LC CONSTRUCTION COMPANY, INC., Plaintiff/Counterclaim Defendant, v. GREENWICH TOWNSHIP, a municipal corporation of the State of New Jersey, et al., Defendants/Counterclaimant/ Third-Party Plaintiff v. REMINGTON & VERNICK ENGINEERS, INC., Third-Party Defendant/ Counterclaimant	SUPERIOR COURT OF NEW JERSEY LAW DIVISION –CIVIL PART GLOUCESTER COUNTY DOCKET NO. GLO-L-1688-12 CIVIL ACTION **OPINION**

Before the court is Defendant/Third-Party Plaintiff, Greenwich Township's ("Greenwich" or "Township") motion for leave to amend its Counterclaim and Third-Party Complaint pursuant to *Rule* 4:9-1. The motion is strenuously opposed by Plaintiff/Counter Defendant, LC Construction Company, Inc. ("LC Construction") and Third-Party Defendant/Counterclaimant, Remington & Vernick Engineers, Inc. ("Remington"). The court heard oral argument on August 19, 2016, took the motion under advisement, and after careful consideration of the motion record and oral argument now issues this Opinion pursuant to *Rule* 1:6-2(f).

PROCEDURAL HISTORY

LC Construction filed its Complaint on November 19, 2012. Greenwich filed its Answer to the Complaint on February 25, 2013. Greenwich filed an Amended Answer, Counterclaim and Third-Party Complaint on December 26, 2103. Remington filed an Answer and Counterclaim on February 6, 2014. Greenwich filed an Answer to the Counterclaim on May 2, 2014.

After eight extensions, the Discovery End Date was May 31, 2016, but discovery was stayed until May 31, 2016 by Management Order dated February 29, 2016, to "allow all parties to engage fully in settlement discussions related to this and other related cases." The Management Order further provided that another discovery extension would be permitted if the parties were unable to reach settlement before May 20, 2016. Discovery is not yet complete. Expert reports have not yet been exchanged. Thus, expert depositions have not yet been taken. Although the parties did not reach settlement the Discovery End Date has not yet been extended.

Greenwich's motion for leave to amend its Counterclaim and Third-Party Complaint was filed on July 7, 2016. This matter is presently scheduled for trial on November 7, 2016.

This case is designated as complex business litigation under the Complex Business Litigation Program implemented by the Supreme Court by Order dated November 13, 2014.

ANALYSIS

Rule 4:9-1 otherwise governs pleading amendments. The rule imposes the following standards:

> A party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice.
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> [*R.* 4:9-1.]

The granting of a motion to file an amended complaint always rests in the court's sound discretion and should be freely granted in the interest of justice. *Kernan v. One Washington Park*, 154 *N.J.* 437, 456-57 (1998). "That 'broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result.'" *Id*. at 457 (quoting Pressler, *Current N.J. Court Rules*, comment on *R.* 4:9-1(1998)); *see also Adron, Inc. v. Home Ins. Co.*, 292 *N.J. Super.* 463, 475-76 (App. Div. 1996) ("Although the court must be concerned that 'no undue delay or prejudice will result from the amendment,' it must weigh such factors against the overriding need to seek justice.") (quoting *Tomaszewski v. McKeon Ford, Inc.*, 240 *N.J. Super.* 404, 411 (App. Div. 1990)).

"The motion for leave to amend is required by the rule to be liberally granted and without consideration of the ultimate merits of the amendment." *Current N.J. Court Rules*, *supra*, comment 2.1 on *R.* 4:9-1 (citing *Notte v. Merchants Mut. Ins. Co.*, 185 *N.J.* 490, 500-01 (2006); *Kernan, supra*, 154 *N.J.* at 456-57). "Thus, objection to the filing of an amended complaint on the ground that it fails to state a cause of action should be determined by the same standard applicable to a motion to dismiss under *R.* 4:6-2(e). *Ibid.* (citing *Maxim Sewerage v. Monmouth Ridings*, 273 *N.J. Super.* 84, 90 (Law Div. 1993)). "We caution, however, that although a decision to grant or deny a motion to amend a complaint is subject to the discretion of the trial court, leave to amend is to be freely granted, and denial of such a motion is usually only required when there would be prejudice to the other party or the movant was dilatory in the prosecution of the claim." *Finderne Management Co. v. Barrett*, 355 *N.J. Super.* 170, 196 (App. Div. 2002).

As noted by two distinguished commentators:

> Nevertheless amendment remains a matter addressed to the court's sound discretion. Accordingly, the discretion to deny a motion to amend is not mistakenly exercised when it is clear that the amendment is so meritless that a motion to dismiss under *R.* 4:6-2 would have to be granted, the so-called futility prong of the analysis. It is, moreover, error to permit an amendment that fails to state a cause of action on which relief can be granted.
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> So too is a motion to amend properly denied where its merits are marginal, its substance generally irrelevant to the main claim, and allowing the amendment would unduly protract the litigation or cause undue prejudice.
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> [*Current N.J. Court Rules*, *supra*, comment 2.2.1 on *R.* 4:9-1 (internal citations omitted).]

The exercise of such discretion requires a two-step analysis: whether the non-moving party would be prejudiced; and whether the amendment would be futile -- that is, whether the claim as amended would nevertheless fail, thus making the amendment a useless endeavor. *Notte*, *supra*, 185 *N.J.* at 501. Remington contends that the amendment would be futile because it would be barred by the applicable six-year statute of limitations and cannot "relate back" to the Township's original pleading "because it does not arise from the same 'transaction or occurrence' under *Rule* 4:9-3." *Ibid*. In deciding this motion, the court will not undertake the fact-sensitive, detailed analysis required to determine whether the amendment would relate back under *Rule* 4:9-3, or be barred by the applicable statute of limitations. Instead, that issue is preserved. Remington may raise that issue subsequently by way of motion to dismiss pursuant to *Rule* 4:6-2(e), or motion for summary judgment.

> A motion to amend may also be denied due to lateness.
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> The denial of the motion to amend is also sustainable when made on the eve of trial. This is particularly true if the motion seeks to add new parties.
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> Nevertheless, in particularly compelling circumstances, the court retains discretion to permit a late amendment where the opposing party will not be prejudiced thereby. And, as noted, it may be an abuse of discretion to deny a late amendment where the public interest may be implicated.

> Lateness of the motion coupled with apparent lack of merit virtually dictates denial.
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> [*Id.* at comment 2.2.2 on *R.* 4:9-1 (internal citations omitted).]

Greenwich contends that the proposed amendment to its Third-Party Complaint against Remington is merely a clarification of its claims so as to "avoid any question as to the claims being made." *Brief* at 2. Greenwich asserts that its claims "have been known by each defendant since the inception of this matter and through discovery to date." *Ibid*. In that regard, Greenwich argues:

> Letters and documents have been exchanged, interrogatory answers made, and deposition questions pursued, which have dealt with the issues and claims discussed in this motion to amend. No legitimate surprise may be asserted and no valid claim of prejudice can be made.
>
> At this time, expert reports have not been exchanged. The expert reports will further clarify not only the claims made but also provide more definite information on the subject of damages.
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> [*Brief* at 2-2.]

Greenwich contends that the public interest is implicated and warrants the granting of the motion because this matter involves the alleged improper design and construction of a public improvement project.

Remington objects to the proposed amendment because it amounts to more than a clarification of existing claims, and instead would add an entirely new claim based on alleged design deficiencies which have not previously been asserted. Remington claims that allowing the amendment would prejudice the parties, pointing to the completion of paper discovery, the deposition of party witnesses, substantial prior motion practice and settlement negotiations, and the approaching trial date.

Remington argues that if the design deficiency claim is permitted, "this litigation will have to, essentially, be rebooted and started all over again. Written discovery will need to be served, depositions will need to be conducted again and there will undoubtedly be more pre-trial motion practice." *Brief* at 1. Remington further argues that a second round of discovery would also "unduly protract this already lengthy litigation." *Id.* at 2.

To be sure, the proposed amendment does not add any new parties. Consequently, *Rule* 4:24-2 is not implicated. The need for any resulting additional discovery can be addressed through reopening and extending discovery for a sufficient time period for obtaining additional expert reports, conducting expert depositions and any other necessary additional discovery. Indeed, a further discovery extension was contemplated by the last Case Management Order. Substantial additional discovery is needed even if the amendment is not permitted. Greenwich asserts that the deposition of six Remington employees and the Mayor of Greenwich Township have not yet been taken. Moreover, reopening and extending discovery will automatically adjourn the current trial date, thereby eliminating any concern that the amendment is being allowed on the eve of trial, which had been scheduled for November 7, 2016. By reopening and extending discovery, any anticipated prejudice will not materialize.

Although Greenwich could have and perhaps should have filed its motion earlier, the court further finds that the delay in seeking leave for the amendment was not to gain tactical or strategic advantage. In addition, the new claim against Remington comes as no real surprise to either Remington or LC Construction. On the contrary, the design defect claim has been discussed during conferences, mentioned or alluded to in early correspondence, referenced or suggested in discovery responses, and at least touched upon in depositions.

The court further finds that the negligent design claim may have been hampered by significant delays in obtaining the design documents submitted by Remington to the NJDEP for permit approval.

Amendments are to be freely and liberally granted in the interest of justice. *R.* 4:9-1. Overall, the facts and circumstances militate in favor of allowing the proposed amendment. Accordingly, the court deems it appropriate to grant Greenwich leave to amend its Counterclaim and Third-Party Complaint. Greenwich shall file its proposed Amended Counterclaim and Third-Party Complaint within 20 days. An Order reflecting the court's ruling has been entered.

The court will conduct a telephonic case management conference on a date to be determined to address the reopening and extension of discovery, including imposing time limits for completing fact discovery, naming additional experts, serving expert reports and conducting expert depositions.

Greenwich will be expected to comply with the requirements of the Affidavit of Merit statute, *N.J.S.A.* 2A:53A-27, in a timely fashion to the extent it applies to the amendment.

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RICHARD J. GEIGER, J.S.C.

Dated: September 1, 2016