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Order on Plaintiff's Motion to Add Party Defendant (JAMES & JACKSON LLC)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES & JACKSON LLC, individually and derivatively on behalf of MBC, GOSPEL NETWORK, LLC.,	)	
Plaintiffs,	)	Civil Action No.: 2006CV124372
v.	)	
EVANDER HOLYFIELD, JR., WILLIE E. GARY, CECIL FIELDER, LORENZO WILLIAMS, THOMAS WEIKSNAR, CHAN ABNEY, LORI METOYER-BROWN, and RICK NEWBERGER,	)	
Defendants.	)	

FILED IN OFFICE
DEC 19 2007
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON PLAINTIFF'S MOTION TO ADD PARTY DEFENDANT

This case is before the Court on Plaintiff's Motion to Add Party Defendant. After having reviewed the briefs submitted on this motion and the record of the case, the Court finds as follows:

This law suit, filed in October, 2006, arises out of a dispute among former limited liability company members. Plaintiffs allege that in breach of their fiduciary duties, Defendants approved the cash-out merger of MBC, the nominal plaintiff, into Programming Acquisitions, LLC ("Programming Acquisitions"), which is owned by the named Defendants.

Plaintiffs seek to add Programming Acquisitions as a defendant in this case pursuant to O.C.G.A. § 9-11-21, which provides that "[p]arties may be dropped or added by order of the court on motion of any party....on such terms as are just." Id. The trial court has discretion in determining whether a party should be added and may consider factors such as prejudice to the new party, and excuse or justification in the delay of naming such party in the case. Aircraft Radio Sys. v. Von Schlegell, 168 Ga. App. 109, (1983); Ellison v. Hill, __ S.E.2d. __, 2007WL 3104991 (Ga. App. 2007).

Plaintiffs cite recent discovery responses pursuant to this Court's November 7, 2007, Order as revealing new evidence of Programming Acquisitions' ownership and control that justifies their petition to add it as a party. Defendants, however, highlight that Plaintiffs' original complaint stated that Programming Acquisitions was entirely owned and controlled by Defendants. While Plaintiffs may have learned specifics regarding officer appointment, etc., through recent discovery, such responses revealed no new basis for a liability theory against Programming Acquisitions that did not exist at the time they filed their complaint.

Additionally, Plaintiffs argue discovery is not closed in this case and thus the addition will not prejudice Programming Acquisition. Finally, Plaintiffs argue that Programming Acquisitions, which is owned and controlled by Defendants, will not be prejudiced by their inclusion presumably because it would be aware of the potential to be brought into this lawsuit.

Defendants counter that discovery, which was scheduled to close December 1, 2007, but was extended by the parties only through January 15, 2008, arguing that discovery is nearly closed. Defendants claim that Programming Acquisitions will be prejudiced by its late inclusion because it was unable to participate in important fact discovery over the last fourteen months or in the Motion to Dismiss.

In Ellison v. Hill, the case Plaintiffs' cite in their brief, the Court of Appeals affirmed a denial of a motion to add a party because the case was 2 ½ years old, discovery was closed, the new defendant had separate counsel, and there was no reason to anticipate inclusion in the lawsuit. __ S.E.2d. __, 2007WL 3104991 (Ga. App. 2007). Thus, the addition of a defendant would prejudice the party and there was no justification for the delay. Id.

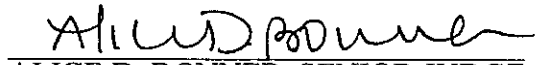
Delay in adding a party alone, however, is not sufficient grounds for a trial court to deny a motion to add a party. Shiver v. Norfold-Southern Railway Co., 220 Ga. App. 483 (1996). In Shiver, the

Court of Appeals reversed on grounds that even though there was substantial delay in naming the new party, there was no showing of prejudice to the added party. Id. at 484. Specifically, the Court noted that the amended complaint was filed within the statute of limitation, that the allegations against the new party arose out of the same facts and occurrences alleged against the other defendants, that the new party shared representation with the existing defendants, and that the new party had notice of the law suit and should have known that it might be involved in the litigation. Id.

While there has been considerable delay in seeking to add Programming Acquisitions and the justifications proffered by Plaintiffs for the delay are not persuasive, it is difficult to determine what, if any, prejudice Programming Acquisitions will suffer as a result of being added at this stage. As in Shiver, the amended complaint will have been filed within the statute of limitations and it arises out of the same facts/occurrences as the other allegations. Additionally, because of Defendants' control/ownership of Programming Acquisitions, it had notice of the suit and should have known that it might be involved in this lawsuit. Similarly, given that Defendant Gary's law firm is representing MBC and the individual Defendants (along with outside counsel), there is a substantial likelihood that Programming Acquisitions will share the same counsel.

In accordance with the foregoing analysis, this Court hereby **GRANTS** Plaintiffs' Motion to Add Party Defendant, Programming Acquisitions, in the above-captioned case. Plaintiffs shall file an original First Amended Complaint and Demand for Jury Trial to be served upon Programming Acquisitions in accordance with the laws of this State.

SO ORDERED this 19 day of ~~November~~ Dec., 2007.



ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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