FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of	)	
	)	
The Office of the Ohio Consumers' Counsel, et al.,	)	Case No. 10-2395-GA-CSS
	)	
Complainants,	)	
	)	
v.	)	
	)	
Interstate Gas Supply, Inc.	)	
	)	
Respondent.	)	

MEMORANDUM CONTRA STAND ENERGY CORPORATION'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT NAMING COLUMBIA GAS OF OHIO, INC. AND NISOURCE CORPORATE SERVICES, INC., AS PARTIES

I. INTRODUCTION

On October 21, 2010, 350 days ago, the Ohio Consumers' Counsel ("OCC"), Border Energy, Inc. ("Border"), Northeast Ohio Public Energy Council ("NOPEC"), Stand Energy Corporation ("Stand"), and the Ohio Farm Bureau Federation ("OFBF") filed a complaint against Interstate Gas Supply, Inc. ("IGS"), alleging IGS d/b/a Columbia Retail Energy has engaged in marketing, solicitation, sales acts, or practices that are unfair, misleading, deceptive, or unconscionable. Prior to this filing, in August 2010, similar parties intervened in IGS' certification docket with similar allegations as those presented in this case. On November 5, 2010, MXenergy, Inc. ("MXenergy") moved to intervene in the proceeding. The Commission granted MXenergy's motion to intervene on February 28, 2010.

On November 12, 2010, 329 days ago, IGS filed its Partial Motion to Dismiss, requesting the Commission to dismiss the First Claim, Fifth Claim, Ninth Claim, Tenth Claim, Eleventh Claim, and Twelfth Claim in the Complaint. Also on November 12, 2010, IGS filed its Answer and Affirmative Defenses. On December 3, 2010, the OCC, Stand, Border, NOPEC and OFBF filed their Memorandum Contra IGS's Partial Motion to Dismiss. IGS replied to the Memorandum Contra on December 10, 2010. The Partial Motion to Dismiss is currently pending a decision by the Commission.

Since the filing of the Complaint, the parties have pursued discovery in the case through interrogatories, requests for production, requests for admission, public record requests, and depositions. Additionally, Border and MXenergy withdrew from the case on March 16, 2011 and May 13, 2011, respectively.

On September 13, 2011, a prehearing was held in advance of the hearing scheduled for October 4, 2011. On September 23, 2011, IGS, OCC, NOPEC, and OFBF filed a Joint Motion to Extend the Procedural Schedule by approximately one month while those parties pursued a settlement in the case. On September 27, 2011, the Commission granted the Joint Motion to Extend the Procedural Schedule. The hearing is now scheduled for November 7, 2011.

On September 22, 2011, eleven months after the Complaint against IGS was filed and, at the time, less than twelve (12) days before the hearing was initially scheduled, Stand filed this motion to amend the Complaint to join Columbia Gas of Ohio ("CGO") and NiSource Corporate Services, Inc. ("NiSource") as Respondents to this proceeding. Presently, it is one month before hearing is now scheduled.

For the reasons set forth herein, IGS respectfully requests this Commission to deny Stand's Motion to Amend.

II. LEGAL STANDARD.

Ohio Administrative Code § 4906-1-06 provides that "[u]nless otherwise provided by law, the commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon motion of any party for good cause shown, authorize the amendment of any . . . complaint . . .filed with the commission." Ohio Rule of Civil Procedure Rule 15(A) encourages liberal amendment to pleadings, however "motions to amend pleadings pursuant to Civ. R.15(A) should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party." *Turner v. Central Local School Dist.* (1999), 85 Ohio St.3d 95, 99, 706 N.E.2d 1261; see also *Westbrook v. Swiatek (2011),* 2011-Ohio-781, ¶ 78 (Denial of Motion to Amend Complaint appropriate when filed 18 months after first Complaint and after Motion for Summary Judgment was filed.); *Nat'l/RS, Inc. v. Huff* (10th Dist. 2010), 2010-Ohio-6530 *appeal not allowed,* 2011-Ohio-2055, 128 Ohio St. 3d 1483, 946 N.E.2d 241 (Denial of Motion for Leave to Amend Complaint affirmed when Motion filed 18 months after the filing of the Complaint, the same day a motion for partial summary judgment was filed, and only three months prior to the scheduled trial date.) In addition, futility of the claims included in the amendment is a factor that the Court should consider. *Miller v. American Heavy Lift Shipping*, 231 F.3d 242, 250 (6th Cir. 2000).

Here, the Motion to Amend was not filed until more than eleven months after Stand and the other Complainants commenced this litigation and 32 days before the scheduled hearing in this case. Further, IGS will be unduly prejudiced if the Motion to

Amend is granted. The only logical conclusion that can be made is that the Motion to Amend was made in bad faith and intended only to delay.

For these reasons and those that follow, the Motion to Amend should be denied.

III. LAW AND ANALYSIS.

A. Unless the untimely filed Motion to Amend is denied, the Defendants will be unduly prejudiced.

Stand has failed to demonstrate that good cause exists for the Commission to grant the Motion. Most troubling, Stand has failed to explain why it waited until the eleventh hour to file the Motion. Rather, Stand asserts, without any supportive evidence, that it is "generally agreed" that a bill in the Ohio State Legislature decreasing the OCC's funding was directly related to and caused by the filing of the Complaint in this case. Consequently, Stand states, the "political activity distracted the parties from pursuing this case because of the uncertainty of the OCC's level of participation," and that "Complainants were waiting to see who would continue prosecution of case and to what degree." Stand's Motion, at p. 2.

Stand's unsworn factual assertions should not be accepted as evidence in this case. When a motion is to be decided without an oral hearing, and the grounds in support thereof may neither be judicially noted nor established by reference to internal evidence, then those grounds must be proved by admissible evidence contínaed in affidavits, depositions, answers to interrogatories, written admission, transcripts of evidence in the pending case, or written stipulations of fact which are served and filed with the motion. *Melamed v. Catalano*, 1981 Ohio Misc. LEXIS 68; 20 Ohio Op. 3d 428 (1978)(citing *Pleadings* O.Jur 2d § 217). Unsworn allegations of operative facts contained in the motion or in the brief or memorandum in support of the motion are not

of sufficient evidentiary quality to be accepted as evidence upon which to grant a motion. *Id.* Accordingly, the Commission should not rely on Stand's unsupported alleged facts that the filing of the Complaint set-off a chain of events that caused the Ohio State Legislature to cut the OCC's funding, and, in turn, delayed the co-complainants from prosecuting this case. Consequently, Stand has not shown good cause for the Commission to grant such extraordinary leave to Stand's extremely untimely motion.

Even if Stand's assertions were supported with evidence, Stand's argument fails to explain what aspect of the "political activity" and "uncertainty" surrounding the case prevented Stand from filing a motion to add CGO and NiSource at an earlier date. In fact, Stand's argument for adding the new parties has no connection to any alleged delay in the proceedings. Stand's decision to add the parties was based in Stand's determination "that the best result the complainants can obtain in this action against IGS is a 'cease and desist' order from the Commission against IGS." Stand's Motion, at p. 3. However, the relief available in this case could not have come as a surprise to Stand, because Stand signed the Complaint seeking a cease and desist order prohibiting IGS from using the trade name Columbia Retail Energy. Thus, in October 2010, Stand had all of the information it would have needed for its conclusion that NiSource and CGO would not be prohibited from licensing their names in the future if Stand were successful in the case against IGS. By filing the Motion to Amend the Complaint at this juncture, without good cause, it is clear that Stand is engaging in bad faith, dilatory tactics at the detriment of IGS.

Moreover, Stand has been a party since the start of this case. Regardless of any parties' alleged distractions in the Ohio General Assembly, Stand is represented by counsel and is obligated to prosecute its claim in good faith. Stand opted to "wait[] to see who would continue prosecution of the case and to what degree." Stand's Motion, at p. 2. Here, Stand has acknowledged that it did not pursue its claims against IGS when it had nearly a year to do so. IGS should not suffer as a result of Stand's eleven months of inaction.

In the same timeframe, IGS has not rested on the anticipated work of others in preparation of defense of the claims. IGS has expended significant resources, time and money engaging in discovery throughout the twelve months that have passed since the original complaint was filed in an attempt to ascertain what, if any, factual or legal basis the complainants have for the allegations in the complaint. IGS fails to see what relevance other events, proceedings, or the disposition of other parties in this proceeding have to Stand's duty to timely prepare for claims that it is asserting against IGS. Stand signed the complaint against IGS nearly one year ago and, now, with only a month before trial, Stand should be prepared to go forward with the claims it has presented.

In considering a request for leave to amend a complaint, like a civil court, this Commission's primary consideration should be whether there is actual prejudice to the other party because of the delay. *Darby v. A-Best Prods. Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117, at ¶20. Additionally, courts consider the timeliness of a motion to amend a complaint; such timeliness being determined by the reasonable diligence of the plaintiff. *Johnson's Janitorial Serv. v. Alltel Corp.* (9th Dist. 1993), 92

Ohio App.3d 327, 330, 635 N.E.2d 60, 63 (citing *Patterson v. V & M Auto Body* (1992), 63 Ohio St.3d 573, 575, 589 N.E.2d 1306, 1308, fn. 1).

Prejudice suffered by the non-moving party because of the undue delay is especially substantial when the delay would require the reopening of discovery and the marshalling of additional evidence to refute the new claim. *Id.* A motion to amend is properly denied where it would compel another round of discovery geared toward the newly introduced causes of action, and result in unnecessary expenditure of time and money. *Jones v. R/P International Technologies, Inc.* (Sept. 27, 1995), 1st Dist. No. C-940567, 1995 WL 566622, *5, a copy of which is attached hereto as Exhibit A.

In the instant case, granting the Motion to Amend will result in substantial prejudice to IGS because the parties have already conducted discovery, which has included interrogatories, requests for production, requests for admission, public records requests and depositions (a comprehensive list of discovery in this proceeding is attached as Attachment B). IGS has taken the depositions of Stand Energy's Vice-President of Energy Regulation Mark Ward, Executive Vice-President Larry Freeman, Vice-President of Outside Sales David Burig, and Vice-President of Business Development Stacee Dover. If Stand is permitted to amend its Complaint for a second time, additional depositions of Mr. Ward and Mr. Freeman will be necessary and another round of discovery will be required for IGS to respond to Stand's new claims against IGS and the additional parties, CGO and NiSource. Likewise, IGS may also be subject to additional discovery requests from Stand, the co-complainants, or the newly added parties. This new round of discovery would result in a substantial and unnecessary expenditure of time and money; particularly in light of the fully briefed

Partial Motion to Dismiss that is pending before the Commission. Also, it is nearly certain that the November 7, 2011 hearing date would be in jeopardy because of the need to conduct such additional discovery. IGS has been faced with the allegations in this complaint for almost a year. It is not IGS' burden to prove the complainant's case, and Stand's failure over the past 12 months to pursue its case should not be borne by IGS. IGS should be able to rely upon the claims that have been presented in order to fairly prepare its defense. Now, one month before trial, IGS is again faced with stall tactics and bad faith assertions that, if permitted, would require IGS to restart the discovery process and the defense of the claims against IGS. For this reason alone, the Motion to Amend should be denied.

Furthermore, when a party knew that it had grounds to assert a claim and failed to do so early in a case, a delay in asserting the claim is unduly prejudicial to the non-moving party. See *e.g.*, *Nationwide Mut. Ins. Co. v. Am. Elec. Power*, 10th Dist. No. 08AP-339, 2008-Ohio-5618, at ¶21 (the moving party knew it had grounds to assert a claim and failed to do so until a year after the original complaint was filed). Here, Stand and others commenced this action on October 21, 2010. Stand has known that IGS entered into an agreement with NiSource to use the name Columbia Retail Energy in CGO's service territory since at least August 2010 and well before it filed the Complaint. The facts have not changed in this case, nor have any new facts about that argeement been discovered in the progress of this case. Any additional claims against IGS, as well as the introduction of new parties to the case at this late hour, will be prejudicial to IGS because the proceedings will be further delayed and IGS will be required to devise a

new defense in response to the new Complaint, which will cost IGS undue time and money spent on interrogatories, depositions, and protracted litigation.

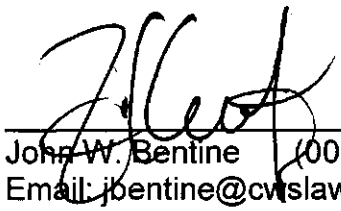
There are fewer than 32 days until the hearing is set to begin. Courts have routinely denied motions to amend where the motion was made with little time remaining before trial. *See e.g., National/RS, Inc. v. Huff* , 10th Dist. No. 10AP-306, 2010-Ohio-6530, at ¶35, 36 (denying motion to amend to add new party as untimely when a plaintiff sought to add a defendant that was identified in exhibits to the complaint, but the plaintiff did not seek to amend the complaint for eighteen months after the complaint was filed, and only three months prior to the trial date); *Doe v. Flair Corp.* (8th Dist. 1998), 129 Ohio App. 3d 739, 719 N.E.2d 34 (denying motion to amend complaint to add new defendant and new claims one month before trial); *Geo-Pro Serv., Inc. v. Solar Testing Laboratories, Inc.* (10th Dist. 2001), 145 Ohio App.3d 514, 528, 763 N.E.2d 664, 676 (denying a motion to amend when it was made over a year after the original complaint and with only five (5) months left till the trial date); *Csejpes v. Cleveland Catholic Diocese* (8th Dist.1996) 109 Ohio App.3d 533, 542, 672 N.E.2d 724, 730 (denying a motion to amend that was made 20 months after the original complaint). Stand's motion to amend is no different from the abundant Ohio case law that prohibits extremely untimely motions to amend. The motion should be denied.

Stand's motion to amend was filed untimely, in bad faith, and will result in undue prejudice to IGS. For all the foregoing reasons, this Commission should deny Stand's Motion to Amend.

III. CONCLUSION.

For the foregoing reasons, the Motion to Amend should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum Contra Stand Energy Corporation's Motion for Leave to File an Amended Complaint Naming Columbia Gas of Ohio, Inc. and NiSource Corporation Services, Inc, As Parties* was served this 6th day of October, 2011 by electronic mail upon the following:

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4829-4340-7627, v. 1

ATTACHMENT A

Not Reported in N.E.2d, 1995 WL 566622 (Ohio App. 1 Dist.)
(Cite as: 1995 WL 566622 (Ohio App. 1 Dist.))

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, First District, Hamilton County.
Jerry D. JONES, Plaintiff-Appellant,
v.
R/P INTERNATIONAL TECHNOLOGIES, INC., Defendant-Appellee.

No. C-940567.
Sept. 27, 1995.

Civil Appeal From Hamilton County Court of Common Pleas
Donald J. Meyer, Harrison, OH.

J. Timothy Cline, Dayton, OH.

DECISION

PER CURIAM.

*1 The plaintiff-appellant, Jerry D. Jones, appeals from the order of the trial court granting summary judgment to the defendant-appellee, R/P International Technologies, Inc. ("RPI"), on his claim for breach of a written employment contract. In his two assignments of error he asserts that the trial court erred by (1) granting RPI summary judgment on the basis of the statute of frauds, and (2) denying his motion for leave to file an amended complaint. We find neither assignment of error to have merit and thus affirm.

I.

RPI was established in 1979 by Norman E. Robinson in Lincoln Heights, Ohio, with his wife, three children, and a partner, Chester Parer, who was later bought out. Robinson is presently the president and chairman of the board of RPI. The business designs and builds special systems for the defense industry. The company competitively bids for the contracts as a certified minority business in the minority set-aside business program under the Small Business Administration ("SBA").

Jones first became employed by RPI in 1989 as an engineering manager. He left the company approximately six months later to take another position. Subsequently, however, RPI became aware that Jones was once again available to work and the company contacted him to express its interest in rehiring him as a general manager. The company then entered into negotiations with Jones regarding a compensation package.

The negotiations consisted primarily of an exchange of faxed compensation agreements, each in the form of a letter from Robinson to Jones, clearly designated as drafts, beginning with the language "I am pleased to offer you the position of General Manager for R/P International Technologies, Inc." The document which Jones finally signed is dated July 1, 1991, and is in the same format, but does not contain the language designating it as a draft. Paragraph six of the letter provides that, in the event of his termination, Jones would receive "as full and final settlement of any claim that you may have in respect to such termination, continuation of base salary at the rate in effect upon the date of termination, for period not to exceed one year." Paragraph seven of the contract provides in pertinent part:

VII. *Employment Date/Duration:*

You will begin employment on July 1, 1991 at R/PIT at Lincoln Heights, Ohio. Your employment with R/PIT be [sic] for a minimum of five years from July 1, 1991.

* * *

The letter concludes:

If the foregoing is acceptable to you, please sign

and return to me the enclosed copy of this agreement.

R/PIT welcomes you back and we feel confident that this will be the beginning of a long and mutually beneficial relationship.

Sincerely,

Norman E. Robinson President

Robinson never signed the document. Jones, however, signed in the space designated to show his acceptance. According to Robinson, the document accepted by Jones was largely subject to SBA approval and Jones was made aware of this fact. According to Jones, however, he was never informed by Robinson or anyone else that the agreement was contingent upon SBA approval, and when he gave it his signature he felt that he was entering into a binding employment contract. Although Jones conceded that Robinson did not sign the document in his presence, he stated that his subsequent repeated requests for Robinson to do so were met with constant assurances from Robinson that he would sign the agreement and that Jones should not worry about it.

*2 According to Jones, during the period he was negotiating with RPI, he was offered the job of president of TechMation in Hamilton, Ohio, a position which was guaranteed for two years at an annual salary of $75,000, with the potential of an annual bonus of up to 15% of his salary. He stated that he rejected the offer from TechMation in reliance upon the provisions of what he considered his written contract of employment with RPI.

Jones began working with RPI on July 1, 1991, performing the duties of general manager and being paid the base salary called for in the agreement he had signed. Pursuant to that agreement, he also received expenses of $500 per month to operate a home office. On March 1, 1992, in what Jones described as a unilateral move, RPI ceased paying him the $500 monthly expense money.

According to Robinson, RPI's government contracts began to dwindle in 1992, forcing cutbacks. Jones was laid off. According to Jones, he agreed to only a voluntary two-week temporary layoff and repeatedly called Robinson afterward to ask when he would be able to come back to work. He was never told that he could do so.

II.

In his first assignment of error, Jones asserts that the trial court erred in granting summary judgment in favor of RPI. He raises the following two issues for our review:

1. When a party seeks to rebut or overcome the defense of the Statute of Frauds by using the doctrine of promissory estoppel, the issue of whether the promisee's reliance is a bar is a question of fact to be decided by the trier of fact and a trial court commits reversible error by granting summary judgment.

2. In an action for breach of an employment contract, a substantial fact issue existed as to whether a typewritten signature on a memorandum containing the terms of employment satisfied the Statute of Frauds requirement of a signing, thereby precluding summary judgment on that issue for employer.

With respect to the first issue, we note that it begs the question as to whether the issue of promissory estoppel was properly raised in the pleadings. We agree with RPI that it was not. The complaint filed by Jones contains only a single concise count: breach of the "written contract" dated July 1, 1991. No other theories of recovery are raised or even remotely suggested.

The doctrine of promissory estoppel has been allowed by Ohio courts to preclude a statute-of-frauds defense. *See, e.g., Gathagan v. Firestone Tire & Rubber Co.* (1985), 23 Ohio App.3d 16, 490 N.E.2d 923. Certain courts have limited use of the doctrine to cases where, as here, there is an allegation that the defendant has misrepresented that the

statute's requirements have been satisfied. *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.* (1993), 87 Ohio App.3d 613, 662 N.E.2d 1093; *Beaverpark Assocs. v. Larry Stein Realty Co.* (Aug. 30, 1995), Montgomery App. No. CA-14950, unreported. Although at least one court has held that it is not necessary to plead promissory estoppel as a separate cause of action so long as the complaint contains sufficient facts to place defendant on notice of the estoppel claim, *see Worrel v. Multipress Corp.* (Jan. 21, 1988), Franklin County App. Nos. 86AP-909, 86AP-1010, unreported, both *McCarthy* and *Beaverpark*, the latter expressly and the former implicitly, indicate that promissory estoppel must be pleaded as a separate cause of action.

*3 We agree with the approach taken by *McCarthy* and *Beaverpark* that, in keeping with the tenets of a notice system of pleading, promissory estoppel should be asserted as a separate cause of action based upon an oral promise which has induced reliance. Moreover, even were we to accept the analysis in *Worrel*, it is clear that the complaint in the present case did not contain any facts to suggest a claim of promissory estoppel. Rather, the language of the complaint speaks to one thing and one thing only: breach of the "written contract" dated July 1, 1991.

Without resort to the doctrine of promissory estoppel, moreover, we hold that the statute of frauds effectively entitled RPI to judgment as a matter of law. Ohio's statute of frauds, codified at R.C. 1335.05, provides that:

> No action shall be brought whereby to charge the defendant, upon a special promise * * * or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

Although Jones raises the issue on appeal whether the July 1, 1991, agreement bore Robinson's typewritten signature, this argument fails on both procedural and substantive grounds. First, as RPI correctly remonstrates, the issue was not raised in the trial court and cannot, therefore, be raised for the first time on appeal. *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 574 N.E.2d 457, rehearing denied, 62 Ohio St.3d 1410, 577 N.E.2d 362; *Niemann v. Cooley* (1994), 93 Ohio App.3d 81, 637 N.E.2d 943; *The Midwestern Indem. Co. v. Video Features Inc.* (Nov. 2, 1994), Hamilton App. No. C-930401, unreported. Second, while no special form of execution is required by the statute of frauds, it is patent that Robinson's signature is missing from the July 1, 1991, letter, and that his typewritten name appearing below the blank space for his handwritten signature was not intended as its equivalent.

Given the absence of a signature on the written contract and his failure separately to plead the doctrine of promissory estoppel, the trial court correctly determined that the statute of frauds effectively disposed of Jones's claim on the written contract. Although Jones has not raised the issue, use of the doctrine of part performance, as opposed to promissory estoppel, to avoid the statute of frauds was not available to him because the Ohio Supreme Court determined early on that the doctrine is not applicable with respect to a contract for personal services. *See Hodges v. Ettinger* (1934), 127 Ohio St. 460, 189 N.E.2d 113; see, also, *Soteriades v. Wendy's of Ft. Wayne, Inc.* (1986), 34 Ohio App.3d 222, 517 N.E.2d 1011.

We hold, therefore, that the trial court correctly granted summary judgment to RPI on the original complaint and answer. Jones's first assignment of error is, therefore, overruled.

III.

*4 In his second assignment of error, Jones asserts that the trial court erred by failing to grant him leave to amend his complaint. Specifically, Jones argues that the trial court abused its discretion by

denying him leave to amend his complaint to include a second cause of action based on implied contract and a third cause of action based on promissory estoppel.

Civ.R. 15(A) provides that, after a responsive pleading is served, a party may amend its pleading only by leave of court and that such leave "shall be freely given when justice so requires." Interpreting the trial court's discretion to grant or deny such leave, the Ohio Supreme Court has stated:

> Although the grant or denial of leave to amend a pleading is discretionary, where it is possible that the plaintiff, by an amended complaint, may set forth a claim upon which relief can be granted, and it is tendered timely and in good faith and no reason is apparent or disclosed for denying leave, the denial of leave to file such amended complaint is an abuse of discretion.

Peterson v. Teodosio (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113, 122.

Clearly it was possible for Jones, by amending the complaint to include causes of action for promissory estoppel and implied contract, to set forth a claim upon which relief *may* have been granted. The question we perceive as dispositive, however, is whether Jones's motion to amend was, under the circumstances of this case, timely made, and, if not, whether it can therefore be said that the trial court's decision not to grant leave was arbitrary, unreasonable, or unconscionable.

It cannot be overemphasized that Jones's complaint stated a single cause of actionbreach of a written contractand that RPI's answer specifically pleaded as an affirmative defense the statute of frauds. The answer was docketed on May 24, 1993. Rather than immediately seek leave to amend the complaint, counsel for Jones waited until April 22, 1994, to file a motion to amend. In the interim, several depositions, including those of Jones and Robinson, had been taken in discovery and, based on those, RPI had filed its motion for summary judgment on February 25, 1994. In essence, counsel for Jones waited until faced with approaching summary judgment to seek leave to assert causes of action which were clearly available to Jones at the time of the complaint and which, once the answer had been served asserting the statute of frauds, were patently necessary. Under these circumstances, we hold that the motion to amend was not timely.

Having found the motion to amend to have been untimely, we are left with the question whether this justified the trial court's refusal to grant the motion. In assessing matters within the trial court's discretion, we must do more than simply disagree in order to reverse. As noted by the Ohio Supreme Court in *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, 313 (quoting *Spalding v. Spalding* [1959], 355 Michigan 382, 384-85, 94 N.W.2d 810, 811-12):

> *5 "An abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

The issue therefore, properly framed, is whether it was a defiance of reason, an act of passion or bias, for the trial court to deny Jones's motion to amend given its untimely nature. As pointed out by the court in *Fruyard Seed Inc. v. Century 21 Fertilizer and Farm Chemicals* (1988), 51 Ohio App.3d 158, 165, 555 N.E.2d 654, 662 (citing *McCormac, Ohio Civil Rules Practice* [1970] 197, Section 9.04), the most important factor in deciding whether to grant or deny a motion to amend must be actual prejudice to the opposing party. In this regard, RPI argues, and we agree, that the proposed amendment would have compelled essentially another round of discovery geared toward the newly intro-

duced causes of action, causing an expenditure of time and money that, in major part, would have been unnecessary had these issues been put on the table earlier.

Based upon these considerations, we cannot say that the trial court's decision denying the motion to amend was "not the exercise of reason but rather of passion or bias." While a decision by the trial court to grant the motion to amend, allowing the case to be heard on the merits, would also have been consistent with sound discretion, we cannot conclude that the denial of the motion, given its untimeliness, abused that discretion.

Jones's second assignment of error is overruled.

Accordingly, the judgment below is affirmed.

M.B. BETTMAN, P.J., PAINTER and SUNDERMANN, JJ.

Ohio App. 1 Dist.,1995.
Jones v. R/P International Technologies, Inc.
Not Reported in N.E.2d, 1995 WL 566622 (Ohio App. 1 Dist.)

END OF DOCUMENT

ATTACHMENT B

Attachment B

1.	10/27/10	Public Records Request to NOPEC
2.	10/27/11	Public Records Request to OCC
3.	11/09/10	OCC's responses to IGS' Public Records Request
4.	11/24/10	The OCC's Interrogatories and Requests for Production of Documents
5.	12/13/10	NOPEC's Response to IGS' Public Records Request
6.	12/20/11	IGS's responses to the OCC's Interrogatories and Requests for Production of Documents
7.	01/19/11	NOPEC's Supplemental Responses to IGS' Public Records Request
8.	03/10/11	OCC's 2nd Set of Interrogatories and Requests for Production of Documents and Request for Admissions
9.	03/11/11	NOPEC's 1st Set of Discovery Requests
10.	03/29/11	IGS' Responses to OCC's Request for Admissions
11.	04/04/11	IGS' Responses to OCC's 2nd Set of Interrogatories and Requests for Production of Documents
12.	04/08/11	IGS' Responses to NOPEC's 1st Set of Discovery Requests
13.	04/29/11	IGS' 1st Discovery Requests to OCC
14.	05/11/11	IGS' 1st Discovery Requests to Stand Energy
15.	05/11/11	IGS' 1st Discovery Requests to Ohio Farm Bureau
16.	05/11/11	IGS' 1st Discovery Requests to MX Energy
17.	06/23/11	Ohio Farm Bureau's Responses to IGS' 1st Discovery Requests
18.	07/05/11	NOPEC's Responses to IGS' 1st Set of Discovery Requests
19.	07/06/11	Stand's Responses to IGS' 1st Set of Discovery Requests
20.	07/14/11	OCC's Responses to IGS' 1st Set of Discovery Requests
21.	07/18/11	NOPEC's supplemental Responses to IGS' 1st Set of Discovery Requests
22.	07/20/11	Stand's Supplemental Responses to IGS' 1st Set of Discovery Requests
23.	07/26/11	Deposition of Mark Ward, Stand Energy, Vice President of Regulatory Affairds
24.	07/26/11	Deposition of Larry Freeman, Stand Energy, Vice President of Business Development

25.	10/02/11	Stand's Second Supplemental Resonses to IGS' 1st Set of Discovery Requests
26.	10/05/11	Deposition of Stacee Dover, Stand Energy, Vice President of Business Development
27.	10/05/11	Deposition of David Burig, Stand Energy, Vice President of Outside Sales