

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
MIDLAND/ODESSA DIVISION**

**FIRST BAPTIST CHURCH OF  
ODESSA,**  
*Plaintiff,*

v.

**BROTHERHOOD MUTUAL  
INSURANCE COMPANY,**  
*Defendant.*

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**MO:18-CV-00208-DC**

**ORDER**

BEFORE THE COURT are the Motion for Leave to File Counterclaims and Third-Party Complaint and Motion to Modify the Court’s Scheduling Order and for Leave to File Counterclaims and Third-Party Complaint filed by Defendant Brotherhood Mutual Insurance Company (BMIC). (Docs. 36, 56). Plaintiff First Baptist Church of Odessa (FBCO) opposes the Motion for Leave to File Counterclaims and Third-Party Complaint only. (Docs. 41, 63). After due consideration, the Court **GRANTS** both Motions. (Docs. 36, 56).

**I. BACKGROUND**

This case arises from an insurance dispute between FBCO, the insured, and BMIC, the insurer. FBCO purchased an insurance policy (the Policy) from BMIC to insure properties located in Odessa, Texas (the Property). (Doc. 2-1 at 4).

On or about June 14, 2017, a severe storm caused damage to the Property. FBCO filed a claim with BMIC. BMIC assigned an adjuster to inspect the Property and paid FBCO a sum which FBCO found insufficient to cover the alleged loss. As a result, on October 19, 2018, FBCO filed suit in the 161st Judicial District Court of Ector County, Texas. (Doc. 2-2). The case was removed to this Court on November 28, 2018. (Doc. 1). On November 7, 2019, the Court

granted the parties' joint motion to stay the case pending the outcome of the appraisal process, which FBCO invoked. (*See* Docs. 8, 9). The case was administratively closed pending the outcome of the appraisal.

On November 6, 2020, the parties advised the Court that an executed appraisal award was issued on October 23, 2020. (Doc. 13). Nonetheless, the parties requested that the Court continue to stay the case pending mediation. *See id.* The Court agreed, however, on February 1, 2021, the parties filed a joint motion to lift the stay and a status report. (Doc. 14). Therein, the parties noted that they were unable to settle the case. *Id.* Accordingly, the Court reinstated the case to the Court's active docket. (Doc. 17).

The Court issued a Scheduling Order on February 19, 2020. (Doc. 27). The deadline to file amended pleadings and to join parties expired April 2, 2021. *Id.* On April 2, 2021, BMIC filed the instant Motion for Leave to File Counterclaims and Third-Party Complaint, and FBCO filed an unopposed motion for leave to file an amended complaint. (Doc. 36). The Court granted FBCO's motion, and the Amended Complaint was docketed on April 5, 2021. (Doc. 38). The Amended Complaint is the live pleading. BMIC filed its Answer to the Amended Complaint on April 19, 2021. (Doc. 43).

On July 2, 2021, BMIC filed a Motion to Modify the Court's Scheduling Order. (Doc. 56). FBOC did not file a response.

## **II. DISCUSSION**

The Court will review BMIC's Motions in reverse order.

### **A. Motion to Modify Scheduling Order & for Leave to File Breach of Contract Counterclaim**

BMIC seeks to modify the deadline to file a motion to amend the pleadings. (Doc. 56 at 1). It also requests leave to file a counterclaim for breach of contract against FBCO based on

newly-discovered evidence. *See id.* As FBCO did not file a response, the Court grants BMIC's Motion to Modify the Court's Scheduling Order as unopposed. *See* W.D. Tex. Civ. R. 7(d)(2) ("If there is no response filed within the time period prescribed by this rule, the court may grant the motion as unopposed."). Accordingly, the Court may consider BMIC's Motion for Leave to File a Counterclaim for Breach of Contract Against FBCO. After due consideration, the Court grants BMIC's Motion for Leave to File Counterclaim.<sup>1</sup> (Doc. 56).

### **B. Motion for Leave to File Counterclaims & Third-Party Complaint**

BMIC also seeks to file claims for fraud against FBCO, Raymond Choate (Choate), and Mark Weeks (Weeks), conspiracy to commit fraud against FBCO, Choate, and Weeks, and tortious interference with contractual relationship against Choate and Weeks. (Doc. 36-1). FBCO did not file a timely response.<sup>2</sup> (Doc. 41). Consequently, the Court grants the Motion for Leave to File Counterclaims & Third-Party Complaint as unopposed. *See* W.D. Tex. Civ. R. 7(d)(2) ("If there is no response *filed within the time period prescribed by this rule*, the court may grant the motion as unopposed." (emphasis added)).

Alternatively, for the following reasons, the Court grants BMIC's Motion for Leave.

First, the Court notes that FBCO does not oppose BMIC's Motion for Leave as it relates to the counterclaims asserted against FBCO. (*See* Doc. 41 at 10). Thus, the Court grants BMIC's Motion for Leave as it relates to the claims against FBCO.

The claims against Choate and Weeks are governed by Federal Rules of Civil Procedure 15 and Federal Rule of Civil Procedure 13. Rule 15(a) governs the amendment of pleadings prior to trial. Specifically, Rule 15(a)(2) provides that a party may amend its pleadings with the opposing party's consent or with the court's leave. "The court should freely give leave when

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1. Notably, this request was also unopposed and may be granted as such. *See* W.D. Tex. Civ. R. 7(d)(2).

2. The Court advises the parties that failure to comply with the Western District of Texas Local Rules in the future will result in the automatic denial of the request sought or the document filed being stricken from the record.

justice so requires.” Fed. R. Civ. P. 15(a)(2). In the absence of “undue delay, bad faith or dilatory motive,” courts should give leave to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A district court reviewing a motion to amend pleadings under Rule 15(a) considers five factors: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; and (5) futility of amendment. *See Smith v. EMC*, 393 F.3d 590, 595 (5th Cir. 2004) (citing *Foman*, 371 U.S. at 182).

Rule 13 governs the addition of omitted counterclaims and generally adheres to the “liberal amendment policy of Rule 15.” *Accresa Health LLC v. Hint Health Inc.*, No. 4:18-CV-00536, 2019 WL 10960486, at \*5 (E.D. Tex. May 23, 2019) (citation omitted). It also allows the joinder of persons not parties to the original action, such as Choate and Weeks, so long as the requirements of Rules 19 and 20 are followed. *Id.* (citing Fed. R. Civ. P. 13(h)).

Here, BMIC explains that its claims against Choate and Weeks “are integrally related to the unopposed compulsory counterclaims [raised against FBCO],” and they relate to the same transaction, occurrence, or series of transactions and contain “multiple common questions of law and fact.” (Doc. 42 at 5). The Court agrees. Accordingly, FBCO’s claims against Choate and Weeks are permitted under Rule 20.

FBCO argues that granting BMIC’s motion will result in undue delay because Choate and Weeks would have very little time to conduct discovery. However, it appears that the discovery related to the claims against Choate and Weeks has been produced; hence, FBCO’s Motion for Leave to add counterclaims against the two individuals.

Moreover, FBCO argues that BMIC’s claims against Choate and Weeks are filed in bad faith, citing a lengthy email exchange. (Doc. 41 at 14–16). The parties have displayed to the Court an inability to resolve disputes in good faith. The record reflects counsel’s hostility toward

one another and certain parties. Specifically, multiple filings contain arguments personally targeting attorneys and some of the parties involved. Rather than focusing solely on the legal issues posed in the motions filed, the parties have chosen to engage in back-and-forth quarreling. The Court rules that the emails alone do not evidence that BMIC filed its claims against Choate and Weeks in bad faith.

Having reviewed the posture of the case, the Court finds that there is, in fact, no evidence that BMIC filed claims against Choate and Weeks in bad faith or with dilatory motive. The case was reinstated on February 1, 2021, and BMIC filed the instant Motion April 2, 2021, only two months after the case was reinstated. Moreover, the instant Motion is BMIC's first attempt at adding claims. Finally, as noted previously, the Court does not believe that *undue* delay will result if the Court grants the instant Motion. For these reasons, the Court grants BMIC's Motion for Leave. (Doc. 36).

### III. CONCLUSION


For the foregoing reasons, the Court **GRANTS** BMIC's Motion for Leave to File Counterclaims and Third-Party Complaint. (Doc. 36).

The Court further **GRANTS** BMIC's Motion to Modify the Court's Scheduling Order and for Leave to File Counterclaims and Third-Party Complaint. (Doc. 56).

The Court **DIRECTS** the Clerk of Court to docket Exhibit A to Document 56 as BMIC's Counterclaims and Third-Party Complaint. (Doc. 56-1).

It is so **ORDERED**.

SIGNED this 16th day of December, 2021.

A handwritten signature in black ink, appearing to read "David Counts", with a stylized star-like flourish at the end.

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DAVID COUNTS  
UNITED STATES DISTRICT JUDGE