IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| PHILADELPHIA'S CHURCH OF OUR SAVIOR, Plaintiff, | : | CIVIL ACTION |
| v. | : | |
| CONCORD TOWNSHIP, et al. Defendants. | : | NO. 03-1766 |

MEMORANDUM AND ORDER

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

Currently before the Court is a Motion for Leave to Supplement the Amended Complaint by plaintiff, Philadelphia's Church of Our Savior. Having considered the arguments of both parties, the Court denies Plaintiff's motion.

I. PROCEDURAL HISTORY

On March 26, 2003, plaintiff, Philadelphia's Church of Our Savior (the "Church"), filed a complaint against defendant, Concord Township (the "Township") alleging three counts of defendant's misconduct in violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIP"), 42 U.S.C. § 2000cc, et seq., five counts of misconduct in violation of 42 U.S.C. § 1983, and five counts of misconduct in violation of the Pennsylvania Constitution. The complaint specifically contended that defendants (1) wrongfully rejected the Church's request for a building permit, after promising to issue one; (2) improperly demanded a permanent easement from the Church as a quid pro quo for the building permit and; (3) improperly refused

to accept for filing or to review the Church's written application for a building permit, despite the fact that the proposed sanctuary complied with all applicable zoning, building and safety codes. Plaintiff asserted this Court's federal question jurisdiction overall federal claims pursuant to 28 U.S.C. § 1331 and 1342(a)(3)-(4), and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367. On February 4, 2004, plaintiff was granted leave to amend its complaint in order to add the five members of the Township's Board of Supervisors, the Township Solicitor and the Township Building Inspector in their individual capacities.

Both parties met with this Court on June 23, 2003 and entered into settlement negotiations. Following discussions, the parties agreed that plaintiff would complete an application for a building permit and plaintiff would pay the cost for an architectural firm to certify BOCA compliance. The firm was approved by defendant and, upon submission of the firm's report, the Township issued a foundational permit on August 28, 2003, authorizing plaintiff to build the foundation to support the membrane structure. Thereafter, it issued a Building Permit authorizing plaintiff to erect the proposed sanctuary.

On June 4, 2004, plaintiff filed a Motion for Leave to Supplement its First Amended Complaint to include paragraphs referring to the settlement conference and how the concessions made by the Township establish that defendants had the authority to waive its application requirements. The undersigned held oral argument on June 17, 2004 and, subsequently, both parties filed post-argument briefs. The Court now considers whether Plaintiff's request for leave to supplement the Amended Complaint should be granted.

## II. DISCUSSION

Plaintiff seeks leave to supplement its Amended Complaint with references to the

settlement proceedings held before this Court[1] in order to prove that defendants repeatedly denied, in their responsive pleading and discovery responses, that they had the authority to grant waivers of various requirements.[2]

Federal Rule of Civil Procedure 15(d) states that:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth

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[1] Specifically, plaintiff seeks to add the following paragraphs:

91. In or about March 2003, plaintiff filed its Complaint against the Defendant Township, and in or about February 2004 plaintiff filed its First Amended Complaint. In its responsive pleadings and discovery responses, defendants have repeatedly denied that defendant Concord Township, by and through its Board of Supervisors, had the authority to grant a waiver or waivers of various permitting requirements such as land development or land disturbance permits, and/or a special exception. . . .

92. At a conference held before Magistrate Judge Charles B. Smith on June 23, 2003, Defendant Concord Township, by and through its counsel, agreed to afford plaintiff a procedure to obtain a building permit which would permit the plaintiff to construct the proposed temporary sanctuary in question, which procedure did not include any requirements that plaintiff comply with various local building requirements such as a the need to obtain a land development permit, land disturbance permit, and/or special exception.

93. Plaintiff availed itself of the opportunity afforded by Defendant Township and the Defendant Township officials, and the Defendant Township did, in fact, thereafter issue a foundational permit to Plaintiff on or about August 28, 2003 authorizing the Plaintiff to build the foundation to support the membrane structure. . . .

94. Thereafter the Defendant Township issued a building permit to the plaintiff authorizing the plaintiff to erect the proposed sanctuary.

95. Both the foundational permit and the building permit issued to the plaintiff were issued under a process which did not require Plaintiff to comply with various local building requirements such as the need to obtain a land development permit, land disturbance permit or a special exception. . . .

96. As permitted by the foundational permit and the building permit, the plaintiff has begun the construction of its proposed 620-seat sanctuary.

97. In light of the explicit representations and actions on behalf of defendants before this Court including the explicit waiver of various permitting requirements, defendant should be and/or judicially and/or equitably estopped from denying such authority in this case.

[2] In its Answer to the Complaint, the Township denied that there was "any alternative procedure for reviewing and granting requests for building permits," and that "any procedure resembling what Plaintiff refers to as 'the expedited permit approval procedure' exists within Concord Township." Answer to Complaint, at par. 24.

> transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

The Supreme Court has held that "leave to amend 'shall be freely given when justice so requires.'" Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). "In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, by 'freely given.'" Id. It "is an abuse of discretion for a district court to deny leave to amend" without one of these reasons. Alvin v. Suzuki, 227 F.3d 107, 121 (3d Cir. 2000).

Defendants offer two arguments in opposition to plaintiff's motion. Defendants first claim that the motion to supplement would only proffer inadmissible evidence making the supplement futile. Second, defendants claim that the motion to supplement the claim with allegations regarding the settlement proceedings is being offered in bad faith. As the Court deems the futility argument to be the more compelling claim, we deny the motion on these grounds.

Denying leave to amend on the ground of futility includes those instances where:

> a complaint or an answer, as amended, would be subject to a motion to dismiss under Rule 12(b)6, or a motion to strike under 12(f), [and] it would be an idle move for the court to allow such an amendment over the objection of the opposing party who could simply make a formal motion to dismiss or strike after leave to amend is granted.

3 Moore's Federal Practice ¶ 15.080[4]; see also Liberty Fish Co. v. Home Indemnity Co., Civ.

A. No. 89-5201, 1990 WL 83341, *1 (E.D. Pa. June 18, 1990) (leave to amend may be denied on grounds of futility where proposed amendment would be subject to successful motion to strike under Rule 12(f)); Medical Graphics Corp. v. Hartford Ins. Co., 171 F.R.D. 254, 257 (D. Minn. 1997) (leave to amend should be denied if proposed amendment would invite motion to strike).

Defendants argue that the proposed supplemental allegations are strictly prohibited by Federal Rule of Evidence 408, which states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence or statements made in compromise negotiations is likewise not admissible.

Fed. R. Evid. 408. This Rule is founded on two major policies: (1) "[t]he evidence is irrelevant since the offer may be motivated by a desire for peace rather than from any concession of weakness of position…(2) [a] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. Fed. R. Evid. 408, Advisory Committee Note. While Rule 408 does not apply to pleadings directly, repeated decisions from this Court have held that allegations in a complaint may be stricken, under Rule 12(f), as violative of these policies. See, e.g., Agnew v. Aydin Corporation, Civ. A. No. 88-3436, 1988 WL 92872, *4 (E.D. Pa. Sept. 6, 1988) (parts of a complaint may be stricken pursuant to Rule 408 if they are for the purpose of showing liability and refer to settlement negotiations); United States Transmission Systems v, Americus Center, Civ. A. No. 85-7044, 1986 WL 13838, *2 (E.D. Pa. Dec. 3, 1986) (striking allegations from a complaint as they fall within Rule 408 and are thus clearly inadmissible); Scott v. Township of Bristol, Civ. A. No. 90-1412, 1991 WL 40354, *5 (E.D. Pa. Mar. 20, 1991) (striking allegations referencing settlement discussions as

immaterial and of questionable probative value); see also United States ex rel. Alasker v. CentraCare Health Systems, Inc., Civ. A. No. 99-106, 2002 WL 1285089, *2 (D. Minn. June 5 2002) (granting defendant's motion to strike paragraphs of complaint that improperly refer to settlement negotiations and fall within the scope of Rule 408); Yankelevitz v. Cornell University, Civ. A. No. 95-4593, 1997 WL 115651, *4 (S.D.N.Y. Mar. 14, 1997) (if the amendment relates to settlement discussions, then it may be stricken under Rule 12(f) and would therefore be futile). Therefore, because claims in a complaint may be stricken under Rule 12(f) if they violate Rule 408, they may also be found futile pursuant to Rule 408.

The Court must now determine whether the proposed supplement to the Amended Complaint falls within the scope of Rule 408. As noted above, allegations made in a complaint may not use settlement negotiations "to prove liability for or invalidity of the claim or its amount." Fed. R. Evid. 408. Plaintiff alleges in Paragraph One of the complaint, that defendants violated the RLUIP as well as multiple constitutional rights due, in part, to defendants' "wrongful rejection of the Church's request in October through December of 2002 for a building permit through defendant Township's Expedited Permit approval procedure, after Defendant Concord Township promised to issue a permit." Defendants, in their Sixth Affirmative Defense, expressly deny that they ever had "an expedited permit approval procedure for Building Permits or land development." Consequently, to use the settlement discussions and offers of compromise to prove that the Township did have such an expedited permit approval procedure would directly undermine a primary affirmative defense and go towards proving liability under the complaint.

Plaintiff asserts that it does not seek to aver an offer of settlement to prove liability.

Rather, it plans to "attack defendants' credibility, and/or establish that, contrary to its pleadings and discovery responses, defendant Concord Township did at the time in question have a procedure for the expedited processing of building permits." Plaintiff's Post-Argument Brief, at pp. 6-7. Plaintiff contends that "[d]espite defendant's denials, after plaintiff filed suit the Defendant Township agreed to grant the Church a building permit without the Church first (a) filing a building permit application, and (b) obtaining all permits and/or approvals that would normally be required." Id. at 4.

Yet, plaintiff's argument, which seeks to attack defendants' credibility, is superfluous. Throughout its pleadings and discovery requests, plaintiff has alleged only that an expedited permit approval procedure existed[3] and repeatedly, defendants have denied those allegations,

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[3] Paragraphs 34-37 state as follows:

34. ". . . Defendant Township's Board has adopted customs, practices and/or procedures under which the Defendant Township may exempt landowners from the various procedural and substantive formalities set forth in Paragraphs 30-33 above. Pursuant to these customs, practices and/or procedures, at all times material hereto the Defendant Township's Board had implemented alternative procedures for reviewing and granting requests for building permits. The procedure has been and is hereinafter referred to as the Expedited Permit approval procedure.

35. Under the Expedited Permit approval procedure, the Defendant Township's Board may initiate and complete an expedited review of a landowner's request to build a structure without written application by the landowner.

36. Under the Expedited Permit approval procedure, the Defendant Township's Board may grant a building permit, and permit construction to begin, based upon the landowner's submission to the Supervisors of, *inter alia*, sealed architectural and/or engineering drawings.

37. Under the Expedited Permit approval procedure, the Defendant Township's Supervisors may authorize the Defendant Township's Building Inspector to issue the landowner a building permit, and conduct a building code review during construction; if any changes in construction are required by applicable building code provisions, the landowner may be required by the building Inspector to promptly modify the construction.

First Amended Complaint, at ¶¶ 34-37.

indicating only that no such expedited approval procedure was in place.[4] For plaintiff now to argue that it seeks to use the settlement negotiations to contradict Defendants' averments and judicially estop them from taking inconsistent positions before this Court is nothing more than an attempt at misdirection. Using the settlement negotiations to attack defendants' credibility would also conveniently disprove defendants' Sixth Affirmative Defense and establish a primary basis of liability. As noted, such a purpose is expressly precluded under Rule 408.

Plaintiff's alternative claim, that it only seeks to prove that defendants had the "authority" to grant an expedited permit in order to attack defendants' credibility, is likewise fatally flawed. Primarily, plaintiff never alleged, at any point in its pleadings, that defendants possessed this expedited waiver authority. Therefore, defendants never had occasion to deny in their Answer that they had such authority,[5] meaning that the settlement negotiations would not operate to contradict any of defendants' averments. Moreover, as the focus of plaintiff's cause of action depends not on the Township's authority to grant an expedited permit, but rather whether the process actually existed, the Court recognizes this new addition of the word "authority" as a cloaked attempt to prove liability. As Rule 408 expressly precludes use of settlement negotiations to establish such liability, the proposed supplement is futile.

To the extent plaintiff contends that its proposed supplemental allegations pertain only to admissions of fact made by defendants during settlement negotiations, which fall outside the

[4] For example, in its Answer to the First Amended Complaint at paragraph 34, defendants state "It is specifically denied, and strict proof demanded, that the Township's Board of Supervisors has implemented any alternative procedure for reviewing and granting requests for Building Permits. It is further denied that any procedure resembling what plaintiff refers to as 'the expedited permit approval procedure' exists within Concord Township." Moreover, in its answer to plaintiff's Requests for Admissions, the Township stated "[n]o such expedited approval procedure was ever in effect in Concord Township."

[5] Although plaintiff vehemently argues in its Post-Argument Brief that defendants have denied their authority to grant waivers of local building requirements, it cites to nothing to support that statement.

scope of Rule 408, the Court finds that nothing in the proposed supplemental allegations constitute such an admission. That the Township could waive its permit requirements in the course of a federal court litigation does not mean that it had the ability to do otherwise outside of litigation. In several cases cited by defendants, the Pennsylvania Commonwealth Court, albeit in dicta, took judicial notice that variance decisions in the context of the settlement of a judicial proceeding are distinct from zoning board variances. See Summit Township Taxpayers Assoc. v. Summit Township Board of Supervisors, 411 A.2d 1263, 1266 (Pa. Commw. 1980) ("Because court-approved settlements of zoning cases are lawful…we must recognize such settlements as being distinct from zoning hearing board variances; even though a judicial settlement may result in a departure from the ordained zoning pattern"); Yaracs v. Summit Acadamy, 845 A.2d 203, 209 n. 6 (Pa. Commw. 2004) (citing Summit). Accordingly the mere fact that the Township could act in the context of a settlement agreement is not dispositive of whether it had the authority outside of federal litigation.

Finally, it appears that discovery would not yield any information that could lead to admissible evidence. Nor does plaintiff offer any insight on the admissible evidence they hope to find. The "strong Congressional policy behind Fed. R. Evid. 408 as well as the liberal discovery rules'" support putting the burden "on the party seeking discovery to make a particularized showing 'that the documents relating to the settlement negotiations are relevant and likely to lead to the discovery of admissible evidence.'" Key Pharmaceuticals v. ESI-Lederle, Civ. A. No. 96-1219, 1997 WL 560131, *2 (E.D. Pa. Aug. 29, 1997) (citing Fidelity Fed. Sav. And Loan Ass'n v. Felicetti, 148 F.R.D. 532 (E.D. Pa. 1993)). Plaintiff fails to show that the discovery relating to these supplemental complaints will lead to admissible evidence.

Consequently, plaintiff fails to meet its burden of showing that the discovery of these supplemental complaints will lead to any admissible evidence not shielded by Rule 408.

In sum, plaintiff has neglected to overcome defendants' contention that the proposed supplemental allegations are, in fact, futile for purposes of Federal Rule of Civil Procedure 15. Accordingly, the Court denies the Motion for Leave to Supplement the First Amended Complaint.

An appropriate order follows.