STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF WATAUGA	07-CVS-222
IN THE MATTER OF:)	
)	
THE RUTH COOK BLUE LIVING)	
TRUST, dated August 26, 1996,)	
James M. Deal, Jr., Linda C. Dalton and)	
Sarah C. Isaacs, Trustees,)	
)	
Petitioners,)	**PETITIONERS' REPLY IN SUPPORT OF MOTION TO AMEND PETITION**
)	
v.)	
)	
Clifton N. Blue, Jr., Peter Blue Crane,)	
Henry McCoy Blue, William F. Blue, Jr.,)	
Katherine M. Blue, William F. Blue, Mrs.)	
Gary B. Peterson, Richard F. Blue, Jr., John)	
Tyler Blue, Vance A. Crane, Richard F.)	
Blue, Mrs. Gary B. Blue, Jana Blue, Robert)	
G. Blue, William A. Crane,)	
)	
Respondents.)	
)	

The motion before the Court is a simple one: will Petitioners be allowed to amend their Petition in an action that has been pending now for just three months and before significant discovery has been conducted? The law governing amendments dictates that Petitioners should indeed be permitted to amend, and Respondents[1] have not presented sufficient grounds for denying Petitioners' motion.[2]

I. Background.

This case is in its very early stages, having been pending for just three months. Less than two months after filing their original Petition, Petitioners took the unremarkable procedural step

[1] "Respondents" in this Reply does not include Jana Blue, who has not made an appearance in the case.

[2] Respondents' Opposition to Petitioners' First [sic] Motion to Amend is included in the same document as their Brief in Support of Their First Motion for Partial Summary Judgment. In this Reply, Petitioners address only the pending Motion to Amend. Petitioners will submit a separate brief in response to Respondents' First Motion for Partial Summary Judgment in the time permitted by the Business Court Rules.

of seeking to amend their Petition to correctly state their position with respect to certain issues before the Court. (Motion to Amend, ¶ 4) In particular, Petitioners wish to correct the record to show that they do not have sufficient information on which to allege either of two things: (1) that a report prepared by Bowers & Company PLLC (the "Bowers Report") governs the determination of the price at which certain stock (the "Railroad Stock") is to be offered for sale to Respondents, and (2) that Bowers and Company PLLC ("Bowers") is the accounting firm envisioned by ¶ 8.01 of the operative Trust Agreement. (Motion to Amend, ¶¶ 4, 5)

II. Applicable Law.

Under Rule 15 of the North Carolina Rules of Civil Procedure, leave to amend a pleading "shall be freely given when justice so requires." Rule 15 contemplates liberality on the part of the Court in allowing amendments to pleadings. *Pickard v. Pickard*, 176 N.C. App. 193, 195, 625 S.E.2d 869, 871 (2006). According to a leading commentator on North Carolina Civil Procedure, "[n]o other rule has received a more liberal interpretation, and amendments to pleadings are freely allowed absent a showing of material prejudice." G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE, § 15-1 (2nd ed. 1995). Respondents have not demonstrated any such prejudice here. Their arguments opposing amendment — based on the alleged futility of amendment and Petitioners' alleged bad faith — are not sufficient to defeat Petitioners' motion.

III. Argument.

A. As a threshold matter, the motion to amend should be ruled on before Respondents' motion for partial summary judgment.

In an attempt, perhaps, to confuse the issues, Respondents combined their briefing in response to the motion to amend with a motion for partial summary judgment based on the original Petition — the very pleading the pending motion to amend seeks to modify. In doing so, Respondents are putting the cart before the horse. Ordinarily, a motion to amend should be ruled

on before a motion for summary judgment. *Carolina Builders Corp. v. Gelder & Associates, Inc.*, 56 N.C. App. 638, 640, 289 S.E.2d 628, 629 (1982) (failure to rule on a motion to amend "invit[es] piecemeal litigation and prevent[s] consideration of the merits of the action on all the evidence available.")

b. Respondents cannot prevail on their futility argument.

Respondents' futility argument is premised on the notion that, even if Petitioners' were permitted to amend, Respondents "would remain entitled to partial summary judgment on the strength of a record supplemented, considering its current state, only by an unverified pleading." (Respondents' Brief, p. 15) As a practical matter, this can be easily remedied by having the Petitioners verify the Amended Petition when it is filed. Further, this argument ignores the sworn deposition testimony offered by Petitioners in support of the motion to amend. Both Jim Deal and Linda Dalton, the two Petitioners who have been deposed in this case, testified under oath that they would not sign the original Petition today. *See* Deposition of Jim Deal ("Deal Depo."), p. 203; Deposition of Linda Dalton ("Dalton Depo."), p. 98.[3] Further, Ms. Dalton has testified that the proposed Amended Petition accurately states her position with respect to the matters at issue. Dalton Depo., p. 98; *see also* Deal Depo., pp. 191-192 (acknowledging that he read and discussed the proposed Amended Petition before it was submitted to the Court).

Respondents' reliance on *Tew v. Brown*, 135 N.C. App. 763, 522 S.E.2d 127 (1999), is misplaced. In *Tew*, the Court of Appeals noted that "it is error for the trial court to grant a motion for summary judgment without first ruling on a party's motion to amend its pleadings under Rule 15(a)." *Id.*, 135 N.C. App. at 766-67, 522 S.E.2d at 130; *see also Carolina Builders Corp. v. Gelder & Associates, Inc.*, 56 N.C. App. 638, 640, 289 S.E.2d 628, 629 (1982) (error

[3] For the Court's convenience, copies of the transcripts of the Deal and Dalton depositions are attached as **Exhibits 1** and **2**, respectively.

not to allow motion to amend filed less than four months after the original complaint, even though summary judgment motion was pending (but had not been heard); the amendment was not deemed "futile even though upon remand the trial court may determine that plaintiff cannot recover on the claim asserted in the amended complaint.")

Although the error was deemed harmless in *Tew* because the party opposing summary judgment offered no competent sworn testimony in opposition to the motion, such is not the case here, where Petitioners have testified under oath in support of the motion to amend.

More fundamentally, Respondents' futility argument appears to be premised on the notion that Petitioners simply cannot contradict the allegations in a verified pleading. (Respondents' Brief, Argument Sections 1.b.i. and 1.b.ii., pp. 8-10) Although this argument is presented in the section of Respondents' Brief addressing their motion for summary judgment, it deserves attention here to the extent it is intended to suggest a basis for denying the motion to amend — which it does not. The two cases cited by Respondents in Section 1.b.i. of their brief offer no basis for denying the motion to amend; they arise in a completely different context and stand simply for the basic proposition that, on a motion for summary judgment, "a nonmovant may not generate a conflict simply by filing an affidavit contradicting his own sworn testimony where the only issue raised is credibility." *Allstate Insur. Co. v. Lahoud,* 167 N.C. App. 205, 211, 605 S.E.2d 180, 185 (2004); *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 590 S.E.2d 15 (2004). In *Allstate*, the defendant had pled guilty in a prior criminal proceeding to taking indecent liberties with a minor, accepted responsibility for his actions, and apologized to his victim in court. The victim then filed a civil action against defendant, prompting defendant's insurer to file yet another action seeking a declaration of its obligations to defendant under its insurance policy. The insurer then moved for summary judgment on the grounds that

defendant's guilty plea in the criminal proceeding established that defendant's conduct was intentionally harmful and triggered the policy's intentional acts exclusion. In opposition to the insurer's motion for summary judgment, defendant offered an affidavit to the effect that his acts against the victim were unintentional or negligent. The court rejected defendant's argument and granted summary judgment in favor of the insurer.

Similarly, in *Belcher*, plaintiff submitted an affidavit in opposition to defendant's motion to dismiss (which was converted to a motion for summary judgment) that contradicted plaintiff's earlier deposition testimony. The court held that the affidavit alone was not sufficient to create a genuine issue of material fact.

Thus, *Allstate* and *Belcher* arose in a completely different context than that presented here. Petitioners in this case seek at an early stage of the case to amend their Petition, and they have offered sworn deposition testimony in support of their amendment. They are not seeking to resolve a particular issue but rather to set the record straight as to what they know and what they do not know, after which the case can proceed in traditional fashion with discovery to resolve those factual issues in dispute.[4]

Similarly, to the extent that Respondents suggest that North Carolina law on judicial admissions prevents amendment of the Petition, they are mistaken. (Respondents' Brief, p. 9) As stated by the Court of Appeals in *Universal Leaf Tobacco Co. v. Oldham*, 113 N.C. App. 490, 439 S.E.2d 179, *rev. denied*, 336 N.C. 615, 447 S.E.2d 412 (1994), a case cited by Respondents:

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[4] More to the point, and notwithstanding the out-of-context snippets of their testimony offered throughout Respondents' Brief, a closer reading of the deposition testimony shows that neither Mr. Deal nor Mrs. Dalton *concede* or *deny* that Bowers is the accounting firm envisioned by ¶ 8.01. Instead, they simply do not know. *See* Dalton Depo., pp. 29-33 (stating that she did not know who the Railroad's accounting firm was, that she relied on information provided to her by the Railroad, and that she was aware of another accountant who performed work for the Railroad), p. 90 (stating that she is not sure that Bowers is the accounting firm contemplated by ¶ 8.01); *see also* Deal Depo., p. 130 (his understanding was that the Railroad "was utilizing two accounting firms"), p. 205 (but he acknowledged that, "to the best of my knowledge," Bowers was the Railroad's accounting firm as of December 31, 2004). Thus, this is an issue that typically would be addressed in discovery.

> It is well established in this jurisdiction that '[a] party is bound by his pleadings and, *unless withdrawn, amended, or otherwise altered,* the allegations contain in all pleadings ordinarily are conclusive as against the pleader.'

Id., 113 N.C. App. at 493, 439 S.E.2d at 181 (citing *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964); emphasis added). Thus, the law of judicial admissions does not prevent Petitioners from amending their Petition.

c. Nor can Respondents establish that Petitioners are acting in bad faith.

In their bad faith argument, Respondents seem to suggest that Petitioners' motion to amend is so far removed from their original Petition, and so inconsistent with their deposition testimony, that it can only be explained as a fabrication. Respondents rely on the definition of bad faith used in the context of an insurer's alleged bad faith refusal to settle an insurance claim: "not based on honest disagreement or innocent mistake." Assuming *arguendo* that that standard applies, Petitioners' conduct certainly passes muster.

With respect to whether Bowers is the accounting firm contemplated by ¶ 8.01, both Mr. Deal and Mrs. Dalton testified that they were aware of another accounting firm that had done work for the Railroad, although they were not aware of whether it had prepared any valuations for the company. *See* Deal Depo., pp. 130-131; Dalton Depo., pp. 29-31, 33. The point here is simply that neither Mrs. Dalton nor Mr. Deal has definitive information as to whether Bowers qualifies as the accounting firm under ¶ 8.01 of the Trust Agreement. Notably, Petitioners are not seeking in their amendment to deny that Bowers is the accounting firm; instead, they seek to amend to clarify that they do not know. That question can be resolved in discovery. There is nothing sinister about seeking to modify a pleading to accurately reflect one's lack of personal knowledge of a matter.

With respect to the Bowers Report, Petitioners' testimony is clear that they looked to that document in the early stage of this proceeding because that was the information available to them at the time (and which, according to Mrs. Dalton, they had received from the Railroad). *See* Deal Depo., pp. 96-97; Dalton Depo., pp. 10, 17, 24-26, 31-32, 35, 47-48. Petitioners then agreed among themselves, and with the approval of their beneficiaries, to use information from that report in determining a price at which to offer the Railroad Stock to Respondents. *See* Deal Depo., pp. 96-97, 138-140, 158-159; Dalton Depo., pp. 50-51. Petitioners, though, take issue with the value set forth in the Bowers' Report, both the amount and the methods apparently used to reach it. *See* Deal Depo., pp. 121-124, 132-134,167; Dalton Depo., pp. 11, 14-16, 32. Petitioners are unequivocal in their belief that the word "value" in ¶ 8.01 of the Trust Agreement does not refer to the discounted fair market value for estate and gift tax purposes set forth in the Bowers Report. Deal Depo., pp. 92-93, 116, 119, 125-127; Dalton Depo., pp. 15-16. Instead, they believe that the word "value" means the "true worth" of the stock. Deal Depo., pp. 103, 108-109; Dalton Depo., pp. 15-16, 39-41. And nothing in the Petition is to the contrary.

As Mr. Deal testified, he believes that he has a duty as a Trustee to act in the best interest of the Trust beneficiaries and to attempt to carry out Ruth Cook Blue's intent as expressed in the Trust. Deal Depo., p. 98. Mrs. Dalton expressed a similar duty. Dalton Depo., p. 54 ("[I]t was our job as trustees to make sure that the value as Aunt Ruth intended and the real value of this asset ultimately went to those beneficiaries.") In order to do that, Petitioners believe that they need to amend the Petition so that they can proceed with their efforts to accomplish what Mrs. Blue, the maker of the trust, intended. That can hardly be considered bad faith.

IV. Conclusion.

Respondents have demonstrated no material prejudice by the amendment. The case is in its early stages, and Respondents will have the opportunity to conduct discovery on all of these points. Thus, Petitioners motion to amend should be allowed.

This the 12th day of July, 2007.

/s/ Mary K. Mandeville
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RULE 15.8 CERTIFICATION

Petitioners' Reply in Support of Motion to Amend Petition contains 2,651 words and therefore complies with the word-count limitations of BCR 15.8.

This the 12th day of July, 2007.

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing **Petitioners' Reply in Support of Motion to Amend Petition** with the Clerk of Court using the CM/ECF system, which will electronically notify (thennessey@rbh.com), and that pursuant to the Court's 11 June 2007 Order I will also electronically notify (thennessey@rbh.com) and the law clerk of Judge Jolly (trip.coyne@aoc.nccourts.org) of this filing.

I further certify that I have served a copy of the foregoing **Petitioners' Reply in Support of Motion to Amend Petition** by U.S. Mail, postage prepaid, addressed to the following:

Ms. Jana Blue
2076 Woodmont Drive
Richmond, Virginia 23235

This the 12th day of July, 2007.

/s/ Mary K. Mandeville
Mary K. Mandeville