

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

VIRGINIA ROPER and
JOHN M. ROPER,

Plaintiffs,

Civil Action No.
06-CV-713

vs.

HON. BERNARD A. FRIEDMAN

STATE FARM FIRE AND
CASUALTY COMPANY, et al.,

Defendants.

_____ /

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter is presently before the court on the motion of defendant State Farm Fire and Casualty Company (“State Farm Fire”) to dismiss [docket entry 102]. As the court does not believe oral argument is necessary, it shall decide the motion on the briefs.

Plaintiffs allege that their home and its contents were destroyed by Hurricane Katrina and that defendants have failed to reimburse them for this loss under their homeowner’s policy. The complaint asserts claims against State Farm Fire and State Farm Mutual for breach of contract, negligence, bad faith, tortious interference with contractual relations, and fraud. Plaintiffs seek compensatory and punitive damages, costs, interest and attorney fees.

In the instant motion, defendant State Farm Fire argues that the complaint should be dismissed because (1) plaintiffs are not the real parties in interest because they signed an “Assignment of Insurance Proceeds” in favor of the Small Business Administration (“SBA”) when they obtained an SBA disaster loan, and (2) plaintiffs have failed to join a necessary and

indispensable party, namely, their mortgage lender.

Defendant's delay in filing this motion is nothing less than unconscionable. The court has been assigned to this matter since November 1, 2006, and it has conducted several telephone hearings on a variety of issues, including those raised in several written motions, since that time. On January 16, 2007, the court traveled from Detroit to Gulfport and spent several hours conducting an in-person settlement conference with all counsel and their clients. When no settlement was reached, the court heard argument on several pending motions, discussed scheduling, and set a firm trial date that was convenient to all parties and all counsel. At no time prior to the filing of the instant motion (on March 9, 2007, *the exact motion cutoff date*) did defense counsel breathe a word about the possibility that it may seek dismissal of the complaint on the grounds that plaintiffs are not the real parties in interest or that they have failed to join a necessary party. The delay is all the more inexcusable given that State Farm Fire filed a similar motion, seeking dismissal for plaintiffs' failure to join its mortgage lender, in a similar Katrina case in *June 2006*. See *Gaspard v. State Farm Fire and Casualty Co.*, No. 1:06-CV-610 (S.D. Miss.) (docket entry 8, filed 6-23-06). This demonstrates that State Farm Fire was aware of this issue many months ago, even before the instant action was commenced. For defendant to sit on the issue for months, and not raise it until the motion cutoff date and just one month before trial, is gamesmanship at its worst, and shows a cavalier lack of respect and consideration for opposing counsel (who at this late hour should be devoting their resources to trial preparation, not responding to an untimely motion to dismiss) and the court (which, as defendant knows, has made special arrangements to travel from Detroit to Gulfport specifically to try this case beginning on a date certain that was selected in mid-January 2007 with all counsel's agreement). The court urges defense counsel to review the Mississippi Rules of Professional

Conduct, particularly the provisions regarding a lawyer's duty to "be competent, prompt and diligent"; to "demonstrate respect for the legal system and for those who serve it, including judges [and] other lawyers"; and "to expedite litigation consistent with the interests of the client."

Defendant's motion is denied. This motion could and should have been filed months ago, not on the eve of trial. The aspect of the motion seeking dismissal for failure to join a party had to be raised either "before pleading," Fed. R. Civ. P. 12(b), or by filing a timely motion for judgment on the pleadings, *see* Fed. R. Civ. P. 12(h)(2), neither of which defendant did in this case. This issue can therefore now be raised only at trial. *See id.*

The aspect of the motion seeking dismissal on the grounds that plaintiffs are not the real parties in interest has been waived by the extreme delay in raising the issue. As the court noted in *Steger v. General Elec. Co.*, 318 F.3d 1066, 1080 (11th Cir. 2003), a defendant's argument that plaintiff is not the real party in interest is a non-jurisdictional defense which, like all others, is "freely waivable." *See also Gogolin & Stelter v. Karn's Auto Imports, Inc.*, 886 F.2d 100, 102 (5th Cir. 1989) (noting defendant's duty to raise the issue early in the case so as to avoid unnecessary delay and expense, and that "[a] number of cases have held that the defense was waived when tardily asserted"); 6A C. Wright & A. Miller, *Federal Practice and Procedure* § 1554, pp. 407 (1990) (noting that defendant must raise the issue "with reasonable promptness. Otherwise, the court may conclude that the point has been waived by the delay . . ."). In the present case, it would be a gross understatement to say that defendant failed to raise this issue "with reasonable promptness." By filing its motion on the motion cutoff date, just one month before trial, and after having been aware

