

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PURITAN INVESTMENT CORPORATION
v.
ASLL CORPORATION and
ERIC BLUMENFELD

:
: CIVIL ACTION
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: NO. 97-1580
:

MEMORANDUM ORDER

Presently before the court are plaintiff's Motion to Compel the Production of Documents, defendants' Motion to Compel the Depositions of Plaintiff and Plaintiff's Representative and defendants' Motion for Leave to Amend the Pleadings.

Plaintiff has asserted claims for trademark infringement, unfair competition and breach of contract arising from defendants' alleged failure to make payments under a licensing agreement involving the operation of a comedy club. Plaintiff also sought injunctive relief which was granted pursuant to an agreement of the parties.

The week before this case was scheduled to enter the trial pool, plaintiff served subpoenas upon defendants directing them to produce at trial documents plaintiff believed might support its theory of alter ego liability against defendant Blumenfeld. Plaintiff never sought these documents during discovery. The court granted defendants' motion to quash on the ground plaintiff was improperly using trial subpoenas to circumvent the discovery deadline, but briefly extended the

deadline to allow plaintiff properly to seek the documents and moved back the trial pool date to prevent any prejudice to defendants from plaintiff's pursuit of discovery on the eve of trial.

Defendants have since failed to produce the ASLL corporate records and correspondence properly sought by plaintiff in a subsequent document request. Defendants state that the responsive documents exist, that they are "in the process of producing" those they possess, that they had difficulty locating others and that they have now ascertained such documents are being held by David Blumenfeld, an ASLL shareholder. Defendants also maintain that they have been disadvantaged in their efforts to produce the documents and prepare for trial by plaintiff's late pursuit of discovery.

Any potential prejudice to defendants has been cured by the several months they have been afforded since plaintiff first propounded its document request. The type of documents plaintiff seeks are ordinarily maintained by any corporation in the normal course of business. If defendants were unable to produce the documents plaintiff seeks, they should have responded to plaintiff's document request accordingly. Unless David Blumenfeld is also a corporate officer as plaintiff contends, it is difficult to understand why defendant ASLL's books and records were entrusted to a shareholder. In any event, ASLL is

responsible for producing corporate documents held by an officer or agent to whom they were entrusted.¹

Plaintiff's motion to compel production of the documents will be granted. If defendants do not promptly produce documents subject to their control and file an affidavit explaining why they are unable to produce any other requested documents, the court will entertain a request for sanctions consistent with Fed. R. Civ. P. 37(b).

While complaining about plaintiff's late pursuit of discovery, defendants now seek to compel the depositions of plaintiff and its representative. Defendants never served notices of depositions and one cannot discern from the record the identity of the corporate agents defendants wish to depose or the subject matter regarding which plaintiff is expected to produce a knowledgeable corporate representative. Indeed, from the only information provided by defendants, it is not even clear that the persons named are corporate officers or otherwise subject to deposition on notice pursuant to Fed. R. Civ. P. 30(b)(1). As such, an order compelling plaintiff to produce such witnesses for deposition would be inappropriate. The court will, however, provide a further limited discovery period in which defendants can notice or subpoena persons with relevant information for depositions.

¹ If David Blumenfeld claims not to be a party by virtue of any relationship with ASLL, then plaintiff can obtain the necessary discovery from him. See Fed. R. Civ. P. 34(c).

While complaining about plaintiff's late pursuit of discovery, defendants have also filed a motion for leave to amend their answer to assert counterclaims against plaintiff for breach of the agreement which forms the basis of plaintiff's case.²

Fed. R. Civ. P. 13(f) provides that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of the court set up the counterclaim by amendment." Defendants do not contend that their failure to include breach of contract counterclaims was the result of any oversight, inadvertence or excusable neglect and any such contention would be untenable.

Nevertheless, because of the "when justice requires" language, Rule 13(f) "is especially flexible and enables the court to exercise its discretion and permit amendment whenever it seems desirable to do so." Perfect Plastics Indus. v. Cars & Concepts, 758 F. Supp. 1080, 1081-82 (W.D. Pa. 1991) (citing Budd Co. v. Travelers Indem. Co., 820 F.2d 787, 791-92 (6th Cir. 1987); 6 Charles Alan Wright et al., Federal Practice and Procedure § 1430 (1990)). When

deciding whether to grant a defendant leave to amend its answer to add a counterclaim, a court should

² Although defendants do not provide the court with a copy of the amended pleading they seek leave to file, they assert that they will amend their answer "to include counterclaims for losses sustained by the defending corporation and individual defendant as a result of plaintiff's breach of the licensing agreement."

consider whether the counterclaim is compulsory, whether the pleader has acted in good faith and has not unduly delayed filing the counterclaim, whether undue prejudice would result to the plaintiff, or whether the counterclaim raises meritorious claims. When a counterclaim is compulsory under Fed. R. Civ. P. 13(a), the argument for allowing the amendment is "especially compelling."

Perfect Plastics Indus., 758 F. Supp. at 1082 (citing Spartan Grain & Mill Co. v. Ayers, 517 F.2d 214, 220 (5th Cir. 1975); Northwestern Nat'l Ins. Co. of Milwaukee v. Alberts, 717 F. Supp. 148, 153 (S.D.N.Y. 1989); Index Fund, Inc. v. Hagopian, 91 F.R.D. 599, 606 (S.D.N.Y. 1981)).

Plaintiff justifiably stresses that defendants have been aware of the proposed counterclaims for at least seventeen months. Indeed, defendants' answer to plaintiff's complaint includes an averment that plaintiff had breached the parties' agreement. The mere passage of time between an original filing and a proposed amendment, however, "is not a sufficient reason for denial of the motion," Perfect Plastics, Inc., 758 F. Supp. at 1082.

Plaintiff does not contend that addition of counterclaims for breach of the licencing agreement would prejudice it. As it appears from the answer that defendants asserted plaintiff's alleged breach of the licencing agreement as a defense, the court cannot discern any prejudice or need for any appreciable additional discovery.

The court turns next to whether the proposed counterclaims are meritorious. It is far from clear that defendant Blumenfeld's breach of contract claim has merit in view of his denial in the answer that he was ever a party to the agreement. Insofar as he now appears ready to assert a claim predicated on his standing as a contracting party, plaintiff's resistance is not altogether understandable. The assertion of such a counterclaim would significantly assist plaintiff in proving its claims against Mr. Blumenfeld and obviate the need for plaintiff to establish alter-ego status. In any event, the question of meritoriousness is determined from the face of the proposed counterclaim. See Fort Washington Resources, Inc. v. Tannen, 153 F.R.D. 565, 566-67 (E.D. Pa. 1994) (standard for determining whether proposed counterclaim is meritorious is same as that applied to a Rule 12(b)(6) motion to dismiss).

Most significantly, if defendants' motion were denied, their breach of contract claims would be forever lost.³

All parties share responsibility for the failure to bring this litigation to a prompt conclusion. Justice requires that the parties be given an equal and final opportunity to present all their claims. The motion for leave to amend will be granted.

³ Plaintiff does not contest that the counterclaims are compulsory.

ACCORDINGLY, this day of July, 1998, upon consideration of plaintiff's Motion to Compel the Production of Documents (Doc. #26), **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in that defendants shall have ten days to produce all documents subject to their control which are responsive to plaintiff's request and, as to any requested documents which are not produced, to submit affidavits explaining their last known whereabouts and the efforts undertaken to locate or retrieve them; upon consideration of defendants' Motion to Compel the Depositions of Plaintiff and Plaintiff's Representative (Doc. # 28), **IT IS FURTHER ORDERED** that said Motion is **DENIED** without prejudice to defendants properly to obtain by notice or subpoena, if required, the desired depositions during the extended discovery period; upon consideration of Defendants' Motion for Leave to Amend the Pleadings (Doc. #30), **IT IS FURTHER ORDERED** that said Motion is **GRANTED** on condition that defendants forthwith file and serve their amended answer and counterclaims; and, **IT IS FURTHER ORDERED** that the parties shall have until September 18, 1998 diligently to conduct any additional discovery needed, this case will be moved to the trial pool of November 2, 1998 and all other deadlines in the court's June 13, 1997 scheduling order are adjusted accordingly.

BY THE COURT:

JAY C. WALDMAN, J.

