

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV005620-590

KEN FAIRLEIGH, INDIVIDUALLY
and AS TRUSTEE FOR THE
LOUISE ROBERTSON FAIRLEIGH
TRUST,

Plaintiff,

v.

PHILIP WEGNER and SECURE
VENTURES GROUP, LLC,

Defendants.

**ORDER AND OPINION ON
PLAINTIFF'S MOTION TO FILE
SECOND AMENDED COMPLAINT**

THIS MATTER is before the Court on Plaintiff Ken Fairleigh's Motion to File Second Amended Complaint ("Motion", ECF No. 33).

THE COURT, having considered the Motion, the parties' briefs and other submissions, and other appropriate matters of record, **CONCLUDES**, in its discretion, that the Motion should be **GRANTED** for the reasons set forth below.

Higgins & Owens, PLLC, by Sara W. Higgins, for Plaintiff Ken Fairleigh, individually and as Trustee for the Louise Robertson Fairleigh Trust.

Sisson Law Firm, PLLC, by Kevin M. Sisson, for Defendants Philip Wegner and Secure Ventures Group, LLC.

Davis, Judge.

FACTUAL AND PROCEDURAL BACKGROUND

1. A detailed factual background of this case can be found in the Court's 9 May 2024 Order on Plaintiff's Motion for Preliminary Injunction (ECF No. 27). *See Fairleigh v. Wegner, 2024 NCBC LEXIS 67, at **1–10 (N.C. Super. Ct. May 9, 2024).*

2. On 31 July 2024, Plaintiff filed the present Motion in which he seeks leave to file a Second Amended Complaint containing a new claim for constructive fraud against Defendant Philip Wegner along with a claim for punitive damages. In addition, the proposed Second Amended Complaint adds several new factual allegations in support of Plaintiff's existing claims.

3. The Motion has been fully briefed and is now ripe for resolution.¹

LEGAL STANDARD

4. Rule 15 of the North Carolina Rules of Civil Procedure states in pertinent part as follows:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not yet been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. R. Civ. P. 15(a).

5. Our Supreme Court has held that “[t]here is no more liberal canon in the rules than that leave to amend shall be freely given when justice so requires.” *Vaughan v. Mashburn*, 371 N.C. 428, 434 (2018) (cleaned up). “This liberal amendment process under Rule 15 complements the concept of notice pleading embodied in Rule 8 and reflects the legislature’s intent that decisions be had on the merits and not avoided on the basis of mere technicalities.” *Id.* (cleaned up).

¹ Pursuant to North Carolina Business Court Rule 7.4, the Court elects to rule on the Motion without a hearing.

6. Nevertheless, “the [R]ules still provide some protection for parties who may be prejudiced by liberal amendment.” *Henry v. Deen*, 310 N.C. 75, 82 (1984) (citation omitted). “Reasons for justifying denial of an amendment include: (1) undue delay, (2) bad faith, (3) undue prejudice, (4) futility of amendment, and (5) repeated failure to cure defects by previous amendments.” *Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *17 (N.C. Super. Ct. Dec. 22, 2021) (citation omitted). “The burden is upon the opposing party to establish that [it] would be prejudiced by the amendment.” *Vitaform, Inc. v. Aeroflow, Inc.*, 2021 NCBC LEXIS 79, at *11 (N.C. Super. Ct. Sept. 16, 2021).

7. Motions to amend are “addressed to the discretion of the trial court.” *Vaughan*, 371 N.C. at 433 (citation omitted).

ANALYSIS

8. In their brief in opposition to the Motion, Defendants make no argument as to the futility of the proposed amendments. Rather, they argue that the Motion should be denied because it was filed in bad faith and, if granted, would subject them to unfair prejudice.

9. As an initial matter, the Court notes that the Motion was filed prior to the 1 August 2024 deadline for motions to amend set out in the Court’s 27 June 2024 Case Management Order. (ECF No. 29, at 7.) Therefore, the Motion is not untimely.

10. Defendants’ primary objection to the Motion appears to be that it was filed one day after the parties held a mediated settlement conference in this case.

However, they have not offered any persuasive reason why this fact warrants the denial of the Motion.

11. Defendants also suggest that Plaintiff's new allegations are based on information that was already available to him at the time this lawsuit was originally filed.

12. A review of the proposed Second Amended Complaint, however, reveals that several of the new factual allegations concern events occurring in June 2024 and relate to the company's financial status as of July 2024—months after the date Plaintiff's initial Complaint was filed. ("Exhibit A", ECF No. 33.1, at ¶¶ 38, 46–50.)

13. Moreover, Defendants do not dispute the fact that they have not yet served any written discovery in this case and that no depositions have been taken or even scheduled.

14. The Court finds that Defendants have failed to show how they would be prejudiced by the granting of the Motion.

15. Accordingly, the Court concludes that the Motion should be **GRANTED**.

CONCLUSION

THEREFORE, IT IS ORDERED that Plaintiff's Motion be **GRANTED**. Plaintiff is **DIRECTED** to file the Second Amended Complaint in the form attached as Exhibit A to the Motion within five (5) days of the date of this Order.

SO ORDERED, this the 6th day of September, 2024.

/s/ Mark A. Davis

Mark A. Davis

Special Superior Court Judge
for Complex Business Cases