United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **VDP, Inc. v. Kendal M. Emory, et al.**
Case Number: **02-01239**
Nature of Suit:
Judge Code: **S**
Reference Number: **02-01239 - S**

Document Information			
Number:	128		
Description:	Memorandum Opinion re: [78-1] Motion To Amend Complaint - to assert additional claims against defendants by VDP, Inc. .		
Size:	12 pages (23k)		
Date Received:	10/15/2004 11:09:48 AM	**Date Filed:** 10/15/2004	**Date Entered On Docket:** 10/15/2004

Court Digital Signature View History

51 a9 3c e9 f2 1f 36 48 05 ef 75 19 bd fe 30 e4 f3 52 2d 9b 0e 52 02 76 5a 2e 08 33 e0 15 25 04 37 ba bf 76 72 52 28 56 a4 7c 7a 64 7d 9d 61 91 b0 05 ee 5a 91 a1 91 ba 64 32 03 53 f0 12 a4 2b 2e 89 61 78 9b 1b 4f 4f 1b a0 fd 01 a0 17 d4 f9 c5 1b a3 91 25 a8 e4 d1 29 53 30 48 72 6b 83 39 31 c5 46 5a 6b 08 9f d6 20 1e fd 69 10 04 ba 92 62 84 23 b3 3d e8 36 8d b8 3c 16 be ff 0c 88 c9

Filer Information	
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
VDP, INC.,
Debtor. No. 11-01-17042 SL

VDP, INC.,
Plaintiff,
v. Adv. No. 02-1239 S

KENDAL M. EMERY, et al.,
Defendants.

MEMORANDUM OPINION ON MOTION TO AMEND COMPLAINT AND ORDER DENYING SAME

This matter is before the Court on the Plaintiff's Motion to Amend Complaint (doc. 78) and the objections thereto filed by Defendants Richmond and Wright (docs. 81 and 84), Defendant Emery (doc. 83), and Defendant Lalla (doc. 85). Plaintiff is represented by its attorney Steven Schmidt. Defendants Richmond and Wright are represented by their attorney Kathleen Blackett. Defendant Emery is self-represented. Defendant Lalla is represented by her attorney Brad Eubanks. For the reasons set forth below, the Court finds that it should deny the motion.

DISCUSSION

Amended and supplemental pleadings are governed by Federal Rule 15. That rule provides, in relevant part:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the

> pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.
> ...
> (d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense.

The Tenth Circuit Court of Appeals gives guidance on reviewing motions to amend under Rule 15(a):

> Several factors are typically considered by the courts in determining whether to allow amendment of a complaint.
>
> > These include whether the amendment will result in undue prejudice, whether the request was unduly and inexplicably delayed, was offered in good faith, or that the party had sufficient opportunity to state a claim and failed. Where the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend is subject to denial.
>
> Untimeliness alone may be a sufficient basis for denial of leave to amend.

Las Vegas Ice and Cold Storage Co. v. Far West Bank, 893 F.2d 1882, 1185 (10th Cir. 1990)(Affirming District Court's denial of motion to amend complaint to include claim for punitive damages because it was untimely, would substantially broaden

the issues for trial, and because the factual basis for the claim was known at the time the complaint was filed.)

The Tenth Circuit also offers guidance on the treatment of motions to supplement under Rule 15(d).

> Rule 15(d) gives trial courts broad discretion to permit a party to serve a supplemental pleading setting forth post-complaint transactions, occurrences or events (Gillihan v. Shillinger, 872 F.3d 935, 941 (10th Cir. 1989)). Such authorization "should be liberally granted unless good reason exists for denying leave, such as prejudice to the defendants." Id.

Walker v. United Parcel Service, Inc., 240 F.3d 1268, 1278 (10th Cir. 2001).

> Discovery was closed, [Defendant] was ready for trial or for the alternative of summary judgment, and it had in fact moved for summary judgment on all of [Plaintiff's] claims. [Plaintiff's] proposed new claim would have required additional discovery and precluded the entry of a final judgment order when the original claims had been resolved via summary judgment or trial.

Id. (Affirming that portion of District Court's order denying Plaintiff's motion to amend complaint.)

Regarding prejudice to the opposing party, the Courts consider whether the new claim would 1) require the opponent to expend significant additional resources to conduct discovery and prepare for trial, 2) significantly delay resolution of the dispute, or 3) prevent the plaintiff from timely filing an action in another court. Sidari v. Orleans

County, 169 F.Supp.2d 158, 162-63 (W.D. N.Y. 2000)(citing Block v. First Blood Assoc., 988 F.2d 344, 350 (2nd Cir. 1993)).

An additional requirement set forth by most courts to address the issue is that the supplemental pleading must have some relationship to the original matter. See 6A Wright & Miller, Fed. Prac. & Proc.2d §§ 1504 ("[T]he courts typically require some relationship between the original and the later accruing material."), 1506 ("[W]hen the matters alleged in a supplemental pleading have no relation to the claim originally set forth and joinder will not promote judicial economy or the speedy disposition of the dispute between the parties, refusal to allow the supplemental pleading is entirely justified."). See also Quarantino v. Tiffany & Co., 71 F.3d 58, 66 (2nd Cir. 1995)("Again, leave to file a supplemental pleading should be freely permitted when the supplemental facts connect it to the original pleading.")(Citations omitted.); Keith v. Volpe, 858 F.2d 467, 474 (9th Cir. 1988)("While some relationship must exist between the newly alleged matters and the subject of the original action, they need not all arise out of the same transaction.")(quoting 3 J. Moore, Moore's Federal Practice ¶15.16[3] (1985).); Rowe v. United States Fidelity and Guaranty Co., 421 F.2d 937, 943 (4th Cir. 1970)("[T]he matters

stated in a supplemental complaint should have some relation to the claim set forth in the original pleading."); Albrecht v. Long Island Railroad, 134 F.R.D. 40, 41 (E.D. N.Y. 1991):

> Rule 15(d) of the Federal Rules of Civil Procedure provides for a motion to supplement pleadings so as to include subsequent occurrences which are related to the original complaint and do not prejudice the opposing party. A supplemental pleading is designed to cover matters that occur subsequent to the filing of the complaint, but pertain to the original pleadings. Thus, under Rule 15(d), a party may supplement the original pleading to include subsequent occurrences which are related to the claim presented in the original complaint, absent prejudice to the nonmoving party.

(Citations omitted.)

Finally, the Tenth Circuit has stated that it is improper in ruling on a plaintiff's motion to amend to rely on a defendant's pleadings to make factual findings. Las Vegas Ice and Cold Storage Co., 893 F.2d at 1184-85.

PLAINTIFF'S COMPLAINT

Plaintiff filed its complaint on September 12, 2002. It has two counts: 1) for turnover of estate "funds"[1], seeking a turnover of various items of property from defendants under 11 U.S.C. § 542; and 2) for injunctive relief, seeking to enjoin

[1] Although Count 1 is entitled "Turnover of Estate Funds", there is no reference to funds in the factual allegations. Rather, ¶ 14 states "Such property of the Estate consists of computer hardware and software." and ¶ 15 states "Such property also consists of object and source code of Plaintiff's current and future software products."

defendants from ever using any of the property, and for an accounting and return of the property. The complaint on its face does not seek monetary damages. The Order Resulting from Pretrial Conference (doc. 28) fixed a discovery deadline of May 9, 2003. In a May 13, 2003 final pretrial conference, the Court extended the discovery deadline to July 18, 2003. See Order (doc. 63). The Court held another Final Pretrial Conference on August 12, 2003, and further extended discovery by allowing depositions to take place on September 22 and 23, 2003. See Clerk's Minutes (doc. 64); Order (doc. 67). The Court held another Final Pretrial Conference on September 30, 2003, and fixed a deadline for filing motions for summary judgment of November 10, 2003. See Clerk's Minutes (doc. 66). On November 10, 2003, three of the Defendants filed motions for summary judgment (docs. 69, 70, 72), and on November 12, 2003, the fourth Defendant filed his motion for summary judgment (doc. 80). Also on November 10, 2003, Plaintiff filed four motions for summary judgment (docs. 73, 75, 76, 77) and a motion to dismiss a counterclaim (doc. 74). On November 10, 2003, Plaintiff also filed a Motion to Amend Complaint (doc. 78).

THE AMENDED COMPLAINT

The Amended Complaint repeats the same first two counts as the original complaint and seeks to add three additional counts. First, Count 3 is entitled “Prima Facie Tort”. Count 3 is only directed at Defendant Emery and describes 5 acts that occurred “during the pendency of the associated Chapter 11 case” (¶¶ 28-32). These acts are 5 allegations that Mr. Emery “told a third person” things about the Debtor or its President that were arguably false or misleading. Plaintiff alleges that the acts were intentional, lawful acts made with the intent to injure the Plaintiff, injured Plaintiff, and were not justified. Second, Count 4 is entitled “Civil Conspiracy.” Count 4 is directed to all defendants. It alleges that defendants improperly acquired the property as described in Counts 1 and 2, with the motivation to put Plaintiff out of business. (¶¶ 38, 39). Plaintiff alleges that the defendants conspired to accomplish an unlawful purpose, and employed an unlawful means to accomplish the purpose, and that Plaintiff was damaged (¶¶ 40-44). Third, Count 5 is entitled “Intentional Interference”. Count 5 is also directed to all defendants. Paragraph 46 states that Plaintiff seeks to continue its operations and reorganize under the laws of the United States. Paragraph 47 and 48 state that the acts and/or omissions of Defendants have

intentionally and improperly interfered with Plaintiff's prospective contractual relations, and that as a result, Plaintiff has been damaged.

ANALYSIS

Counts 3 and 5 allege actions that have occurred after the bankruptcy and after the filing of this adversary proceeding. Therefore, they are "supplemental pleadings" under Rule 15(d). Count 4 is based on the same acts alleged in Counts 1 and 2, but is seeking to establish an alternative remedy to those claimed in the original complaint. Therefore, Count 4 is governed by Rule 15(a).

I. **Count 3 (Prima Facie Tort)**

Proposed Count 3 is unrelated to Counts 1 or 2 in the original complaint. Count 3 seeks tort damages. Counts 1 and 2 are based on turnover of property and injunction from using the property. Some relationship more than an identity of parties is required. See Keith, 858 F.2d at 474. See also Albrecht, 134 F.R.D. at 41.

Count 3 is also directed at only one of four defendants. Trial of Count 3 together with 1 and 2 would waste the other Defendants' and their attorneys' time. It therefore would not be a convenient trial unit.

Allowing Count 3 at this point would require significant resources to conduct discovery and prepare for trial. Discovery on the turnover and injunction counts is already closed. The facts required to prove or defend against the prima facie tort are unrelated to existing counts. Discovery would basically have to start all over. Allowing Count 3 at this point would also delay resolution of the entire case. Discovery, having been extended repeatedly, is now closed. Motions for summary judgment have been filed and ruled on. The case is ready to set for trial. Finally, disallowing Count 3 will not prevent Plaintiff from seeking relief for this tort claim either in a separate adversary proceeding or in the state courts.

II. **Count 4 (Conspiracy)**

As the District Court found in Las Vegas Ice and Cold Storage Co., 893 F.2d at 1184, this Court finds that the proposed amendment is untimely, would substantially broaden the issues for trial, and that the factual basis for the claim was known to the Plaintiff at the time the complaint was filed. Proposed Count 4 is, essentially, an alternate theory of recovery for the same facts alleged in Counts 1 and 2. These facts were known to Plaintiff at the time of the complaint. No new facts are alleged, other than a claim that defendants

"conspired". ¶ 42. And, this new allegation should have been obvious from day one.

Discovery is complete. The issue of damages would not have been the subject of previous discovery because damages were not alleged in Counts 1 and 2. Therefore, allowing a new count for damages[2] at this point would require parties to redo all the discovery, causing a great expenditure of time and expense. It is not credible that the issue of damages did not arise early on in the case. It is too late to add that claim now.

III. **Count 5 (Intentional Interference)**

Proposed Count 5 is unrelated to Counts 1 or 2 in the original complaint. Count 5 seeks tort damages for interference with prospective contracts. Counts 1 and 2 are based on turnover of property and injunction from using the property. Some relationship more than an identity of parties is required. See Keith, 858 F.2d at 474. See also Albrecht, 134 F.R.D. at 41.

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[2] The elements to establish civil conspiracy are: 1) a conspiracy between two or more individuals existed; 2) that specific wrongful acts were carried out by the defendants pursuant to the conspiracy; and 3) that plaintiff was damaged as a result of such acts. Ettenson v. Burke, 130 N.M. 67, 72, 17 P.3d 440, 445 (Ct. App. 2000)(citing Silva v. Town of Springer, 121 N.M. 428, 912 P.2d 304 (Ct. App. 1996)).

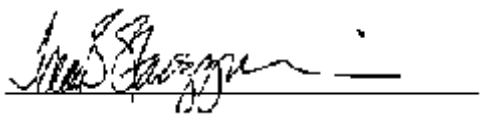
Allowing Count 5 at this point would require significant resources to conduct discovery and prepare for trial. Discovery on the turnover and injunction counts is already closed. The facts required to prove or defend against the interference with contract claim are unrelated to existing counts. Discovery would basically have to start all over. Allowing Count 5 at this point would also delay resolution of the entire case. Discovery, having been extended repeatedly, is now closed. Motions for summary judgment have been filed and ruled on. The case is ready to set for trial. Finally, disallowing Count 5 will not prevent Plaintiff from seeking relief for this tort claim either in a separate adversary proceeding or in the state courts.

CONCLUSION

The Court finds that the Motion to Amend Complaint is not well taken and will be denied.

ORDER

IT IS ORDERED that Plaintiff's Motion to Amend Complaint (doc. 78) is denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 15, 2004, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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