

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

SPEROS A. BATISTATOS,	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.: 2:22-CV-254-JVB-JEM
	)	
LAKE COUNTY CONVENTION AND	)	
VISITORS BUREAU d/b/a SOUTH	)	
SHORE CONVENTION AND VISITORS	)	
AUTHORITY, <i>et al.</i> ,	)	
Defendants.	)	

ORDER

This matter is before the Court on a Motion for leave to File Counterclaim against Spero (sic) Batistatos for Fraud and Unjust Enrichment [DE 121], filed by Defendant Lake County Convention and Visitors' Bureau d/b/a South Shore Convention and Visitors Authority (SSCVA) on June 20, 2024. SSCVA seeks leave to amend its responsive pleading to add a counterclaim against Plaintiff.

I. Background

On August 29, 2022, Plaintiff filed his Complaint including claims arising out of the termination of his employment with SSCVA, amended on December 5, 2022, to include additional claims against SSCVA, the City of Hammond and its mayor. Multiple motions to dismiss were filed, as well as motion to reconsider, with the last motion to dismiss granted in part on June 18, 2024. Limited discovery was permitted with respect to one of the issues raised in a motion to dismiss, but no other discovery has begun because of the pending dispositive motions. The case is set for a status conference on September 12, 2024, to set a scheduling order to govern discovery.

The instant Motion was filed on June 20, 2024, two days after the last pending motion to dismiss was resolved. Plaintiff filed a response on July 16, 2024, and on August 2, 2024, SSCVA filed a reply. None of the other defendants have filed a response and the time to do so has passed.

II. Analysis

Federal Rule of Civil Procedure 15(a) provides that, when a party seeks leave to amend a pleading, the “court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). Thus, if the underlying facts or circumstances relied upon by a plaintiff are potentially a proper subject of relief, the party should be afforded an opportunity to test the claim on the merits. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The decision whether to grant or deny a motion to amend lies within the sound discretion of the district court. *Campbell v. Ingersoll Milling Mach. Co.*, 893 F.2d 925, 927 (7th Cir. 1990). However, leave to amend is “inappropriate where there is undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment.” *Villa v. City of Chicago*, 924 F.2d 629, 632 (7th Cir. 1991) (citing *Foman*, 371 U.S. at 183). Under Rule 13, a counterclaim is compulsory when it “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” Fed. R. Civ. P. 13(a)(1).

SSCVA represents that its analysis of compensation records in the case revealed inaccurate reports related to Plaintiff’s time worked, and requests leave to file a counterclaim against him for fraud and unjust enrichment. It argues that, like the claims in the complaint, the counterclaims arise out of Plaintiff’s employment with SSCVA and that judicial economy

would be served by trying the related claims together as part of the same suit. Plaintiff argues that the proposed counterclaim was unduly delayed, filed almost a year after SSCVA's initial responsive pleading, and is futile because it fails to state a claim.

A. Timeliness

Plaintiff argues that the motion is untimely. He asserts that it was filed long after SSCVA had the information necessary to draft the counterclaims and that the timing is retaliatory. SSCVA argues that it is not acting in bad faith, and filed the motion after review of documents related to Plaintiff's claim revealed the misrepresentations that form the basis of its proposed counterclaim. Plaintiff also makes arguments about the statute of limitations, addressed below. Despite the age of the case, the motions to dismiss have only recently been resolved, and discovery has not yet begun. No party will be prejudiced by allowing the counterclaims at this stage, so the motion will not be denied because of when it was filed.

B. Statute of Limitations

Plaintiff argues that at least some of the claims of fraud are beyond the statute of limitations. Some of the alleged fraudulent conduct dates back to 2014, but the statute of limitations for fraud in Indiana is six years. Ind. Code § 34-11-2-7(4). SSCVA argues that discovery is needed regarding the length of time that Plaintiff engaged in the conduct at issue, and that at least the actions that occurred since 2018 are not barred.

Under the Rule 15, an amendment to a pleading relates back to the date of the original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). The claims arise out of the same relationship and occurrences as

described in the complaint, and it is apparent that at least several years' worth of conduct is not barred. Furthermore, a contention that a claim is barred by the statute of limitations is an affirmative defense, and a plaintiff does not have to "anticipate or overcome" it in the complaint. *Covington v. Mitsubishi Motor Mfg. of Am., Inc.*, 154 F. App'x 523, 524 (7th Cir. 2005) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004)); Fed. R. Civ. P. 8(c). The burden of an affirmative defense rests upon the party seeking the benefit. *See MNW, LLC v. Mega Auto Grp., Inc.*, 884 F. Supp. 2d 740, 754 (N.D. Ind. 2012) (citing *GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 653 (Ind. Ct. App. 2002)). Accordingly, to the extent that Plaintiff wishes to raise the statute of limitations concerns as an affirmative defense, he may do so, accompanied by sufficient facts for the issue to be resolved.

C. Fraud

Plaintiff argues that the claims for fraud are futile because the allegations of fraud are not plead with particularity. SSCVA alleges that while he was employed by SSCVA, Plaintiff knowingly entered false information on his timesheets to obtain financial benefits he did not earn. Plaintiff argues that SSCVA fails to identify with particularity the dates that were allegedly improperly documented or how much he was wrongly paid and therefore is not plead with sufficient specificity.

The Rule 9 sets forth heightened pleading standards for pleading allegations of fraud: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). To state a claim for fraud under Indiana law, a party must allege "(1) a material misrepresentation of past or existing fact which (2) was untrue, (3)

was made with knowledge of or in reckless ignorance of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) which proximately caused the injury or damage complained of.” *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 335 (Ind. 2013) (quoting *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244, 249 (Ind.1992)).

Plaintiff argues that SSCVA failed to identify exactly how many days they allege he marked incorrectly on his time sheet and the amount of money it alleges was improperly paid. SSCVA argues that it has sufficiently alleged the who, what, when, where, why, and how to support its claim of fraud. In particular, SSCVA has identified the time period during which the alleged material misrepresentation in the time cards was made, the content of the misrepresentation, that Plaintiff knew he was completing the cards with inaccurate information with the intent to deceive SSCVA to obtain income he was not entitled to, that SSCVA relied upon that information in calculating his compensation, and paid Plaintiff funds to which he was not entitled. “Rule 9(b) requires that facts such as ‘the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff’ be alleged in detail.” *Hefferman v. Bass*, 467 F.3d 596, 601 (7th Cir. 2006) (quoting *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir.1992)) (finding fraud allegations to be adequate despite not identifying exact dates); *see also, e.g., Am. Guardian Warranty Servs., Inc. v. JCR-Wesley Chapel, LLC*, No. 16 C 11407, 2017 WL 2224883, at *5 (N.D. Ill. May 22, 2017) (denying motion to dismiss counterclaim and explaining “Defendants need not state exact dates on which [the counterclaim defendant] allegedly made the representations”); *Heller Bros. Bedding v. Leggett & Platt, Inc.*, No. 01 C 3409, 2001 WL 740514, at *3 (N.D. Ill. June 28,

2001) (“[T]he fact that Heller Bros.’ complaint fails to cite the exact dates of the alleged misrepresentations does not warrant dismissal. Heller Bros. identifies the general time frame in which the alleged misrepresentations occurred. This is sufficient for purposes of Rule 9(b).”). SSCVA has alleged fraud in sufficient detail for Plaintiff to be able to defend against the claim. At this stage of the proceedings, it need not identify the specific date and exact amount of improperly entered time on each timecard for the entire time period at issue.

SSCVA’s claim for fraud is not futile on its face, and it can be brought against Plaintiff.

D. Unjust Enrichment

SSCVA seeks to assert a claim for unjust enrichment, alleging that Plaintiff reported that he had been working when he was actually on vacation and thereby received benefits he was not entitled to. Plaintiff argues that the unjust enrichment claim is futile as inadequately alleged and because there is an express written contract between the parties. SSCVA argues that the contract between the parties does not preclude a claim for unjust enrichment.

Under Indiana law, “[t]he existence of express terms in a valid contract precludes the substitution of and the implication in law of terms regarding the subject matter covered by the express terms of the contract” and “[w]hen the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law,” such as unjust enrichment. *Zoeller v. E. Chicago Second Century, Inc.*, 904 N.E.2d 213, 221 (Ind. 2009) (quoting *Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind.Ct.App.1992)). Plaintiff argues that the employment agreement between the parties contemplated that he would not have specific business hours and might have to work some evenings and weekends, so SSCVA cannot recover for its claims of improperly allocated vacation time. SSCVA agrees that there was a

contract between the parties but argues that its claim for unjust enrichment falls outside of the express contract. *See Coppolillo v. Cort*, 947 N.E.2d 994, 998 (Ind. Ct. App. 2011) (contrasting cases where “the parties had entered into an express contract for services, and there was no evidence that the contract failed to address all aspects of the parties' relationship” so could not recover with case where “the Agreement is not a contract for services and does not fully encompass the parties’ payment arrangement” so equitable remedy was available). In particular SSCVA argues that the contract does not address the parties’ obligations regarding how Plaintiff was to have reported his vacation time to receive matching funds. At this stage of the proceedings, and before discovery has begun, the claim is not futile, and may proceed.

III. Conclusion

For the foregoing reasons, the Court hereby **GRANTS** the Motion for leave to File Counterclaim against Spero (sic) Batistatos for Fraud and Unjust Enrichment [DE 121 and **ORDERS** SSCVA to file the counterclaim, currently on the docket as an attachment to the instant Motion, by **September 16, 2024**.

SO ORDERED this 11th day of September, 2024.

s/ John E. Martin
MAGISTRATE JUDGE JOHN E. MARTIN
UNITED STATES DISTRICT COURT

cc: All counsel of record