

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

AMERICAN PRIVAD CORPORATION : CIVIL ACTION
 :
 v. :
 :
 WORLDCOM, INC. :
 :
 v. :
 :
 DUNN FINANCIAL CORPORATION : NO. 98-2336

MEMORANDUM AND ORDER

HUTTON, J.

January 11, 1999

Presently before the Court are the Plaintiff American Privad Corporation's Motion for Leave to File an Amended Complaint Pursuant to Federal Rule of Civil Procedure 15(a) (Docket No. 16), Defendant Worldcom's reply (Docket Nos. 19 & 20), and Plaintiff's sur reply thereto (Docket No. 21). For the reasons stated below, the Plaintiff's motion is **GRANTED**.

I. BACKGROUND

Beginning in 1996, Plaintiff American Privad Corporation ("APC") and Third-Party Defendant Dunn Financial Corporation ("Dunn") obtained telecommunication services from Defendant Worldcom, Inc. APC executed an agreement with Worldcom and assumed the obligations of Dunn under another agreement. After several disputes arose between the parties, Worldcom served a Notice of Termination on April 30, 1998 because of alleged non-payment.

Worldcom alleges that unpaid charges for services by APC and Dunn accumulated to approximately \$500,000.

Worldcom agreed to extend the termination deadline until May 4, 1998 to allow time for APC/Dunn to resolve the alleged delinquency. APC filed suit against Worldcom and sought a temporary restraining order. Worldcom agreed that it would not terminate service before noon the following day. The parties were unable to resolve the dispute and Worldcom terminated service two days later on May 6, 1997.

APC now seeks damages, including loss of customers and accounts receivable, because Worldcom terminated services. APC alleges four claims: (1) breach of contract; (2) breach of the implied duty of good faith and fair dealing; (3) fraud; and (4) tortious interference with contractual relations. Worldcom counterclaimed against APC for the alleged sums owed under the agreement. Worldcom also filed a Third Party Complaint against Dunn alleging that Dunn guaranteed the obligations of APC when it transferred the obligations of their agreement to Worldcom. On December 9, 1998, APC filed this motion for leave to file an amended complaint. Worldcom opposes this motion.

II. DISCUSSION

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is

served." Because the Plaintiff seeks to amend their complaint long after the Defendant served their responsive pleading, the Plaintiff "may amend [their complaint] only by leave of court." Fed. R. Civ. P. 15(a). Rule 15(a) clearly states that, "leave shall be freely given when justice so requires." Id. "Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997) (citations omitted); see also Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993). The Third Circuit has found that "prejudice to the non-moving party is the touchstone for denial of an amendment." Id. at 1414.

In the instant matter, the Plaintiff seek to amend the complaint to: (1) clarify that Worldcom terminated service; (2) clarify the scope of the credits and adjustments entitled to APC; (3) assert a fifth claim of violation of the Communications Act, 47 U.S.C. § 202; and (4) clarify allegations in regards to the tortious interference with contractual relations claim. Defendant raises numerous objections to Plaintiff's proposed amended complaint. However, many of Defendant's arguments not contend that it will suffer any prejudice from allowing the proposed amendments. Rather, these arguments simply express Defendant's disagreement with the nature and characterization of Plaintiff's proposed amendments.

The only argument that this Court need address is Defendant's argument that this is a "last minute amendment." Def.'s Mem. of Law in Opposition at 6. Several courts have found that prejudice exists where a plaintiff seeks to amend the complaint several years after the start of litigation and within a few weeks of trial. See, e.g., Lorenz, 1 F.3d at 1414 (denying motion brought three years after start of litigation); Hewlett-Packard Co. v. Arch Assocs. Corp., 172 F.R.D. 151, 153 (E.D. Pa. 1997) (denying motion brought fifteen months after original pleading was dismissed); Johnston v. City of Phila., 158 F.R.D. 352, 353 (E.D. Pa. 1994) (denying motion to add new theory of liability after close of discovery and on eve of trial); Kuhn v. Philadelphia Elec. Co., 85 F.R.D. 86, 87 (E.D. Pa. 1979) (denying motion after discovery was completed). Nevertheless, in this case, Defendant fails to explain how Plaintiff's proposed amendments are "last minute." The Plaintiff served the Defendant with the proposed amended complaint in November of 1998. There have been no extensions of discovery which does not conclude until April of 1999. Therefore, the Court concludes that APC's proposed amendment is not "last minute."

Based on the proposed amendment, this Court cannot find that the Defendant would be prejudiced by the Plaintiff's request.

Accordingly, this Court grants the Plaintiff's motion and allows the Plaintiff leave to file their amended complaint.\¹

An appropriate Order follows.

¹/ Defendant requests follow-up discovery, including re-deposition of certain witnesses, in the event the Court grants Plaintiff's motion for leave to file an amended complaint. The Court will not address this issue. Defendant may file a motion requesting re-deposition of witnesses if it deems necessary.

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O R D E R

AND NOW, this 11th day of January, 1999, upon consideration of the Plaintiff's Motion for Leave to File an Amended Complaint Pursuant to Federal Rule of Civil Procedure 15(a) (Docket No. 16), IT IS HEREBY ORDERED that the Plaintiff's Motion is **GRANTED**.

IT IS FURTHER ORDERED that the Plaintiff **SHALL** file the Amended Complaint within ten (10) days of the date of this Order.

BY THE COURT:

HERBERT J. HUTTON, J.