

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DANIEL T. WARREN,

Plaintiff,

vs.

COUNTY LEGISLATURE, COUNTY OF ERIE,
NEW YORK, and KEVIN M. KELLEY, as Clerk of
the Legislature of the County of Erie, New York and
COUNTY OF ERIE, NEW YORK,

Defendants.

**AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
LEAVE TO SERVE A SECOND
AMENDED COMPLAINT**

Index No. I 2004-12768

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:

KRISTIN KLEIN WHEATON, being duly sworn, deposes and says:

FILED
AUG 22 2005
ERIE COUNTY
CLERKS OFFICE

1. I am an attorney at law duly licensed to practice in the State of New York and am Assistant County Attorney to FREDERICK A. WOLF, Erie County Attorney, and attorney for the defendants, in the above captioned proceeding. As such, I am fully familiar with the circumstances and facts had herein.
2. I make this affidavit in opposition to the plaintiff's motion to amend the complaint in this matter.
3. Plaintiff has moved for permission to serve a Second Amended Complaint. As the Court is aware, plaintiff has already amended his complaint once in this proceeding on February 25, 2005 and motions for summary judgment are currently pending.
4. Plaintiff seeks to add additional alleged violations of the Open Meetings Law

which plaintiff claims he became aware of “subsequent to the amendment of the complaint as of right.” Plaintiff’s Motion to Amend, ¶ 13. Plaintiff does not indicate when he became aware of the additional alleged violations.

5. “Leave to amend pleadings should be freely granted upon such terms as may be just (CPLR 3025[b]).” Rutz v. Kellum, 144 A.D.2d 1017 (4th Dep’t 1988). “Although leave to amend a pleading shall be freely given, in the absence of surprise or prejudice, the determination whether to grant such a leave is within the court’s discretion. . .” Comsewogue Union Free Sch. Dist. v. Allied- Trent Roofing Systems, Inc., 15 A.D.3d 523 (2d Dep’t 2005). “While the motion to amend is one addressed to the Court’s discretion, mere lateness is not a barrier to the amendment.” Rutz, 144 A.D.2d at 1018.

6. “It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine.” Id., quoting Edenwald Contr. Co. v. City of New York, 60 N.Y.2d 957, 959. (other citations omitted). “The need for additional discovery, or additional time to prepare a defense, dose not constitute prejudice sufficient to justify the denial of a motion to amend pleadings.” Id., citing Perkins v. New York State Electric & Gas Corp., 91 A.D.2d 1121. Rather a party must show that it has been “hindered in the preparation of his case or has been prevented from taking some measure in support of his position.” Id.

7. “When leave is sought on the eve of trial, judicial discretion should be exercised sparingly.” Comsewogue, 15 A.D.3d at 524. Accordingly, where plaintiff engaged in an extended delay in moving to amend and lacked a reasonable excuse for the delay in seeking the amendment, the “Supreme Court providently exercised its discretion in denying the plaintiff’s motion for that relief on the ground of gross laches alone.” Id. (citations omitted). Finally, “it is

incumbent upon one seeking leave to amend a pleading to make an evidentiary showing that a claim can be supported.” Farrell v. K.J.D.E. Corp., 244 A.D.2d 905 (4th Dep’t 1997).

8. In the present case, plaintiff’s motion to amend should be denied. Plaintiff seeks to add alleged violations in meetings that allegedly occurred in February and March 2005. Plaintiff filed an amended complaint after one of the meetings in February 2005. Plaintiff has offered no excuse as to the delay in seeking amendment with respect to meetings that occurred in February and March.

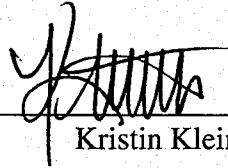
9. Significantly, plaintiff has attached an affidavit of Albert DeBenedetti, Erie County Legislator to his papers. Mr. DeBenedetti has been one of plaintiff’s principal witnesses, previously submitting affidavits in this matter. Mr. DeBenedetti was a participant and attendee at the alleged meetings at issue. Plaintiff offers no excuse for the delay in seeking the instant amendment and apparently cannot since plaintiff’s main witness was apparently aware of alleged violations when they allegedly occurred in February and March.

10. Defendants are prejudiced by an amendment at this point. Essentially, plaintiff is seeking an amendment on the eve of trial, as summary judgment motions have been made and this Court previously issued an Order implementing a discovery cutoff and directing that note of issue should be filed by April 15, 2005. (Decision and Order of Hon. John P. Lane, granted January 21, 2005). As the parties have timely moved for summary judgment and waived discovery at this point, the case is trial ready (except for determination on motions). Plaintiff’s motion to amend at this late juncture is prejudicial given the fact that the case is far along on its track.

11. Moreover, given the fact that plaintiff offers absolutely no excuse for his delay in

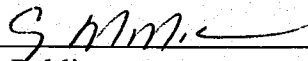
seeking the amendment, in addition to the fact that summary judgment motions have been filed, plaintiff's request for leave to amend should be denied by this Court. If plaintiff's motion is granted, defendants will have to file an additional answer, perhaps seek discovery and file an additional summary judgment motion. These consequences, as well as plaintiff's failure to explain the delay in the instant motion constitute severe prejudice to the defendants warranting a denial of plaintiff's motion.

WHEREFORE, it is respectfully requested that the Court deny plaintiff's motion to file and serve a Second Amended Complaint and grant such other and further relief as may be just and proper.



Kristin Klein Wheaton

Sworn to before me this 22nd day
of August, 2005



Notary Public

Amy M. McCabe
Notary Public of the State of New York
Qualified in Eric County
Commission Expires 10-30-06