12, ECF No. 139.) Brown has clarified that JSR Land Partners would be a defendant only as to the new claim for fraudulent conveyance, which Defendants do not appear to contend would be futile. (*See* Pl.'s Reply Br. 1–2.) Accordingly, the Court need not and does not address Defendants' futility argument.

382 (2012) (affirming denial of motion to amend when claim could have been raised earlier "based on the information known to the plaintiff at the time"); *see also Strickland v. Lawrence*, 176 N.C. App. 656, 667, 627 S.E.2d 301, 308 (2006).

13. For these reasons, the Court, in its discretion, **DENIES** Brown's motion to amend.

SO ORDERED, this the 18th day of February, 2019.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases