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

PETER A. CURATO and CECELIA ANNE CURATO	:	CIVIL ACTION
v.	:	
GERALD M. SALUTI, et al.	:	NO. 98-2703

MEMORANDUM AND ORDER

HUTTON, J. January 26, 1999

Presently before this Court is the Motion to Dismiss Count VII of Amended Complaint, or in the alternative, For a More Definite Statement by Defendants Gerald M. Saluti, Joseph P. Diebold, IVAX Corporation and IVAX Industries, Inc. (Docket No. 9), Plaintiffs Peter A. Curato and Cecelia Anne Curato's response thereto and Plaintiffs' Cross-Motion for Leave to Amend (Docket No. 11), Plaintiffs' Answer to Counterclaims of Defendant IVAX Industries, Inc. and Plaintiffs' Counter-Counterclaims (Docket No. 12), and the Motion to Dismiss Plaintiffs' Counter-Counterclaim by Defendant IVAX Industries, Inc. (Docket No. 13) and Plaintiffs' response thereto (Docket No. 14). For the foregoing reasons, the Defendants' Motion to Dismiss Count VII of Amended Complaint, or in the alternative, For a More Definite Statement is **DENIED as moot,** Plaintiffs' Cross-Motion For Leave to Amend is **GRANTED**, and Defendants' Motion to Dismiss Plaintiffs' Counter-Counterclaim is **DENIED**.

I. BACKGROUND

On May 27, 1998, Peter A. Curato and Cecelia Anne Curato ("Plaintiffs" or the "Curatos") commenced the instant action by filing a Complaint in this Court. On June 22, 1998, the Plaintiffs filed an Amended Complaint, which for the first time included a count entitled Defamation of Character. It is that count, Count VII, which is at issue here.

The core factual allegations on which the Plaintiffs base their Amended Complaint are as follows. Peter A. Curato was an employee and corporate officer of IVAX Industries, Inc. A female employee of IVAX Industries, Inc., over whom Peter A. Curato exercised supervisory control, accused him of sexually harassing her. In response, certain of the Defendants attempted to discipline him for his actions. The discipline was never effected, however, because Peter A. Curato left IVAX Industries, Inc. on short-term and then long-term disability, and he did not return.

On July 17, 1998, Defendants Gerald M. Saluti, Joseph P. Diebold, IVAX Corporation and IVAX Industries, Inc. (collectively, the "Defendants") filed a Motion moving this Court to dismiss Count VII of Plaintiffs' Amended Complaint with prejudice for failure to state a claim on which relief can be granted or, in the alternative, requiring the Plaintiffs to formulate a more definite statement for its claims. On August 7, 1998, the Plaintiffs filed their response to Defendants' Motion requesting leave to file a

Second Amended Complaint. Also, that same day, Plaintiffs filed an Answer to Counterclaims of Defendant IVAX Industries, Inc. and Plaintiffs' Counter-Counterclaims. On August 28, 1998, the Defendants filed a Motion to Dismiss Plaintiffs' Counter-Counterclaim. The Plaintiffs filed their response thereto on September 18, 1998.

II. DISCUSSION

A. Motion to Amend the Complaint

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." Fed. R. Civ. P. 15(a). Because the Plaintiff seeks to amend the complaint for a second time, the Plaintiffs "may amend [their complaint] only by leave of court." Id. 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." Lorenz, 1 F.3d at 1414. In the instant matter, the Court finds that no prejudice would befall the Defendants by allowing the

Plaintiffs leave to refile their Amended Complaint. The Plaintiffs do not seek to add a claim to the current Amended Complaint. Rather, they seek to merely restate Count VII with a more definitive statement. Moreover, the Defendants' Motion to Dismiss requests, in the alternative, that the Plaintiffs be required to formulate a more definite statement for its claims. Accordingly, this Court grants the Plaintiffs' motion and allows the Plaintiffs leave to file their Second Amended Complaint.

B. Motion to Dismiss Count VII of Amended Complaint

Because this Court grants the Plaintiffs' Motion for Leave to File a Second Amended Complaint, the Defendants' Motion to Dismiss Count VII of the Amended Complaint, or in the alternative, For a More Definite Statement is denied as moot. See supra Part II.A.

C. Motion to Dismiss Plaintiffs' Counter-Counterclaim

On July 17, 1998, the Defendants filed an Answer to the Amended Complaint. Included with the Answer were Affirmative Defenses and a number of Counterclaims asserted by Defendant IVAX Industries, Inc. against Plaintiff Peter A. Curato. These Counterclaims assert that Peter A. Curato is liable to IVAX Industries, Inc. for the harm it suffered in defending--in state and federal agencies, and in federal court--the sexual harassment complaint lodged against Peter A. Curato. On August 7, 1998, the

Plaintiffs filed their Reply to the Counterclaims contained in the Answer asserting a "Counter-Counterclaim" of "Retaliation."

The Defendants assert that Plaintiffs' Counter-Counterclaim should be dismissed because "there simply is no such thing." (Defs.' Mem. at 3.) Rule 7(a) of the Federal Rules of Civil Procedure lists pleadings allowed:

> There shall be a complaint and an answer; a reply to a counterclaim designated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions in Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Fed. R. Civ. P. 7(a).

Clearly, a Reply by a plaintiff to defendant's counterclaim that raises a counter-counterclaim is a responsive pleading and, therefore, falls within Rule 7(a). See, e.g., Gruber v. Victor, 1996 WL 492991, No. 95 CIV. 2285, at *3 (S.D.N.Y. 1996) (granting in part and denying in part plaintiffs' counter-counterclaims on substantive grounds); Soghanalian v. Soghanalian, 693 F. Supp. 1091, 1095 (S.D. Fla. 1988) (denying motion to dismiss plaintiffs' counter-counterclaim). Thus, the Defendants' argument is unpersuasive.\[1] Because the Defendants

[1]Plaintiffs move this Court "to deem[] Plaintiffs' self-styled 'counter-counterclaim" as an additional Count of the Amended Complaint." (Pls.' Mem. at 1.) As this Court has noted above, Rule 15(a) states that a "party may [thereafter] amend his pleading only by leave of court or by written consent of the averse party; and leave shall be freely given when

(continued...)

fail to address the merits of the Counter-Counterclaim, the Defendants Motion is denied.

An appropriate Order follows.

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[1](...continued)
justice so requires." See supra Part II.A.

In the instant matter, this Court has already granted Plaintiffs' Motion for Leave to File a Second Amended Complaint. Thus, this Court finds no prejudice in deeming Plaintiffs Counter-Counterclaim of Retaliation as an additional count of the Amended Complaint. For purposes of clarity, Plaintiffs shall file their "self-styled counter-counterclaim" of Retaliation as an additional Count of the Second Amended Complaint.

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O R D E R

AND NOW, this 26th day of January, 1999, upon consideration of the Motion to Dismiss Count VII of Amended Complaint, or in the alternative, For a More Definite Statement by Defendants Gerald M. Saluti, Joseph P. Diebold, IVAX Corporation and IVAX Industries, Inc. (Docket No. 9), Plaintiffs Peter A. Curato and Cecelia Anne Curato's response thereto and Plaintiffs' Cross-Motion for Leave to Amend (Docket No. 11), Plaintiffs' Answer to Counterclaims of Defendant IVAX Industries, Inc. and Plaintiffs' Counter-Counterclaims (Docket No. 12), and the Motion to Dismiss Plaintiffs' Counter-Counterclaim by Defendant IVAX Industries, Inc. (Docket No. 13) and Plaintiffs' response thereto (Docket No. 14), IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss Count VII of Amended Complaint, or in the alternative, For a More Definite Statement is **DENIED as moot,** Plaintiffs' Cross-Motion For Leave to Amend is **GRANTED**, and Defendants' Motion to Dismiss Plaintiffs' Counter-Counterclaim is **DENIED**.

IT IS FURTHER ORDERED THAT:

(1) Plaintiffs SHALL file their Second Amended Complaint within ten (10) days from the date of this Order;

(2) the Second Amended Complaint SHALL restate Count VII with a more definitive statement; and

(3) the Second Amended Complaint SHALL include Plaintiffs' "self-styled counter-counterclaim" of Retaliation as an additional Count.

BY THE COURT:

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HERBERT J. HUTTON, J.