

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ADAR IMPORT & DISTRIBUTING CORP.,

Plaintiff,

MEMORANDUM & ORDER

-against-

98-CV-0547(ILG)

THOMSON CONSUMER ELECTRONICS INC.

Defendant.

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THOMSON CONSUMER ELECTRONICS, INC.

Third-Party Plaintiff,

-against-

YEHUDA BACKER and SARAH FISHMAN

Third-Party Defendants.

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GLASSER, United States District Judge:

Background

Defendant Thomson Consumer Electronics Inc. ("Thomson") is a manufacturer of consumer electronic goods. Plaintiff Adar Import & Distributing Corp. ("Adar") is one of its customers. Third-Party Defendants Yehuda Backer ("Backer") and Sarah Fishman are principals of Adar, and guarantors of Adar's debts to Thomson.

Adar filed a summons and complaint on January 28, 1998. At that time, Adar was indebted to Thomson in the amount of \$2,771,553.35 for goods sold and delivered by Thomson to Adar between November, 1996 and December, 1997. Answer ¶ 17. Adar's complaint states that it need not pay for any of those goods because Thomson breached an "exclusivity" right with respect to the goods that were delivered in June, 1997. Compl. ¶¶ 9, 12. Adar's complaint also

seeks damages for breach of contract and a declaratory judgment stating that it need not pay invoices relating to merchandise sold prior to March 18, 1997. Id. at ¶¶ 16, 23. In its counterclaims and third party claims, Thomson seeks to recover the roughly \$2.8 million balance due on the outstanding invoices. Answer ¶ 21(b).

Thomson interposed its answer to the complaint on March 10, 1998. Discovery has begun and Magistrate Chrein has set a discovery cutoff date of January 29, 1999. In June of this year, Adar made a partial document production to Thomson. Among the documents produced were a series of transcripts of tape recordings made by Backer of conversations he had with Thomson personnel. Mot. ¶ 4. One of the transcripts produced, however, was of a conversation solely between Thomson employees. Id. at ¶ 5.

In October, 1997, Adam Feinberg (“Feinberg”), a Thomson representative, visited Adar’s offices to discuss a potential purchase with Backer. Id. While at Adar’s offices, Feinberg, with Backer’s permission, used an office telephone to discuss the potential purchase with other Thomson personnel. Id. Backer taped Feinberg’s telephone conversation. Id.

Thomson now contends that Backer’s taping of Feinberg’s conversation constitutes a violation of New York Penal Code § 250.05 and of 18 U.S.C. § 2511, both felonies. In addition, this Court notes that 18 U.S.C. § 2520(b) and (c)(2)(B) renders a wiretapper civilly liable for statutory damages of \$10,000 for each violation, plus punitive damages and attorney’s fees.

The Amended Answer and Counterclaim that Thomson proposes is substantively identical to its original answer, except for a new fifth count, which alleges the foregoing violations by Adar and Backer of 18 U.S.C. § 2511, and seeks civil damages. Thomson has

sought the consent of counsel to Adar and Backer to the proposed Amended Answer, and counsel has refused.

Discussion

Pursuant to Fed. R. Civ. P. 15(a), after the time during which a party may amend his pleading as of right, leave to amend “shall be given when justice so requires.” Rule 15(a) is generally intended to permit a party to “assert matters that were overlooked or were unknown to him at the time he interposed his original complaint or answer.” Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1473 at 520 (1990) (citations omitted). Amendments may be granted, for example, to permit a plaintiff to assert a new cause of action, change the theory of the case or cure a defect in the jurisdictional allegation of the complaint.

The Supreme Court and the Second Circuit have adhered to the commands of liberality embodied in Rule 15(a). See e.g., Nerney v. Valente & Sons Repair Shop, 66 F.3d 25, 28 (2d Cir. 1995) (per curiam) (“[T]he Supreme Court has emphasized that amendment should normally be permitted.” (citing Foman v. Davis, 371 U.S. 178, 182-83 (1962); Ricciuti v. N.Y.C. Transit Authority, 941 F.2d 119, 123 (2d Cir. 1991) (“[I]t is rare that such leave to [to amend] should be denied, especially when there has been no prior amendment.” (citations omitted)); see also Gumer v. Shearson, Hammill & Co. Inc., 516 F.2d 283, 287 (2d Cir. 1974); Thomas v. New York City, 814 F. Supp. 1139, 1145 (E.D.N.Y. 1993); Storwal Intern., Inc. v. Thom Rock Realty Co., L.P., 784 F. Supp. 1141, 1143 (S.D.N.Y. 1992). The grant or denial of a motion to amend is within the sound discretion of the district court. Sugrue v. Derwinsky, 808 F. Supp. 946, 951 (E.D.N.Y. 1992), aff’d, 26 F.3d 8 (2d Cir. 1994).

Adar argues that this Court must make a “threshold evaluation as to whether the

proposed amended claims have merit.” Graubard Aff. ¶ 3. This is incorrect. A litigant need not establish the factual merits of a proposed amendment. S.S. Silberblatt, Inc. v. East Harlem Pilot Block--Building 1 Housing Development Fund Co., 608 F.2d 28, 42 (2d Cir. 1979) (“where alleged futility of the amendment rests on findings of fact we prefer to let the district court resolve the factual issues”); Anthony v. Facey, 1995 WL 362493 (E.D.N.Y. 1995) (court should not deny leave to file a proposed amended complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief).

A more correct statement of the law is that a district court may deny the motion to amend the complaint if it finds that the proposed amendment would be futile. See e.g., Foman, 371 U.S. 178, 182-83 (1962); Acito v. Imcera Group, Inc., 47 F.3d 47(2d Cir. 1995). An amendment is deemed futile if it fails to state a claim under the principles employed by the court when deciding on a Rule 12(b)(6) motion to dismiss. Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 647 (E.D.N.Y. 1997). Accordingly, in the present case, this Court accepts as true all well-pleaded factual allegations set forth in the proposed amendment and views such allegations, as well as all reasonable inferences drawn therefrom, in the light most favorable to the moving party. See id.

In this case, Adar points to the absence of an affidavit from Feinberg, the Thomson employee who was taped, as reason to deny the proposed amendment. See Graubard Aff. ¶ 3. Adar then concludes that because “Thomson has failed to show a meritorious basis for it’s [sic] proposed amended complaint, its motion to amend its answer should be denied.” Id. However, as explained *supra*, Thomson does not have to show a meritorious basis for its Amended Answer. See S.S. Silberblatt, Inc. The Court will only consider the sufficiency of the

allegations contained in the proposed Amended Answer. See Journal Pub. Co. v. American Home Assur. Co., 771 F. Supp. 632 (S.D.N.Y. 1991). Thomson's allegations, viewed in the light most favorable to it, are sufficient.

Conclusion

For the foregoing reasons, Thomson's motion for entry of an order granting Thomson permission to interpose an Amended Answer and Counterclaim is granted.

SO ORDERED.


United States District Judge

Dated: New York, New York
September 11th, 1998

A copy of the foregoing Order was this day sent to:

Harold F. Bonacquist, Esq.
Traub, Bonacquist & Fox LLP
655 Third Avenue
New York, New York 10017

Kevin E. Rockitter, Esq.
Hollenberg Levin Solomon Ross Belsky & Daniels, LLP
585 Stewart Avenue
Garden City, New York 11530