

state that it lacks knowledge of Plaintiff's location and to add an affirmative defense of lack of subject matter jurisdiction due to a lack of diversity. (D.I. 62) With regard to its proposed counterclaim, Defendant contends that it paid fees for services which were not pre-approved, as required by the parties' agreement, and, therefore, amendment is warranted.

In response, Plaintiff contends that the proposed counterclaim is prejudicial to Plaintiff and is futile in that it is untimely and fails to state a claim upon which relief can be granted. (D.I. 67) Specifically, Plaintiff contends that services under the contract were rendered from mid-May 2005 through early 2006, and, therefore, any breach of contract counterclaim is barred under Delaware's three-year statute of limitations. In addition, Plaintiff contends that the proposed counterclaim fails to state a claim because, *inter alia*, Defendant does not allege to whom payment was made, that the money was paid for services rendered by Plaintiff pursuant to the contract, or that Defendant fulfilled its contractual obligations. Finally, Plaintiff contends that the proposed counterclaim is prejudicial because Plaintiff had no notice of this contention, Defendant has failed to raise it for over 1 ½ years, and because allowing amendment would further delay this case, whose progress has allegedly been hindered by Defendant's conduct.

II. LEGAL STANDARD

"After amending once or after an answer has been filed, [a party] may amend only with leave of the court or the written consent of the opposing party." *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) (citing Fed. R. Civ. P. 15(a)). The district court has discretion in granting a motion to amend, *Foman v. Davis*, 371 U.S. 178, 182 (1962), and "the court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Third Circuit has adopted a liberal policy favoring the amendment of pleadings to ensure that claims are decided on the merits rather

than on technicalities. *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir. 1990). Amendment should ordinarily be permitted absent a showing of “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc.” *Foman*, 371 U.S. at 182.

III. DISCUSSION

The Court will allow Defendant to amend its Answer with respect to paragraph 1 and the additional defense of lack of subject matter jurisdiction in light of Plaintiff’s failure to oppose these amendments and to make any showing that they are futile, prejudicial, or sought in bad faith. Further, the Court concludes that Defendant’s proposed counterclaim is neither futile nor prejudicial and, therefore, Defendant will also be permitted to amend in this respect.

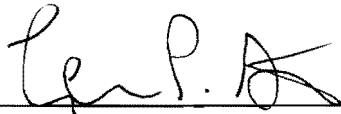
Amendment of a complaint is futile if it fails to state a claim upon which relief can be granted. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). Although the disputed contract was entered into during May 2005 (D.I. 35 Ex. A), Plaintiff’s First Amended Complaint alleges that the contract was in force until May 31, 2008 (*Id.* ¶ 16). Defendant’s proposed counterclaim alleges that Plaintiff violated the contract throughout the pendency of the contract. (D.I. 62) Taking these allegations as true, the Court cannot conclude that the proposed counterclaim is barred under the applicable three-year statute of limitations, 10 *Del. C.* § 8106. Moreover, Defendant’s proposed counterclaim specifically identifies the provisions alleged to be breached, as well as the actions by which Plaintiff allegedly breached its contractual obligations. (*See* D.I. 62 Ex. 3 ¶¶ 47-50) In the Court’s view, Defendant’s allegations suggest the required elements of a breach of contract action, and are sufficient for the

Court to reasonably infer that Plaintiff is liable for a breach of contract. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). Accordingly, the Court concludes that the proposed counterclaim is not futile as time-barred under the statute of limitations or for failure to state a claim.

In order to prove undue prejudice, the non-movant “must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered . . . had the amendments been timely.” *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989). Defendant previously raised Plaintiff’s alleged failure to adequately perform contractual obligations in both its original Answer (D.I. 6 at 4) and its Answer to Plaintiff’s First Amended Complaint (D.I. 39 at 5). Further, although there have been multiple extensions of time in this case, Defendant sought leave to amend within the period required by the Scheduling Order. (D.I. 61) Therefore, the Court concludes that the proposed amendment will not result in undue prejudice to Plaintiff.

NOW THEREFORE, IT IS HEREBY ORDERED that Defendant’s Motion For Leave To Amend Answer And To Include A Counterclaim (D.I. 62) is **GRANTED**.

Dated: September 10, 2010



The Honorable Leonard P. Stark
UNITED STATES DISTRICT JUDGE