

VIRGIE ARTHUR,

Plaintiff,

vs.

HOWARD K. STERN, BONNIE STERN,
LYNDAL HARRINGTON, ART HARRIS,
NELDA TURNER, TERESA STEPHENS,
HARVEY LEVIN, TMZ PRODUCTIONS,
INC., and LARRY BIRKHEAD,

Defendants.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

280TH JUDICIAL DISTRICT

**DEFENDANT ART HARRIS’S RESPONSE TO PLAINTIFF’S
MOTION FOR LEAVE TO JOIN CBS STUDIOS, INC. AS A DEFENDANT**

- AND -

REQUEST FOR ORAL HEARING

Defendant Art Harris (“Harris”) files this Response to Plaintiff’s Motion for Leave to Join CBS Studios, Inc. as a Defendant and Request for Oral Hearing, and in support thereof, would respectfully show the Court the following:

I. REQUEST FOR ORAL HEARING

Plaintiff Virgie Arthur (“Arthur”) filed a Motion for Leave to Join CBS Studios, Inc. (“CBS”) as a Defendant in this case on July 27, 2009. Arthur also filed a Notice of Submission, requesting that the Court consider her Motion for Leave by submission on August 10, 2009 at 8:00 a.m. Harris respectfully requests that the Court set an oral hearing on Arthur’s Motion for Leave so that defense counsel may address said Motion for Leave and Harris’s response thereto. An oral hearing will assist the Court in the proper administration of justice and equity of this matter.

II. SUMMARY OF ARGUMENT

Arthur should not be granted leave of court to assert claims against CBS, a new party, because the Court's June 1, 2009 Docket Control Order specifically states that "NO NEW PARTIES" shall be joined in this case. The motion should be denied for the following additional reasons: (1) Arthur has not provided the Court with *any* explanation for her lack of diligence in seeking to amend her petition *a year-and-a-half* after she initiated this lawsuit (and almost *two years* since she sued CBS in a prior lawsuit over the same subject), and therefore has not justified why this Court should grant leave to join CBS; (2) granting leave of court would condone Arthur's false statements in her initial disclosures and admitted collusion with co-defendant, Nelda Turner, in joining CBS in this case to circumvent the statute of limitations in exchange for Turner's dismissal from this lawsuit; (3) dilatory joinder of new parties at this late date, a year-and-a-half after suit was filed, acts to the prejudice of Harris and other defendants to a speedy resolution of this case; and (4) joinder of CBS would be futile because Arthur's claims against CBS in the Federal Suit were dismissed with prejudice and therefore any new claims are barred under the doctrines of res judicata, collateral estoppel, and judicial admission.

III. FACTUAL BACKGROUND

A. Plaintiff's Prior Suit Against CBS Studios, Inc.

On October 9, 2007, Plaintiff Arthur filed a separate lawsuit in the 280th Judicial District Court against Howard K. Stern, CBS, and KPRC Houston, alleging that the defendants conspired to defame Arthur through interviews on *Entertainment Tonight*. The case was removed to the United States District Court for the Southern District of Texas, Judge Lee Rosenthal presiding, on November 5, 2007 (the "Federal Suit"). Arthur filed a Motion to Remand on December 6,

2007, which she later withdrew on April 21, 2008, three days after the Court held a hearing on the motion, but before it was ruled upon.

On March 14, 2008, Arthur moved for leave to amend her complaint in the Federal Suit to join the very same defendants in this lawsuit: Bonnie Stern, Art Harris, Nelda Turner, TMZ Productions, Inc., and Harvey Levin. (Ex. “A”– Amended Motion for Leave to Amend, March 17, 2008). Defendants responded to that Motion, asserting that Arthur was attempting to use one of the proposed defendants, Texas resident Nelda Turner, to destroy diversity jurisdiction. While awaiting Judge Rosenthal’s decision on Arthur’s Motion for Leave to Amend, on April 28, 2008, Arthur filed this lawsuit, asserting the same causes of action against the proposed parties. (Ex. “B” – Compare Exs. “1” and “2” in Defendants’ Supplemental Response to Plaintiff’s Amended Motion for Leave, April 24, 2008). On June 26, 2008, Judge Rosenthal handed down a Memorandum and Order, denying Arthur’s Motion for Leave to Amend and finding that Arthur indeed improperly sought “leave to amend to add nondiverse parties in order to destroy diversity jurisdiction.” (Ex. “C” – Memorandum and Order, June 26, 2008 at p. 10).

In the face of a likely summary judgment in favor of CBS, Arthur filed an Unopposed Motion to Dismiss with Prejudice, stating that she “*no longer desires to pursue, prosecute, or continue her claims against Defendants Howard K. Stern and CBS Studios, Inc.*” (Ex. “D” – Unopposed Motion to Dismiss with Prejudice, January 28, 2009) (emphasis added). That same day, Judge Rosenthal signed an Order of Dismissal with Prejudice, dismissing all of Arthur’s claims against CBS and Howard K. Stern *with prejudice* to the re-filing of same. (Ex. “E” – Order of Dismissal with Prejudice, January 28, 2009) (emphasis added).

B. Turner and Plaintiff's Counsel Colluded in Filing her Motion for Leave to Designate Responsible Third Parties.

In this state court case, Turner again became Arthur's pawn. On July 17, 2008, despite her pleadings in the then-ongoing Federal Suit against CBS, Arthur served her Initial Disclosures pursuant to Texas Rule of Civil Procedure 194.2 (signed by Mr. Neil McCabe), wherein she stated, "Plaintiff has identified no potential parties, other than those named in the suit" (Ex. "F" – Plaintiff's Initial Disclosures at (b), July 17, 2008), and further that "Plaintiff knows of no such responsible third parties." (*Id.* at (1)). On January 30, 2009, two days after the Federal Court's Order of Dismissal, dismissing Arthur's claims against CBS *with prejudice*, Turner filed a Motion for Leave to Designate Responsible Third Parties ("First Motion for Leave") in this case, requesting that the Court designate non-party CBS as a responsible third party pursuant to Texas Civil Practice and Remedies Code § 33.004. (Ex. "G" – First Motion for Leave, January 30, 2009).

In a sworn statement, Turner admitted that she did *not* prepare or file the First Motion for Leave. (Ex. "H" – Turner's February 9, 2009 Sworn Statement at p. 9 lines 4-5, p. 72 lines 9-15, and p. 73 lines 2-4). Rather, Turner testified that the First Motion for Leave was prepared by Arthur's counsel, Neil McCabe, and was filed without her permission (a fact which McCabe readily admitted during the May 8, 2009 hearing, and which the Court deemed an ironic "conspiracy" between Turner and McCabe). (*Id.* at p. 73 line 13 – p. 74 line 9; Ex. "I" – May 8, 2009 Hearing Transcript at pp. 7-9, 15-16, 24).

Turner further testified she did not agree with the language in the First Motion for Leave filed by McCabe, that she didn't "get what designated responsible party was" and that "[she's] still not sure what it means." (Ex. "H" – Turner's February 9, 2009 Sworn Statement at p. 34 lines 6-9, p. 73 lines 8-12, and p. 74 lines 6-11). When Turner told McCabe that the First Motion

for Leave was incorrect, McCabe did not offer to change the language or re-file a new Motion for Leave. (*Id.* at p. 34 lines 1-9).

Turner also testified that McCabe intimidated her and raised concerns about her personal safety, the safety of her home and possessions, and the privacy of her medical records. (*Id.* at p. 11 lines 2-14, p. 13 line 25 – p. 15 line 23 (“[W]hen he [McCabe] finds out that I’m here today, I’m very scared”), p. 69 lines 12-20, and p. 94 line 24 – p. 95 line 16; **Ex. “H-2”**). According to Turner and documents produced by her, McCabe promised he would dismiss Arthur’s claims against Turner and that she would never have to appear in Court in Houston *if* she filed the First Motion for Leave and testified falsely against the other defendants. (*Id.* at p. 22 lines 10-24, p. 27 line 11 – p. 28 line 1, and p. 41 line 24 – p. 42 line 8).¹ However, after McCabe filed Turner’s sham Motion for Leave (without Turner’s permission), he did not dismiss Turner from the lawsuit as promised. (*Id.* at p. 22 lines 3-11). McCabe told the Court during the May 8, 2009 hearing: “We never came to a deal except this; that if she gave me everything I wanted, if she helped me get CBS into the case . . . by filing the requisite motion and cooperated with me to my satisfaction, she would be dismissed from the case. . . . It just didn’t happen. . . . We kept negotiating and she never satisfied me. I never said I was satisfied.” (**Ex. “I”** – May 8, 2009 Hearing Transcript at pp. 15-16, 24). Indeed, Turner testified that her discussion with McCabe “was like a football game. It was always moving the goalpost further and further along.” (**Ex. “H”** – Turner’s February 9, 2009 Sworn Statement at p. 12 line 22 – p. 13 line 3).

¹ Turner testified: “[McCabe said] [i]f I did a sworn statement or a deposition with y’all and cooperated that I would never be dismissed.” (**Ex. “H”** – Turner’s February 9, 2009 Sworn Statement at p. 22 lines 10-24); Q [by Mr. Babcock]: And the cooperation he wanted from you in terms of testimony was he wanted you to testify in your view falsely about certain matters relating to the lawsuit; is that correct? A [by Turner]: That is correct, and that is when we got -- when we got into it and he decided no deposition, no sworn statement, maybe he could talk me into an affidavit.” (*Id.* at p. 41 line 24 – p. 42 line 8). In emails exchanged between Turner and McCabe, McCabe promised to dismiss Turner: “I will dismiss the case against you when I have determined that I have received sufficient cooperation from you. First, I will have to see and evaluate what you produce and what you say in your deposition.” (**Ex. “H-10”**; *see also* **Exs. “H-2,” “H-4,” and “H-7”**).

On February 12, 2009, Turner withdrew the First Motion for Leave, notifying the Court that “[she] did not prepare that motion . . . [did] not approve its filing, and does not wish to pursue that motion or a court ruling on it.” (Ex. “J” – Turner’s Notice of Withdraw of Motion for Leave to Designate Responsible Third Parties, February 12, 2009).

On May 15, 2009, Turner filed an Amended Motion for Leave that is virtually identical to her First Motion for Leave – the motion she told the Court she did not draft, did not approve of, and believes is inaccurate. (Ex. “K” – Amended Motion for Leave, May 15, 2009). The only difference between her First Motion for Leave and her Amended Motion for Leave is that, in addition to CBS, Harris, and Birkhead, she also sought to designate as responsible third parties defendants TMZ Productions, Inc., Harvey Levin, and Howard K. Stern. (*Id.* at ¶ 3).

In both motions, Turner asserted that CBS should be designated as a responsible third party based upon an interview Art Harris conducted of Anna Nicole Smith’s stepbrother while he was in prison, which *Entertainment Tonight* broadcast in May 2007. (Ex. “G” – First Motion for Leave, January 30, 2009 at ¶¶ 8, 11; Ex. “K” – Amended Motion for Leave, May 15, 2009 at ¶¶ 8, 11-12). Arthur’s claims surrounding this interview are clearly barred by the one-year statute of limitations. The Court granted Turner’s Motion for Leave on June 29, 2009 and designated CBS as a responsible third party. (Ex. “L” – Order, June 29, 2009). As a result of Arthur’s collusion with Turner to designate CBS as a responsible third party, Arthur now seeks to avoid the one-year statute of limitations and join CBS as a defendant in the lawsuit.

C. Further Recent Evidence of Collusion Between Arthur and Turner.

As further evidence of the collusion between Arthur and Turner relating to CBS, just yesterday, the two filed an Agreed Motion Regarding Production by Nelda “Rose” Turner, in which Turner has agreed to turn over her hard-drives and other storage devices to the Special

Master for forensic examination. (Ex. “M” – Agreed Motion Regarding Production, August 6, 2009).

Ironically, the Agreed Order permits the Special Master to go *far beyond* the scope of Arthur’s First Request for Production to Turner, which is the *only* discovery request before the Special Master pursuant to the Court’s orders. Indeed, under the Agreed Order, the Special Master is ordered to produce communications between CBS, including the undersigned lawyers, and a list of persons set forth in the Order. Thus, Arthur and Turner have again colluded and prepared a sham Agreed Order implicating CBS in this case.

IV. ARGUMENT & AUTHORITY

Arthur’s Motion for Leave to Join CBS as a defendant should be denied for five distinct reasons: (1) the June 1, 2009 Docket Control Order provides that “NO NEW PARTIES” will be joined in this case; (2) Arthur has not been diligent in joining CBS in this lawsuit that has been pending over 16 months; (3) the Court should not condone Arthur’s collusion with Turner to join CBS and avoid the statute of limitations; (4) Arthur’s joining CBS as a defendant would be prejudicial; and (5) joinder of CBS in this case would be futile under the doctrines of res judicata, collateral estoppel, and judicial admission occasioned by Arthur’s Motion to Dismiss with Prejudice in the Federal Suit and the subsequent Order granting same. Each of these grounds is set forth in detail below.

A. The June 1, 2009 Docket Control Order Specifically States “NO NEW PARTIES” will be Joined in this Case.

This case has been pending for 16 months, since April 21, 2008, and was originally set for trial on June 1, 2009. The Court’s initial Docket Control Order set the joinder deadline for December 1, 2008. (Ex. “N” – Docket Control Order, September 24, 2008). However, as the Court has repeatedly acknowledged, Arthur continues to delay a trial of this case, and after

repeated continuances of various defendants' special appearances, the Court was forced to enter an amended Docket Control Order on June 1, 2009. (Ex. "O" – Docket Control Order, June 1, 2009). Considering that more than a year had passed since this case's inception, the amended Docket Control Order specifically provides that there will be "NO NEW PARTIES" joined in this case, "whether by amendment or third party practice." (*Id.*). Arthur gives no explanation for why this Court's Docket Control Order should be ignored, particularly since this case has been pending for a year-and-a-half.

B. Arthur Has Been Dilatory in Amending Her Petition to Join CBS as a Defendant, and Her Motion for Leave Should be Denied.

A party must seek leave of court to amend its pleadings after a deadline in a pretrial order, principally so that the Court may decide whether the party has been dilatory in failing to do so before the deadline. *See Hart v. Moore*, 952 S.W.2d 90, 95 (Tex. App.—Amarillo 1997, pet. denied). For example, in *Roskey v. Continental Cas. Co.*, 190 S.W.3d 875, 881 (Tex. App.—Dallas 2006, pet. denied), the Court of Appeals held that the trial court did not abuse its discretion by refusing an amendment 6 days after the deadline in the pretrial order because, like here, the party could have amended its pleading during the 17 months in which the case had been pending. Likewise, the Court of Appeals in *G.R.A.V.I.T.Y Enters., Inc. v. Reece Supply Co.*, 177 S.W.3d 537, 544 (Tex. App.—Dallas 2005, no pet.) affirmed the trial court's striking the plaintiff's second amended petition because it was after the amended pleadings deadline in the scheduling order.

Texas courts have held that a court should refuse leave to amend a pleading when the need for the amendment had already been known to the party. *See, e.g., Taiwan Shrimp Farm Vill. Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc.*, 915 S.W.2d 61, 70 (Tex. App.—Corpus Christi 1996, writ denied) (holding that the trial court did not commit error in refusing an

amendment three days after the scheduling order deadline because the defense was known to the party earlier); *AmSav Group, Inc. v. American Sav. & Loan Ass'n of Brazoria County*, 796 S.W.2d 482, 490 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (holding that the trial court did not err in refusing to grant leave to amend 11 days after the scheduling order deadline because the defense was known by the party earlier).

Given the history of the filings in this case and the Federal Suit, Arthur has been aware of any potential claims against CBS at least since the inception of the Federal Suit almost two years ago, and joining CBS as a defendant at this late date to pursue potential claims that Arthur has known about for years is nothing more than dilatory harassment and should not be permitted by this Court.

C. This Court Should Not Allow Arthur and Turner to Proceed with a Sham Collusive Pleading.

Further, granting Arthur leave to amend her petition to join CBS as a defendant would condone fraudulent representations by Arthur and her counsel in her Rule 194 Initial Disclosures and the admitted collusion between Arthur and Turner for Turner to file a Motion for Leave to Designate CBS as a Responsible Third Party so that Arthur could join CBS as a defendant and avoid the statute of limitations in exchange for Turner's potential dismissal in this case. Since at least 1894, the Supreme Court of Texas has barred Texas courts from entertaining such collusive suits. *See Texas & Pac. Ry. Co. v. Gay*, 26 S.W. 599 (Tex. 1894). In *Gay*, the Court held that no court may make:

itself the mere tool of apparently adverse litigants, or [] entertain[] a collusive suit.

A suit is said to be collusive when brought by seemingly adverse parties under secret agreement and co-operation, with view to have some legal question decided which is not involved in a real controversy between them; or when so brought with intent to defraud other persons, there being no real controversy between the

parties nor purpose to secure some relief which, as between themselves, would not be conceded without suit.

Id. at 604. The Fort Worth Court of Civil Appeals has held that “a collusive suit merely to decide some question that would affect third parties, and not to determine any real controversy between the parties to that suit, would not be entertained.” *Davis v. Mitchell*, 225 S.W. 1117, 1118 (Tex. Civ. App.—Fort Worth 1920, no writ).

Arthur and Turner are seemingly adverse parties. However, they colluded to file a sham Motion for Leave in an effort to secure the Court’s designating CBS as a responsible third party so that Arthur could join CBS as a defendant and circumvent the statute of limitations. (See **Ex. “H”** – Turner’s February 9, 2009 Sworn Statement at p. 21 lines 17-18 and p. 24 lines 6-21; **Ex. “H-3”**). As McCabe told Turner, the purpose of the Motion for Leave was not determine any real controversy between Turner and Arthur (particularly given McCabe’s promise to dismiss Turner in exchange for filing the motion), but to allege an additional claim against Harris and to join CBS as a defendant despite the fact that Arthur’s claim is barred by limitations. (**Ex. “H-3”**). In fact, McCabe told Turner in an email that the purpose of the motion was “so we [plaintiff’s counsel] can add CBS to the state lawsuit,” and he instructed her to “Please keep this secret until we file it!!!” (**Ex. “H-3”**; **Ex. “H”** – Turner’s February 9, 2009 Sworn Statement at p. 24 lines 6-21).

To put it lightly, such shenanigans and gamesmanship to circumvent well-established and legislated Texas law (particularly here where the party and the stale claims that Arthur seeks to add have not only been well known to her for years, but were the subject of prior litigation brought by her, which she voluntarily dismissed with prejudice) should not be condoned, let alone tolerated by the Court. To do so will be a mockery of the Texas judiciary and legal system.

D. Arthur’s Joining CBS as a Defendant in This Lawsuit Would be Prejudicial.

A court has discretion to refuse an amendment if: (1) an opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or joins a new party and thus is prejudicial on its face and an opposing party objects to the amendment. *See Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990); *Hart*, 952 S.W.2d at 95. In reviewing a motion for leave to amend, the Court should analyze whether the proposed amendment is more in the nature of a procedural change or a substantive change that would alter the nature of the trial and which the trial court has discretion to deny. *See Chapin & Chapin, Inc. v. Texas Sand & Gravel Co., Inc.*, 844 S.W.2d 664 (Tex. 1992); *Hart*, 952 S.W.2d at 96.

Here, given that almost a year-and-a-half has passed since Arthur filed her Original Petition and the June 1, 2009 Docket Control Order specifically provides that no new parties shall be joined in this case, Arthur’s joining CBS at this late date would be prejudicial. Furthermore, since Arthur seeks to join a new defendant, the amendment is substantive in nature, and therefore prejudicial on its face, and should be denied.

E. Joinder of CBS Would Be Futile Under the Doctrines of Res Judicata, Collateral Estoppel, and Judicial Admission Because Arthur Dismissed With Prejudice Her Claims Against CBS in the Federal Suit.

Under Texas law, a dismissal with prejudice functions as a final determination on the merits. *Labrie v. Kenney*, 95 S.W.3d 722, 729 (Tex. App.—Amarillo 2003, no pet.) (citing TEX. R. CIV. P. 162); *see also In re Bennett*, 960 S.W.2d 35, 37 n. 4 (Tex. 1997) (explaining that FED. R. CIV. P. 41(a) is the “analogue” of TEX. R. CIV. P. 162); *see also Shull v. Pilot Life Ins. Co.*, 313 F.2d 445, 446 (5th Cir. 1963) (under federal law, a “dismissal with prejudice is res judicata and effectually bars any effort, *in any court, at any time* to find out [the merits of the action by determining] what the true facts were.”) (emphasis added).

Res judicata prevents the “relitigation of a finally-adjudicated claim and related matters that should have been litigated in a prior suit.” *State and County Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693, 696 (Tex. 2001) (citing *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992)). A dismissal is “res judicata” of a later claim if the following three elements are satisfied: (1) a prior final judgment exists; (2) the two lawsuits involve the same parties or parties in privity with each other; and (3) the second action is based on the same or related claims as those raised or *that could have been raised* in the first action. *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 697 (Tex. 2008).

All three elements are met here. First, the Order of Dismissal in the Federal Suit was a final judgment on the merits. Second, Arthur and CBS, the party to be joined as a defendant, would be parties in this case and as they were in the Federal Suit. Finally, Arthur’s claims against CBS in this case arise out of an interview and broadcast on *Entertainment Tonight* that could have been raised in the Federal Suit. *See* TEX. CIV. PRAC. & REM. CODE § 33.011(6).

Moreover, Arthur filed an *Unopposed Motion to Dismiss with Prejudice*, and stated to the Court and CBS there that she “*no longer desires to pursue, prosecute, or continue her claims against Defendants Howard K. Stern and CBS Studios, Inc.*” (Ex. “D” – Unopposed Motion to Dismiss with Prejudice, January 28, 2009) (emphasis added). Such a statement constitutes a judicial admission, and Arthur should not be allowed to run away from a statement she made to the Court and which was relied upon by the parties. Accordingly, joinder of CBS in this case would be futile because the claims are barred by res judicata, collateral estoppel, and judicial admission.

V. CONCLUSION

For the above stated reasons, Arthur’s Motion for Leave to Join CBS Studios Inc. as a Defendant should be denied.

WHEREFORE, Defendant Art Harris respectfully requests that the Court set Plaintiff Virgie Arthur's Motion for Leave to Join CBS Studios, Inc. for oral hearing, that upon hearing of same, that the Court deny said Motion for Leave, and for such other and further relief at law or in equity to which Harris is justly entitled.

Respectfully submitted,

By: *s/ Amanda L. Bush*

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CERTIFICATE OF SERVICE

This is to certify that on this 7th day of August 2009, a true and correct copy of the foregoing ***Defendant Art Harris's Response to Plaintiff's Motion for Leave to Join CBS Studios, Inc. as a Defendant and Request for Oral Hearing*** was served upon all counsel of record and *pro se* defendants as indicated below:

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s/ Amanda L. Bush

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