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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RE-SOURCE AMERICA, INC.,

Plaintiff,

- v -

CORNING INCORPORATED,

Defendant.

**Index No. 07-CV-6048
(CJS/JWF)**

MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

The facts and circumstances of this case are familiar to the Court, and are recited in the Court's Order of September 26, 2007. This Memorandum is submitted in opposition to Corning's Motion to Dismiss (ECF #41, *et seq.*). Corning argues that Re-Source America's ("RA") Second Amended Complaint, which was filed as ECF #39 on October 24, 2007, should be dismissed because:

1. The revisions to the Second Amended Complaint were more extensive than those anticipated by the Court's Order of September 26, 2007 (ECF #37); and
2. Corning complains that the allegations remain insufficient under New York State Law to support a cause of action.

RA does not agree with either proposition, and submits this Memorandum in opposition to Corning's Motion. RA also submits its Cross-Motion for Leave to Amend *Nunc Pro Tunc* in the event the Court decides that a Motion for Leave to Amend should have been filed earlier, and also to support the proposition that the more accurate Third Amended Complaint should be permitted, and that it is the Third Amended Complaint that Corning should answer. Of course, RA believes that the Federal Rules permit liberal amendment of the complaint to accord with the interests of justice.

II. ARGUMENT

The changes from the Amended Complaint to the Second and Third Amended Complaints are not as dramatic as Corning would have the Court believe.¹ RA added some additional detail, but the case still concerns the same set of operative facts. The more detailed

¹ Ironically, Corning attempts to inflame the passions of the Court by accusing RA of "*ad hominem* attacks" that "inexplicably impugn [Corning's buyer] Dale Dykhuizen." See pages 4-5 of Corning's Memorandum of Law. RA's counsel is accused at page 12 of ascribing to a "mantra" - "it does not really matter how the counts are described..." Irony is found in the fact that to accuse another of an *ad hominem* attack, one must engage in the very act complained of.

facts alleged at paragraphs 62, 67 – 83, and 90 respond to the Court’s challenge during oral argument and its finding that, as previously alleged, RA’s Amended Complaint did not make out a cause of action “cognizable under New York law.” Re-Source’s attempt to shift the focus from the contractual relationship alleged in the Amended Complaint, which focused on the so-called “Worldwide Agreement,” to the oral contract regarding the prepaid balance, is consistent with the tenor of the oral argument, and the Court’s comments on Page 7 of the September 26, 2007 Decision and Order, where the Court states that “although Plaintiff suggests that it has pleaded a claim for equitable estoppel, [...] the Court disagrees.” Pleadings reflecting new legal theories are allowed in Federal Courts, and Rule 15(b) allows amendments to conform to new evidence, even after trial. Here, RA seeks only to apply the same prayer for relief to a different contractual circumstance that was already a subject of the litigation.

The Second Amended Complaint also adds additional detail to accord with facts and circumstances which have changed and developed since the original Complaint was filed in the District of New Jersey. Discovery has progressed since the filing of the original Amended Complaint. To expect Re-Source America to file the exact same Complaint, with minor modifications only to Count III, would require counsel to sign the Complaint with knowledge of the inaccuracy of some of the allegations therein. The substantive changes are certainly fair comment. For example, paragraph 32 relates information derived from Corning’s verified response to Plaintiff’s First Set of Interrogatories (Exhibit 2 to the McGuirk declaration).² RA has also made some minor changes to correct grammar and usage and some facts that were somewhat inaccurate. For example, The Third Amended Complaint is essentially the same as

² Corning complains at page 4-5 of its Memorandum of Law that RA included some of its responses, but omitted others. While true, this is also allowed in advocacy, particularly at the stage of a motion under Rule 12. This is not a Rule 56 context.

the Second Amended Complaint, but correctly relates that the “Worldwide Agreement” was extended for a short period in writing.

In its Order of September 26, 2007, the Court tells the Plaintiff that “Plaintiff is granted an opportunity to replead the third cause of action,” but in the conclusion, the Court says that “Plaintiff may file an amended pleading within thirty days of the date of entry of this decision and order.” There is some ambiguity in the Court’s remarks that suggest only that the Court would permit fair amendment consistent with the flexibility demonstrated at oral argument.³ The idea that the Court intended that RA amend Count III only, and that RA submit a factually incorrect pleading is anathema to the liberal amendment of pleadings encouraged by the Federal Rules, and counsels’ obligation under Rule 11.

A. Amendment of Complaints to be Permitted Freely

F.R.C.P. 15(a) provides that leave to file an amended pleading “shall be freely given when justice so requires.” See, Usery v. Marquette Cement Manufacturing Co., 568 F.2d 902, 908 (2d Cir. 1977). “This policy is to be applied with extreme liberality.” Eminence Capital, LLC. v. Aspeion, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003).⁴ The liberal policy of amendment is consistent with “the underlying purpose of Rule 15 - to facilitate decision on the merits, rather than on the pleadings or technicalities.” Roth v. Garcia Marquez, 942 F.2d 617, 628 (9th Cir. 1991); Howey v. United States, 481 F.2d 1887, 1190 (9th Cir. 1973)(purpose of pleadings is “to facilitate a proper decision on the merits.” “Not to erect formal and burdensome impediments in the litigation process.”) It has been found that, particularly in cases where there are technical and demanding pleading standards, such as securities fraud cases, “[a]dherence to

³ It is reasonable to conclude that the Court said that RA had the opportunity to replead the third cause of action merely because that was the one under attack. The Court can’t be charged with knowledge of all the facts that might support an amendment of the entire pleading.

⁴ All internal quotations and citations are omitted.

these principals is especially important” because “drafting of a cognizable complaint can be a matter of trial and error.” Eminence Capital, 316 F.3d at 1052.

District Courts are directed to assess the propriety of motions to amend by weighing several factors, known as the Foman Factors: undue delay, bad faith, failure to cure prior deficiencies, futility of amendment and undue prejudice to the opposing party. See Foman v. Davis, 371 U.S. 178, 182 (1962); Usery v. Marquette Cement Manufacturing Co.; 568 F.2d 902, 908 (2nd Cir. 1977). “Prejudice is the touchstone of the inquiry under Rule 15(a).” Eminence Capital, 316 F.3d at 1052. The party opposing Amendment bears the burden of showing prejudice. DCB Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987).

The Supreme Court said in Foman, 371 U.S. at 182 that:

Of course, the grant or denial of an opportunity to amend is within the discretion of the [trial] court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion, and inconsistent with the spirit of the Federal Rules.

Unless a motion for leave to amend will result in undue prejudice to the opposing party “a trial judge should ordinarily permit a party to amend its complaint.” Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973). As explained by the 11th Circuit, “[t]he lengthy nature of litigation, without any other evidence of prejudice to the Defendants or bad faith on the part of the Plaintiffs, does not justify denying the Plaintiffs the opportunity to amend their complaint.” Bryant v. DuPree, 252 F.3d 1161, 1164 (11th Cir. 2001).

Here, there is no prejudice to Defendant Corning. The facts and circumstances, the relationship between the parties, and the alleged existence of contractual agreements between the parties are the same in all three of the Complaints that the Plaintiff has filed or seeks to file. The only impact on the Defendants is that they needed to reevaluate whether to refile their motion to

dismiss, and that they may be required to make a new legal, but not factual, argument with regard to appropriate damages. Discovery is not altered or disturbed in any way from what it would have entailed had even the First Amendment Complaint survived intact.

Plaintiff's Motion for Leave to Amend *Nunc Pro Tunc* is not the result of undue delay or negligence either. Indeed, the specific direction in the Court's Decision and Order, and the totality of the argument, both before the Court and in submitted motions and responses, created an ambiguity as to whether a motion to file the Second Amended Complaint in the form submitted is even required. After all, Corning has been in possession of all of the information that Plaintiff has added to the proposed Second Amended Complaint. Indeed, Corning did not submit its answers to the RA's interrogatories until after oral argument in the original motion to dismiss. RA is not suggesting that Corning concealed any information or did not comply with its obligation to submit timely responses to interrogatories in some cynical attempt to torpedo the Amended Complaint. Rather, the sequence of discovery is quite natural, and courts routinely permit parties to amend based on newly discovered evidence. For example, in In re 3 Com Securities Litigation, No. C-89-2040 (A. WAI, 1992 U.S. Dist. LEXIS 12923 [**36]) (N.D. Cal. June 8, 1992), the Court said the following:

"There is nothing improper in plaintiff's desire to amplify claims set out in an original complaint or to 'plead them with greater specificity in light of material which they have obtained...'"

(citing Hold v. Katy Industries, Inc., 71 F.R.D. 424, 428 (S.D.N.Y. 1976)). In addition, even in a Rule 15(b) situation (amendment sought at the close of evidence) "[a] party cannot claim unfair surprise when it has been provided with notice of the subject of the amendment, by discovery or documents, well in advance of the actual amendment." Esquire Radio & Electronics, Inc. v. Montgomery Ward, 804 F.2d 787, 795 (2d Cir. 1986).

Surely, in a case like this one, where there have been no depositions taken and where the parties have actually requested an extension of discovery that will be likely have been granted by the Magistrate by the time the Court resolves this Motion, there is little reason not to grant the amendment. No discovery previously performed will be rendered moot. No effort expended will have been wasted upon amendment. The question before the Court should not be decided based upon a procedural ambiguity, such as whether the Court's September 26, 2007 Order, coupled with the liberality of Rule 15, allowed the Plaintiff to make amendment to the Amended Complaint in the manner desired. Rather, the inquiry should be the same inquiry that was previously before the Court. That is, given the revised pleading, has the plaintiff made out a satisfactory claim to support expectation damages?

B. The Second Amended Complaint (And the Third Amended Complaint) State Prima Facie Claims to Support The Damages Sought

The issue before the Court has not changed, regardless of Corning's attempts to feign offense regarding the procedural aspects of the amendments of the pleading. Yes, RA has changed around some of the allegations and added some fact where notice-type allegation had appeared before. But the real question for the Court remains the issue of expectation damages. Corning calls it "lost profits", but the concepts are different. Corning engages in a euphemistic struggle because the Worldwide Agreement actually has a provision that restricts lost profit recovery. So Corning figures the case may be won by conditioning the Court's attitude through the use of language, much the way politicians condition the electorate through the use of certain terms. However, RA seeks damages in the form of profit for work not performed, that it had a reasonable expectation should have been performed had the business arrangement surrounding the oral contract between RA and Corning been conducted in good faith. It is not seeking lost profits under the Worldwide Agreement, per se, even though Corning admits in its interrogatory

responses that the Worldwide Agreement remains partly in effect. In addition, as the letter from Dale Dykhuisen of Corning to Mike Grey of RA attached as Exhibit "B" to the Affirmation of Stephen P. Pazan, Esquire suggests, the amendments should be followed by discovery into the manner in which the oral contract relating to the pre-paid balance is seemingly intertwined with the Worldwide Agreement. After all in the May 3, 2003 letter (Corning C000184-185) Dykhuisen admits linkage between the two when he writes, "Corning advanced funds to Re-Source America to enable Re-Source America to reduce operating costs gradually to align more closely with Corning's requirements under the Corning/Re-Source America contractual arrangement." At that time, the Worldwide Agreement was still in effect.

Based on the facts that have been discussed in previous pleadings and based on what has been learned by RA during the course of discovery, and in response to the Court's questions, RA has changed Counts II and III of its complaint to fit the sought after expectation damages to the oral contractual duty that the Courts' Decision and Order suggests most adequately supports them. Previously, in its Amended Complaint, which had been filed in the hope and expectation that New Jersey law would apply, along with the reasoning of the NJ Supreme Court in Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 690 A. 2d. 575 (1997), RA had alleged that Count II supported a simple cause of action for the return of interest improperly coerced from RA by Corning.⁵ Count III begged recovery of the expectation damages based upon what RA believed to be an inappropriate termination of the relationship between it and RA. The Court effectively found that the duty to deal with RA in good faith did not exist outside of a contractual

⁵ As the papers filed by the Plaintiff in response to the Defendant's original motion to dismiss relate, this case was originally filed in New Jersey, and was directed at what Plaintiff hoped would be controlling New Jersey law. The initial amendment of the Complaint was not voluntary, but was instead Ordered on September 1, 2006 by the District of New Jersey (See ECF #5, District of New Jersey), because Plaintiff had alleged, in its jurisdictional statement, that diversity was based on the proposition that the Plaintiff maintained "a" principal place of business, rather than "its" principal place of business. The Second Amended Complaint submitted by the Plaintiff could therefore be viewed as Plaintiff's first attempt to amend the Complaint.

relationship. As the Court wrote, “[T]he Court finds that the Plaintiff has not pleaded a breach of contract claim, nor any tort claim that is cognizable under New York law” Then the Court rejected the suggestion that RA had pleaded a promissory estoppel cause of action. 9/26/2007 D&O, p. 7.

In the new Complaint, RA has fleshed out its notice pleading with facts that are consistent with the general allegations made previously, and has answered the Court’s challenge by alleging exactly such a breach, arising out of greater detail in Count II. In Count III, RA now argues not only that the hasty termination of the arrangement between RA and Corning was bad faith given the duty created by the actual Worldwide Agreement, but that the bad faith performance of contractual duties associated with the oral contract and arrangement relating to the “pre-paid balance” discussed in Count II caused damages to RA. The question Corning proposes in its motion, when stripped of false indignation, is really quite simple:

What contract is RA alleging such that it could be proven that Corning committed a breach of contract or breached a duty to act in good faith that it created by its own promises?

RA originally alleged, and continues to allege, that the entire RA/Corning course of dealing creates an expectation that RA should have been treated more fairly, and that the manner of the termination of the relationship was bad faith that should be estopped. Dykhuisen’s May 3, 2003 letter confirms that these circumstances cannot be divorced from one another. However, if the Court seeks magic words or conduct to the effect that Corning promised something that it later did not deliver, it need look no further than Second Amended Complaint paragraphs 73, 74, 76, 78, 81, 88, 89, 90, 91, 92. RA believes that it has satisfactorily alleged, and will be able to prove, that Corning, in the context of the oral contract relating to the pre-paid balance, promised that it would negotiate in good faith for a continuation of the RA/Corning relationship, provided

that RA could deliver a reasonable market price. For example, in paragraph 89 of the Second Amended Complaint, RA says that, “Corning promised that RA would be the vendor of choice if its terms were equal to those offered elsewhere.”

RAs allegations are certainly at least as specific as those in Esquire Radio & Electronics, Inc. v. Montgomery Ward, 804 F2d 787 (2d Cir. 1996), the case cited by the Court to frame the requirements of a promissory estoppel. Indeed, the Esquire fact pattern shares some similarities with this case. In Esquire, a long business history and mutually beneficial relationship resulted in a situation where 95% of Esquire’s business efforts were devoted to Montgomery Ward. Montgomery Ward asked that Esquire cease doing business with other customers (compare to *Most Favored Customer* edict of Worldwide Agreement, found at Contract Item #24). This created circumstances whereby “Esquire was reasonably relying on Ward’s promises.” *Id.* at 794. Esquire imported parts for use in electronics, and, upon recognition that its inventory had grown, received reassurances from Montgomery Ward that Esquire should not, “concern yourself about the size of the inventory. We will take the parts.” *Id.* at 792. Meanwhile, Montgomery Ward determined from an internal audit that the program was no longer justifiable, and sought to eliminate Esquire as a business partner.

In New York, a promise to negotiate, without more, is indeed enforceable. For example, in Thompson v. Liquichimica of America, Inc., 481 F. Supp. 365 (SDNY 1979), the plaintiff found himself in a similar situation as RA – his original complaint was dismissed, and the defendant there attacked his attempt to amend it. The Southern District eventually allowed the amendment, writing that, “such an agreement does not require that the agreement sought be achieved, but does require that the parties work to achieve it actively and in good faith.” 481 F. Supp. at 366.

In Arcadian Phosphates, Inc. v Arcadian Corporation, 884 F.2d 69, 73 (2d Cir. 1989), the Court, applying New York law, found that the plaintiff's promissory estoppel cause of action should not have been dismissed on summary judgment because the defendant had allegedly breached its promise to negotiate in good faith. In its commentary, the Court noted the difficulty associated with assessing damages in such a case, and cited several cases from various jurisdictions, including Nimrod Marketing (Overseas), Ltd. v. Texas Energy Inv. Corp., 769 F.2d 1076, 1080 (5th Cir. 1985)(under Texas law, losses from collateral supply contracts recoverable under promissory estoppel theory if breaching party had knowledge of special circumstances producing such damages). Consistent with these cases, if RA can rationally explain and prove that Corning's failure to make good on its promise to negotiate in good faith was the "but-for" cause of loss to RA, then expectation damages would be appropriate. See, Arcadian Phosphates, note 2. For an example of how this works, the Court is respectfully directed to Consortium Information Services, Inc. v. Credit Data Services, Inc., 149 Fed. Appx. 575 (9th Cir. 2005), where a \$1,288,226 award was found appropriate in promissory estoppel case. The Court found that it was well within the District Court's discretion under California law to "fashion relief to do justice", and that if the defendant had honored its promise, the plaintiff would have gotten the business in question. In that case, the plaintiff did things similar to things done by RA in reliance on Corning's promises. The defendant promised to eventually enter into a written contract, and assured the plaintiff that they had a deal. The plaintiff discontinued its search for another vendor, and applied for a line of credit, and made representations to customers.⁶

⁶ The dissent in the Consortium case criticizes the majority for imposing the damages, complaining that when a promissory estoppel case is based upon a party's failure to negotiate in good faith, no one can know what the terms of the contract would have been. See, Consortium, 149 Fed. Appx., note 2. However, in the case of Corning and RA, the work is being performed by a substitute vendor (see allegations of paragraph 82 of Second Amended Complaint), so there is an allegation that suggests a discoverable price and quantity. RA's traditional costs are also discoverable, based on the history between RA and Corning over the many years of the relationship. Therefore, since the price paid to the substitute vendor can be compared to RA's traditional costs, there is at least one way to

CONCLUSION

The allegations in RA's Second Amended Complaint (and the proposed Third Amended Complaint) specifically allege a promise, reliance, and a breach leading to injury, satisfying the predicates for the creation of promissory estoppel. Furthermore, RA has identified an oral contract related to the written contract during the performance of which Corning allegedly acted in bad faith. The Court is thereby obligated to allow RA to prove what might have occurred had Corning not breached its promise to negotiate fairly with RA, and also to indulge RA in its efforts to prove that, had Corning not misrepresented its true intentions, that RA would not have felt compelled to pay off the "prepaid" balance as quickly as it did, would not have suffered the losses and business inconvenience that it suffered, and that the business relationship between the parties would have lasted at least as long as it would have taken for RA to "incrementally" pay off the balance, and perhaps longer.

Plaintiff respectfully refers the Court back to its principal brief in opposition for further support.

figure out whether RA would have gotten the work and how much it would have profited that would not be unduly speculative.

Wherefore, RA asks that the Court accept that amendments incorporated in the Second and Third Amended Complaints and direct that Corning answer the Third Amended Complaint within 20 days after RA files it formally through the ECF system.

Respectfully submitted,

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