

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)	Chapter 11
)	
WORLDWIDE DIRECT, INC.,)	
<u>et al.</u> ,)	Case Nos. 99-108 (MFW)
)	through 99-127 (MFW)
Debtors.)	
)	(Jointly Administered Under
_____)	Case No. 99-108 (MFW))
)	
OFFICIAL COMMITTEE OF)	
UNSECURED CREDITORS,)	
)	
Plaintiff,)	
)	Adversary No. 01-25 (MFW)
v.)	
)	
SHARED TECHNOLOGIES CELLULAR,)	
INC.,)	
)	
Defendant.)	

MEMORANDUM OPINION¹

Before the Court is the Motion filed by Goldin Associates, L.L.C., in its capacity as Liquidating Trustee of the Worldwide Direct Liquidation Trust ("the Liquidating Trustee") for Leave to Amend the Original Complaint filed by the Official Committee of Unsecured Creditors ("the Committee"). For the reasons set forth below, the Motion will be granted.

I. FACTUAL BACKGROUND

On January 19, 1999, Worldwide Direct, Inc., SmarTalk

¹This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

Teleservices, Inc. ("SmarTalk"), and SmarTalk's direct and indirect domestic subsidiaries (collectively, "the SmarTalk Debtors") filed voluntary chapter 11 petitions in this Court. On April 27, 2000, the SmarTalk Debtors filed their Second Amended Consolidated Liquidating Chapter 11 Plan, which was confirmed on June 7, 2001. Per the terms of the Plan, the Liquidating Trustee is now the successor in interest to the Committee and has the responsibility and standing to prosecute this action.

On January 12, 2001, the Committee, on behalf of the SmarTalk Estate², had filed a complaint ("the Original Complaint") against Shared Technologies Cellular, Inc., ("STCI") seeking the recovery of allegedly preferential transfers in the amount of \$234,637. The Original Complaint stated that the transfers made to STCI during the 90 days preceding the SmarTalk Debtors' bankruptcy petitions totaled \$647,207.97. However, the Committee asserted that only \$234,637 was avoidable pursuant to sections 547 and 550 of the Bankruptcy Code.

On September 28, 2001, STCI filed a voluntary chapter 11 petition in the United States Bankruptcy Court for the District of Connecticut, which was subsequently converted to chapter 7. On January 8, 2002, the Liquidating Trustee filed a Proof of Claim in the STCI bankruptcy case in the amount of \$234,637 (plus

²The SmarTalk Debtors' bankruptcy estates were substantively consolidated on July 11, 2000. The term "SmarTalk Estate" refers to the substantively consolidated estate.

attorneys' fees and costs). On April 19, 2002, the Liquidating Trustee filed an amended Proof of Claim for \$647,208. On May 15, 2002, the Liquidating Trustee sought relief from the automatic stay in the STCI bankruptcy case, to prosecute this adversary to judgment. The STCI Court granted that Motion on August 1, 2002, but prohibited the Liquidating Trustee from using any judgment obtained in this Court to disallow STCI's claim under section 502(d), pending further proceedings in the STCI Bankruptcy Case. That decision was appealed by the Liquidating Trustee and affirmed on May 19, 2003.

The Liquidating Trustee filed the instant Motion on May 30, 2003, by which it seeks leave to amend the Original Complaint to assert that the entire amount of the transfers is recoverable, rather than just a portion. The Motion to Amend is opposed by STCI.

II. JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (F), and (O).

III. DISCUSSION

Rule 15(a) of the Federal Rules of Civil Procedure permits a party to amend its pleading "once as a matter of course at any time before a responsive pleading 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."³ Although leave to amend should be "freely given," it may be denied for reasons such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Foman v. Davis, 371 U.S. 178, 182 (1962). "Of course, the grant or denial of an opportunity to amend is within the discretion of the . . . Court." Id.

STCI asserts that leave to amend the complaint should be denied for reasons of undue delay, bad faith, prejudice, and futility of amendment. As to the first basis asserted, "[d]elay may become undue when a movant has had previous opportunities to amend a complaint." Cureton v. NCAA, 252 F.3d 267, 273 (3d Cir. 2001). "Thus, while bearing in mind the liberal pleading philosophy of the federal rules, the question of undue delay requires that we focus on the movant's reasons for not amending sooner." Id. (internal citation omitted). Here, STCI asserts undue delay because the Liquidating Trustee waited over one year from the filing of its Amended Proof of Claim in the STCI

³Rule 15 of the Federal Rules of Civil Procedure is made applicable to adversary proceedings by Rule 7015 of the Federal Rules of Bankruptcy Procedure.

bankruptcy case to file its Motion here. Further, STCI notes the Motion was filed one day prior to the originally scheduled close of discovery. STCI asserts that the Liquidating Trustee has set forth no reason why its Motion was not filed sooner.

In response, the Liquidating Trustee asserts that there has been no undue delay. Though it recognizes that a significant amount of time has passed since this adversary proceeding was filed, it notes that for almost one year of that time, from September 28, 2001, through August 1, 2002, this proceeding was stayed by virtue of STCI's bankruptcy case. The Liquidating Trustee also notes that it has been cooperating with STCI's counsel by extending deadlines and resolving scheduling issues caused by that counsel's representation of another client which precluded him from devoting the necessary time to complete discovery in this case prior to the originally scheduled discovery deadline.

We cannot conclude that the Liquidating Trustee has been dilatory or that STCI has been prejudiced by the delay. Because of STCI's bankruptcy filing, the Trustee could not file its Motion to Amend until it obtained relief from the stay in STCI's case. The Trustee did seek relief from the stay in STCI's case, which was opposed. It filed its Motion to Amend less than one month after the appeal was decided. Therefore, we cannot conclude that the Liquidating Trustee has unduly delayed filing

his Motion.

Related to its claim of undue delay, STCI also asserts that the Motion was filed in bad faith as it was only filed after the Liquidating Trustee's appeal of the Lift Stay Order was denied. Thus, STCI argues that the true purpose of the Liquidating Trustee's Motion is an attempt by it to gain leverage in settlement talks with STCI, leverage it was unable to gain by application of section 502(d) as a result of the Lift Stay Order. However, STCI has failed to offer any evidence in support of this assertion. As such, its mere assertion is insufficient to warrant denial of the Motion. See, e.g. Adams v. Gould, Inc., 739 F.2d 858, 868 (3d Cir. 1984).

STCI also claims it will be prejudiced if the Liquidating Trustee is permitted to amend its Complaint as the original discovery deadline has already passed. STCI asserts that further discovery, with its attendant costs, will be necessary to enable it to properly defend itself. However, in order to warrant denial of the Motion, the prejudice must be "substantial or undue." Cureton, 252 F.3d at 273. "The issue of prejudice requires that we focus on the hardship to the defendants if the amendment were permitted." Id. Specifically, we should consider "whether allowing an amendment would result in additional discovery, cost, and preparation to defend against new facts or new theories." Id.

We do not believe that the prejudice to the defendant in this case, if any, is "substantial or undue." "The need for additional discovery does not conclusively establish prejudice." Dole v. Arco Chemical, Co., 921 F.2d 484, 488 (3d Cir. 1990). There have been continuances and extensions of time requested by both parties in this case. No depositions have been taken and discovery was recently extended until September 30, 2003. There is no reason that STCI cannot obtain the information it needs to defend itself with respect to the amended claims. Further, the dates, amount, and check numbers of the three transfers made during the preference period (including the ones at issue in the Amended Complaint) were already identified in an exhibit to the Original Complaint. Requiring STCI to defend itself in this routine preference action against allegations of receiving a preferential payment in an amount higher than originally stated does not constitute a hardship sufficient to warrant the denial of the Motion.

Finally, STCI claims that leave to amend should be denied as amendment will be futile. Futility of amendment exists "when the claim or defense is not accompanied by a showing of plausibility sufficient to present a triable issue. Thus a trial court may appropriately deny a motion to amend where the amendment would not withstand a motion to dismiss." Quality Botanical Ingredients v. Triarco Indus. Inc., (In re Quality Botanical

Ingredients), 249 B.R. 619, 629 (Bankr.D.N.J. 2000).

Here, STCI asserts that the statute of limitations has run and that the Amended Complaint cannot date back to the original filing date. Rule 15(c) permits an amendment of a complaint to relate back to the original complaint only if:

- (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
- (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Federal Rule of Civil Procedure 15(c).

STCI argues that the Liquidating Trustee is seeking a recovery on different transactions in the Amended Complaint. As such, STCI asserts that the Amended Complaint cannot relate back to the Original Complaint.

We disagree. The Original Complaint alleged that \$647,207.97 was transferred to STCI during the preference period and that \$234,637 was believed by the Committee to be avoidable under sections 547 and 550. The proposed amendment does not involve a different transaction. Rather, it simply asserts that a larger portion, in this case 100%, of the original transaction

is avoidable. As it amplifies a previously stated claim, we conclude that the Liquidating Trustee's proposed amendment relates back to the Original Complaint.

IV. CONCLUSION

For the foregoing reasons, the Motion of the Liquidating Trustee for Leave to Amend the Original Complaint will be granted.

An appropriate Order is attached.

BY THE COURT:

Dated: August 15, 2003



Mary F. Walrath
United States Bankruptcy Judge