UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE HELICOPTER CRASH NEAR WENDLE CREEK, BRITISH COLUMBIA, ON AUGUST 8, 2002	Docket No. 3:04md1649 (SRU)
THIS DOCUMENT RELATES TO:	ALL ACTIONS

RULING

The present litigation arises out of a helicopter crash that occurred in August 2002. The plaintiffs sued Sikorsky Aircraft Corp. ("Sikorsky"); United Technologies Corp.; Helicopter Support, Inc.; Beta Shim Co. ("Beta Shim"); Rotair Industries, Inc. ("Rotair"); General Electric Co. ("GE"); and Richard Manufacturing Co., Inc. ("Richard").[1] The defendants have filed various cross-claims against each other.

The plaintiffs have settled with Sikorsky and Richard and have filed motions for an order of final settlement and distribution. In those motions, the plaintiffs seek to have the case dismissed without prejudice, although plaintiffs' counsel has expressed a willingness to have plaintiffs' claims dismissed with prejudice. Sikorsky and Rotair seek dismissal without prejudice because of a the potential effect on cross-claims of a dismissal with prejudice.

Beta Shim and Rotair have filed objections to the motions for settlement, arguing that the case should be dismissed *with* prejudice. Rotair cites *Zagano v. Fordham University*, 900 F.2d 12 (2d Cir. 1990), for the proposition that the court must consider certain factors when determining whether a motion to dismiss without prejudice is appropriate.

[1] I previously ordered GE dismissed without prejudice based on the stipulation between the plaintiffs and that defendant.

Rule 41(a)(2) provides that, except where all parties agree to a stipulation of dismissal, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2); *see also Zapano*, 900 F.2d at 14.

In *Zapano*, the Second Circuit considered a district court's denial of a plaintiff's motion to dismiss without prejudice under Rule 41(a)(2). The plaintiff in that case was pursuing her claims with the New York State Division of Human Rights at the same time as her federal lawsuit and sought the dismissal fewer than ten days before trial. *Id.* at 13-14. The Second Circuit discussed factors relevant to the consideration of a motion to dismiss without prejudice, specifically: the plaintiff's diligence in bringing the motion; any "undue vexatiousness" on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss. *Id.* at 14. Those factors, however, appear relevant "in determining *whether a case has proceeded so far* that dismissing it in order for the plaintiff to start a separate action would prejudice the defendant." *D'Alto v. Dahon California, Inc.*, 100 F.3d 281, 283 (2d Cir. 1996) (emphasis added).

In both *Zampano* and *D'Alto*, trial was imminent when the plaintiffs sought dismissal without prejudice, and there was substantial risk that the plaintiffs would subject the defendants to additional litigation, either in state court or a subsequent federal trial. The present action was initiated fewer than two years ago. The plaintiffs sought a dismissal against all defendants promptly after reaching a settlement with two defendants and requested that the dismissal be without prejudice in an effort not to affect any of the defendants' cross-claims. Plaintiffs'

counsel represents that the statute of limitations on his clients' claims has run, and the plaintiffs are not, in fact, opposed to a dismissal with prejudice. Neither Rotair nor Beta Shim suggests that the statute of limitations has not expired.

Although it appears that the *Zapano* factors are not even relevant to this case, I note that the plaintiffs were diligent in bringing their motion; there is no hint of "undue vexatiousness" on their part; and they have adequately explained the need to dismiss. The suit has progressed somewhat but there have been no rulings on any dispositive motions, and trial is not imminent. Furthermore, the suit will continue while the remaining parties litigate their cross-claims. Finally, there is no duplicative expense of relitigation because the expenses the objecting defendants have incurred or will incur would be necessary for the defense of cross-claims.

Given the particular facts of the present litigation, a dismissal without prejudice is in the interest of justice and fairness to all parties. Two defendants have agreed to make payments to the plaintiffs in order to settle plaintiffs' claims; the remaining defendants have not. Those defendants that have chosen not to settle with the plaintiffs should not receive a windfall and escape liability on any cross-claims merely because two defendants have chosen to settle with the plaintiffs.

Accordingly, I overrule Beta Shim's and Rotair's objections to the plaintiffs' motions for settlement and distribution. Orders of final settlement will issue forthwith.

Dated at Bridgeport, Connecticut, this 27th day of February 2006.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge