

STATE OF MICHIGAN  
COURT OF APPEALS

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JAMES F. MANICCIA, SR., TRUST, RONALD  
D. MANICCIA, TRUSTEE, WILLIAM J.  
DEBIASI, TRUSTEE, LEAH M. FEILER,  
TRUSTEE, MARY JO BROUGH, AND JAMES  
F. MANICCIA, JR.,

UNPUBLISHED  
November 18, 2003

Plaintiffs-Appellants,

v

SHELL WESTERN E&P, INC.,

Defendant-Appellee.

No. 239739  
Montmorency Circuit Court  
LC No. 96-003396-CK

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Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's grant of summary disposition to defendant, an order that denied plaintiffs' motion to amend their complaint, and an order that denied plaintiffs' third motion to compel discovery. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Plaintiffs first claim the trial court erred because plaintiffs established an issue of material fact regarding whether they were properly paid. We agree.

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Spiek v Transportation Dep't (On Remand)*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a trial court's grant of summary disposition, an appellate court must decide whether a genuine issue of material fact exists that would deny judgment as a matter of law to the moving party. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

The record reflects that plaintiffs presented evidence of a factual dispute regarding whether defendant properly paid plaintiffs. Further, defendant admitted that it disregarded the private agreement concerning the distribution of royalty payments. Because a court must consider the evidence submitted in the light most favorable to the nonmoving party, *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999), and plaintiffs presented an affidavit indicating that the accounting issue was not resolved, we conclude there was a disputed issue whether appropriate royalty payments had been made.

Plaintiffs also argue that summary disposition pursuant to MCR 2.116(C)(10) was inappropriate because defendant presented no evidence to support its motion. Admissible evidence must be submitted to support a motion for summary disposition under MCR 2.116(C)(10). *SCC Assoc Ltd Partnership v Gen Retirement System of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). There is no indication in the record that defendant submitted admissible evidence to support its motion. The trial court's grant of summary disposition to defendant was, therefore, premature and thus improper. And, although it appears that sufficient evidence exists for the trial court to decide the issues raised, a fuller record is clearly necessary for a proper determination under MCR 2.116(C)(10).

Plaintiffs also argue that the court's denial of their third motion to compel discovery was an abuse of discretion because the information was necessary to determine the amount of royalties defendant had underpaid plaintiffs, it was included as part of the production in the accounting claim of the original complaint, and the court had previously ordered defendant to produce other information regarding condensate. We disagree.

We review a court's denial of a discovery motion for an abuse of discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). The purpose of discovery is to provide the parties with relevant facts that may be admissible at trial. *Grubor Enterprises Inc v Constantine Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). Evidence is relevant if it tends to make more probable the existence of a material fact. *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Here, while the information was arguably relevant, relevancy is not the sole consideration.

In deciding whether to grant additional discovery, a trial court should consider whether the information sought will hamper or facilitate the litigation, the timeliness of the request, the duration of the litigation, and the possible prejudice to the parties. *Nuriel v Young Women's Christian Ass'n of Metropolitan Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990). Here, discovery spanned a period of 4½ years. While plaintiffs sent discovery requests to defendant during the discovery period, plaintiffs did not file their third motion to compel until *twenty months* after the court ordered discovery closed. A party's right to pretrial discovery is subject to the trial court's right and duty to control the flow of litigation. *Klabunde v Stanley*, 384 Mich 276, 281; 181 NW2d 918 (1970). Therefore, the trial court did not abuse its discretion by denying plaintiffs' motion on the ground that it was untimely. We further emphasize that, while the grant of summary disposition to defendant was erroneous for the reasons stated, when the trial court reconsiders the issues raised, further discovery for this protracted case is neither necessary nor appropriate based on the record before us.

Plaintiffs also claim that the trial court abused its discretion by denying their motion to amend their complaint. Again, we disagree.

We review a trial court's denial of a motion to amend pleadings for abuse of discretion. *Doyle v Hutzel Hosp*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000). Whether the proposed amendment relates back to the original complaint is a question of law that is reviewed *de novo*. *Id.* Once the period of time during which a pleading may automatically be amended has passed, a party may only amend a pleading with either the court's permission or the adverse party's written consent. MCR 2.118(A)(2). The court must freely grant leave to amend if justice requires. *Id.* Moreover, a motion to amend should be granted absent undue delay, bad faith or

dilatory motive, repeated failure to cure deficiencies, undue prejudice, or futility. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), citing *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134 (1973).

Because the condensate was included in the definition of “all production” in plaintiffs’ original accounting claim, it arguably arose from the same transaction that was the subject of plaintiffs’ original complaint. However, the trial court reasoned that the 4½ year discovery period had been closed, the amended complaint attempted to add new parties, and there was no indication that the previous discovery would support the new claims. Although delay alone is not sufficient to deny a motion to amend, it is proper to deny the motion where the delay causes the opposing party actual prejudice. *Amburgey v Sauder*, 238 Mich App 228, 247; 605 NW2d 84 (1999). With regard to prejudice, our Supreme Court quoted the U.S. Court of Appeals for the Sixth Circuit:

“A party is not entitled to wait until the discovery cutoff date has passed and a motion for summary judgment has been filed on the basis of claims asserted in the original complaint before introducing entirely different legal theories in an amended complaint . . . in complex cases such as this one, . . . it is particularly likely that drastic amendments on the eve of trial will prejudice the defendants . . . .” [*Weymers, supra* at 661, quoting *Priddy v Edelman*, 883 F2d 438, 446-447 (CA 6, 1989).]

Because plaintiffs did not move to amend their complaint until after defendant moved for summary disposition and more than one year following the close of discovery, plaintiffs were at least partially responsible for the delay in bringing their motion. Four and one-half years of discovery indicated that the case involved complex accounting. There was no suggestion that discovery would be any less complicated regarding the remaining members of the proposed class. Presumably, discovery regarding royalty payments would be required for each individual member. Thus, because the delay and additional plaintiffs was prejudicial, the court did not abuse its discretion by denying plaintiffs’ motion to amend their complaint.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Henry William Saad  
/s/ Bill Schuette