

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

NETWORK COMMUNICATIONS INC.

Bankruptcy No. X90-02242S

Debtor(s).

Chapter 11

NETWORK COMMUNICATIONS INC.

Adversary No. X91-0008S

Plaintiff(s)

vs.

U. S. SPRINT COMMUNICATIONS
COMPANY LIMITED PARTNERSHIP

Defendant(s)

ORDER RE: NETWORK COMMUNICATIONS INC.'S

MOTION TO EXTEND DISCOVERY DEADLINE

Plaintiff, Network Communications, Inc. (NCI), seeks an extension of the discovery deadline. Defendant, Sprint Communications Company (SPRINT), objects. Hearing was held by telephone on February 28, 1992.

I.

NCI filed a complaint and an amended complaint against Sprint in January, 1991 seeking to recover a pre-petition account. The account arises out of a contract under which NCI was to market Sprint's long distance phone service to the general public. A scheduling conference was held on April 10, 1991. The court set August 1 as the discovery deadline. On April 15, 1991, NCI filed a "Second Amended and Substituted Complaint." In addition to seeking recovery of the account, NCI alleged that Sprint's setoff of the account against a mutual debt, if post-petition, was a violation of the automatic stay and, if pre-petition, was a recoverable improvement in position under 11 U.S.C. § 553 (b) .

On September 3, 1991, Sprint moved for summary judgment contending that it acted post-petition to recoup its claim against NCI from NCI's claim, and that such action was not barred by the automatic stay. In support of its motion, Sprint submitted an affidavit of an employee, Janet K. Hosler, regarding the amounts of money owed by Sprint and to Sprint. Also submitted were copies of other written materials including letters between NCI President Mark E. Ferdig (FERDIG) and Mary Jo Robinson, Sprint's Director of Vendor Operations (ROBINSON).

NCI resisted the motion. It argued that recoupment was an equitable doctrine which Sprint should be prevented from utilizing because of Sprint's inequitable conduct. NCI asserts that Sprint misrepresented that it would amend the contract between them in order to induce NCI to continue sales of Sprint long distance service so it could recover some of its overpayments to NCI. According to NCI, had the misrepresentation of intention not been made, NCI would not have continued in business and would not have incurred other debts to innocent third parties. NCI contends that Sprint should not be allowed to benefit from its wrongful conduct.

To support its contentions, NCI submitted an affidavit by company president Ferdig which outlines the negotiations to amend the original service contract. The affidavit refers to Ferdig's conversations and correspondence with various employees of Sprint--Steve Thompson, Robinson, Hosler, Steve Aikin and Richard Smith. Attached to the affidavit are copies of correspondence with some of these Sprint employees.

The parties filed a joint pre-trial statement on October 24, 1991. NCI stated that at trial it would call two witnesses--Mark Ferdig and Gary Penisten. Penisten, an NCI director, allegedly loaned money to NCI based on Sprint's alleged agreement to amend its contract with NCI. Sprint indicated it would call as witnesses Hosler, Robinson and Thompson.

Sprint responded to NCI's resistance to its motion for summary judgment with a reply brief and argument and a motion to strike Ferdig's affidavit. Additional affidavits were attached to the reply brief; they included affidavits by employees Robinson and Thompson and by Mark Reinders, a reporter with a Sioux city newspaper. The affidavit by Robinson countered statements in Ferdig's affidavit. For the most part, her statements involved conversations with Ferdig. Thompson's affidavit involved the contents of a particular conversation with Ferdig.

The crux of the motion to strike was that Ferdig's affidavit contained information that was responsive to interrogatories served by sprint on NCI, but which information was not contained in the answers. Sprint asked the court to strike portions of the affidavit dealing with the alleged oral agreement to amend the contract and dealing with damages from the alleged misrepresentation. Alternatively, Sprint asked the court for its costs in preparing the motion, stating that had it received the Ferdig information in response to its interrogatories, it might not have filed the motion for summary judgment. Nonetheless, Sprint argued that even were the court to consider the Ferdig affidavit, Sprint was still entitled to summary judgment.

Sprint pointed principally to three interrogatories which it felt were inadequately answered in light of Ferdig's affidavit- interrogatories 3, 18 and 19. The answers to 18 and 19 were supplemented by NCI at Sprint's request in September, 1991. Sprint's main concern was Ferdig's claim in his affidavit that on December 3, 1990, Ferdig, Hosler and Robinson reached an oral agreement on the amendment of the sprint-NCI service contract. Interrogatory 3 asked whether the agreement between the parties was ever amended or supplemented. NCI answered "yes" to whether there had been amendment or supplementation, but then stated: "extensive negotiations were entered into to amend and supplement the original agreement--starting in early November 1990. On December 14, we were informed that the modification would not be signed by Sprint." Negotiators identified by NCI in its answer were Ferdig, Penisten, Hosler, Robinson, Thompson, Ann Henry of Sprint, and Aikin.

At the hearing on the motions, it became clear that there was somewhat of a mis-understanding between counsel for the parties as to the nature of NCI's defense to Sprint's claim of recoupment. It appeared that Sprint's counsel believed that NCI was attempting to enforce an oral amendment to the agreement. However, NCI is not seeking to do that. It does claim, however, that NCI and Sprint

reached an oral agreement to amend, but Sprint would not execute a conforming written amendment. According to the original contract, amendments must be in writing. It is sprint's alleged conduct in misrepresenting its intention to amend that NCI complains about. The oral agreement allegedly reached in December, 1990 was part of NCI's evidence of Sprint's inequitable conduct.

At the hearing, the court determined that NCI's answers to Sprint's interrogatories were not sufficient to disclose the oral agreement allegedly reached in December, 1990. The court declined, however, to strike any portion of Ferdig's affidavit. As an alternative, the court extended the discovery deadline for 60 days to permit Sprint to do further discovery. The extension was to run from the court's ruling on the motion for summary judgment. It was clear from the oral ruling and the subsequent order, filed on October 29, 1991, that the extension was for Sprint only. The court then heard arguments on sprint's motion for summary judgment. In an order filed on January 2, 1992, the court denied sprint's motion for summary judgment. In a separate order filed the same day, the court denied sprint's motion to assess costs against NCI.

II.

On January 17, 1992, NCI filed a motion seeking the extension of the discovery deadline to permit it to do further discovery. It requested an extension of 60 days commencing January 2. NCI's counsel would like to depose several witnesses whose affidavits were filed by Sprint in connection with the motion for summary judgment--Hosler, Robinson, Thompson, Aikin and Smith.

Prior to the expiration of the discovery deadline, NCI has served a set of interrogatories on Sprint's counsel. These were timely answered under the civil rules. One of the interrogatories asked Sprint to list the name of any person who has any knowledge about any matter involved in the lawsuit. Sprint objected to the interrogatory on the grounds that the request regarding "any knowledge" or "any matter" was vague and burdensome. NCI did not amend the interrogatory nor did it move to compel an answer.

NCI contends that basic fairness requires that the court grant the requested extension. Due to the time interval prior to hearing, it asks for 30 days for further discovery. Sprint's 60-day extension expired on March 2. Having taken two depositions, Sprint has completed its discovery, and its counsel says it is ready for trial. It resists NCI's motion for extension arguing that NCI has not shown cause for the extension.

Pursuant to Fed. R.Bankr. P. 7016 which incorporates by reference Fed. R.Civ. P. 16(b), this court set August 1, 1991 as the discovery deadline in this adversary proceeding. In its discretion, the court extended that deadline for Sprint in order to prevent any unfairness which might result from NCI's insufficient response to Sprint's interrogatories. The court considered the discovery dispute as sufficient cause for the extension.

According to Fed. R.Civ. P. 16(b), the court's pre-trial schedule may not be modified except by leave of court upon a showing of good cause. "Basic fairness" has been offered as cause. By that, NCI appears to mean that it would be unfair to permit Sprint an extension and not to permit NCI one. It would be unfair to treat the parties differently if they are in substantially the same circumstances. But they are not. Sprint was granted an extension to cure the inadequacy of NCI's response to Sprint's interrogatories. NCI should not get an equal extension merely because one was justified for Sprint. NCI has not provided any good reason for its failure to obtain the depositions of the five witnesses before now. Each of the witnesses was known to NCI.

Inequitable conduct as a basis for preventing recoupment by Sprint is part of NCI's case. On such a claim, it has the burden of proof. NCI personnel, particularly Mark Ferdig, was well aware of the nature of the claimed inequitable conduct. All of the witnesses which NCI now seeks to depose were known to Ferdig prior to the discovery deadline. Indeed, NCI's claim of inequitable conduct focuses on negotiations Ferdig says he had with these same persons. One excuse for NCI's failure to take depositions of these witnesses prior to the expiration of discovery was that sprint had not taken any depositions. That is a poor excuse. The failure to take the depositions, however, appears to be the fault of the plaintiff's attorney, not the fault of the plaintiff.

Since the court extended Sprint's discovery deadline, its counsel has taken the depositions of two NCI witnesses including Ferdig. NCI contends that Sprint knew of their existence prior to the expiration of the original discovery deadline so that NCI's prior knowledge of the witnesses it now wants to depose should not be held against it. While Sprint's early knowledge of the existence of the witnesses existed, that is not the point. Sprint was allowed further discovery, even of known witnesses, because NCI had failed to satisfactorily respond to interrogatories which would have disclosed information held by such witnesses.

NCI argues that if it is unable to depose these witnesses, it may not be able to obtain their testimony at trial. All of the witnesses reside in or around Kansas city, Missouri, with the exception of Robinson who resides in Washington, D. C. Fed. R.Civ. P. 45(c) (3) (A) (ii) as incorporated by Fed. R.Bankr. P. 9016 could prevent the subpoenaing of these witnesses. The court cannot, from the evidence, determine which of the five might, as non-officers of Sprint, be under the protection of the rule. It may be that the plaintiff's inability to depose these witnesses will affect the outcome of the case. Granting the extension would not delay trial. No trial date has been set, and the court's schedule would not permit trial prior to sometime in May, 1992.

Having considered all facets of the dispute, the court will grant the motion to extend and permit additional discovery by all parties for 30 days from the date of this order. The failure of the plaintiff to take timely the depositions of these five witnesses is due to the poor planning of its counsel. Prohibiting the depositions might be outcome determinative, and permitting them would not delay trial. Defendant has shown no prejudice from the extension. The court does not consider the cost to take the depositions to constitute prejudice. Finally, the court did not grant the earlier extension to Sprint in order to punish NCI, but rather to protect Sprint. Thus the court does not consider that it is withdrawing punishment.

Although the discovery deadline is extended for both parties for an additional 30 days, the discovery permitted is limited to depositions and any other type of discovery that can be completed under the Rules of Procedure within the 30-day extension. The depositions sought by plaintiff must be taken in Kansas City, and if defendant is willing to make office space available, must be taken at defendant's offices in Kansas City. Accordingly,

IT IS ORDERED that the motion of Network Communications, Inc. for an extension of the time in which it may complete discovery is granted; the period of discovery is extended for both parties for 30 days from the date of this order.

IT IS ORDERED that the depositions which plaintiff seeks to take must be taken in Kansas City, Missouri, and if defendant makes suitable office space available, then the depositions must be taken at defendant's offices in Kansas City.

IT IS ORDERED that the parties shall have 21 days from the completion of discovery to file any amendment they deem necessary to their joint pretrial statement.

IT IS ORDERED that the clerk shall set a telephonic status conference for a date prior to March 18, 1992 for the purpose of selecting a trial date.

SO ORDERED ON THIS 4th DAY OF MARCH, 1992.

William L. Edmonds
Bankruptcy Judge