Minutes of Proceedings

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Date: June 21, 2007

In re:

WORLDCOM, INC., et al.,

Debtors.

Case No. 02-13533 (AJG)
Chapter 11

Present: Hon. Arthur J. Gonzalez (Bankruptcy Judge) _____ (Courtroom Deputy) ECRO (Court Reporter)

Debtors/Movant: WorldCom, Inc.
Counsel: STINSON MORRISON HECKER LLP
By: Michael Tucci, Esq.

Non-Movant: Michael Jordan
Counsel: SCHIFF HARDIN LLP
By: Frederick Sperling, Esq.

Proceedings: ☒ **Motion by Debtors to Amend the Scheduling Order and Allow Additional Discovery**

Orders: ☒ **For the reasons set forth in Exhibit A attached hereto, the Motion Amend the Scheduling Order and Allow Additional Discovery is Granted.**

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/ Arthur J. Gonzalez (United States Bankruptcy Judge) 6/21/2007 (Date) s/ Lynda M. Nulty (Courtroom Deputy)

EXHIBIT A

Before the Court is the Reorganized Debtors', or WorldCom's, Motion to Amend the Scheduling Order and Allow Limited Discovery, hereinafter referred to as the Motion to Extend Discovery. For the reasons that follow, the Court grants WorldCom's Motion to Extend Discovery.

WorldCom seeks to reopen discovery under Federal Rule of Civil Procedure 16(b), made applicable to this bankruptcy proceeding by Bankruptcy Rule 7016. WorldCom requests the Court allow it to (1) conduct discovery for an additional 90 days; (2) including, but not limited to, the takings of depositions, issuing written discovery, and document production requests; and (3) limited in scope to the issues raised in the Court's Opinion of February 13, 2007 (the "February Opinion") concerning the monetary extent to which Jordan could have mitigated his contract damages. WorldCom contends that it meets the good cause exception to allow the modification of scheduling orders under Rule 16(b). Specifically, WorldCom contends that it has exercised diligence in conducting discovery on the issues related to Jordan's claim and that reopening discovery on a limited basis would not unduly burden Jordan. WorldCom cites to the February Opinion's finding that there must be a further evidentiary hearing on how much Jordan's claim should be reduced to reflect "what portion would have been mitigated had he used reasonable efforts to do." WorldCom argues that its previously undertaken discovery did not concentrate on the issue focused upon by the Court in the February Opinion – specifically by what exact measure Jordan could have mitigated his damages. WorldCom also argues that it previously sought some of the information it will seek – such as information regarding Jordan's endorsement contracts – before the discovery period's

expiration but that Jordan refused to turn over requested documents or answer certain interrogatories.

Jordan responds by first noting that WorldCom seeks to reopen discovery fourteen months after it has closed. Next, Jordan argues that WorldCom has not made an adequate showing of good cause that justifies its failure to secure the needed evidence to support its mitigation defense. Jordan also insists he will be burdened by the granting of additional discovery. Furthermore, Jordan takes issue with WorldCom's reasoning for the need for more discovery, such reasoning being that its previous discovery did not concentrate on the issue focused on by the Court. With regard to the previously requested information, Jordan argues he had agreed with Norman Beal, the attorney then handling the matter on WorldCom's behalf for Stinson Morrison Hecker LLP, that Jordan would compile and turn over specific information regarding the requested endorsement contracts with third parties rather than the parties attempting to strictly adhere to the discovery requests by attempting to navigate around the confidentiality provisions in the contracts. WorldCom disputes the existence of such an arrangement, although Beal has not disputed the arrangement's existence.

The decision whether to modify a scheduling order is within the sound discretion of the Court. *See Dos Santos v. Terrace Place Realty, Incorporated*, 433 F. Supp. 2d 326, 336 (S.D.N.Y. 2006). Under the legal standards of Rule 16(b), a scheduling order "shall not be modified except upon a showing of good cause." Federal Rule of Civil Procedure 16(b). "A finding of good cause depends on the diligence of the moving party." *Grochowski v. Phoenix Construction*, 318 F.3d 80, 86 (2d Cir. 2003). *See also In re Orange Boat Sales*, 239 B.R. 471, 474 (S.D.N.Y. 1999) ("To demonstrate good cause,

the party seeking a modification must show that the relevant deadline could not reasonably be met despite that party's diligence."). Events occurring after the entry of a scheduling order, which were reasonably unforeseeable to the parties, may also suffice to establish good cause. *See Oxaal v. Internet Pictures Corporation,* No. 00 Civ. 1863, 2002 WL 485704 (N.D.N.Y. Mar. 27, 2002).

The Court finds that a discovery extension is warranted.

WorldCom's failure to take discovery that shows the amount of how much Jordan's claim should be reduced was not due to WorldCom's lack of diligence. The Court's review of the record reveals that WorldCom diligently pursued discovery to support its reasonable interpretation of its mitigation defense. Giving Jordan the benefit of the doubt that there was an agreement with Beal regarding WorldCom's prior discovery requests, this shows that WorldCom diligently sought evidence that could help it establish what Jordan could have reasonably earned had he mitigated damages and it shows that WorldCom's view of mitigation was not far off the approach the Court took in the February Opinion. To declare that WorldCom should not be entitled to additional discovery would be, in effect, allowing Jordan to use his prior efforts pursuant to the agreement with WorldCom as both a shield against certain disclosures and a sword now to prevent WorldCom from obtaining discovery. This would contradict important principles behind the Federal Rules – the provision of liberal discovery rules and that technicalities should not prevent cases from being decided on the merits. *See Monahan v. New York City Department of Corrections*, 214 F.3d 275, 283 (2d Cir. 2000); *see also Stewart v. Coyne Textile Services*, 212 F.R.D. 494 (S.D. W. Va. 2003) (finding good

cause to grant discovery extension under Rule 16(b) in part because of defendant's late responses to plaintiff's discovery requests).

As to Jordan's claims of prejudice, Jordan has identified the fact that it has been waiting four years for WorldCom to make any payment on the Claim and has speculated on the amount of additional discovery Jordan would have to engage in if discovery is reopened. Neither claim of prejudice shows that additional discovery by WorldCom should not be allowed. The passage of time argument, without a showing of how the delay specifically prejudices Jordan, has been rejected by the Second Circuit. *See Block v. First Blood Associates*, 988 F.2d 344, 350 (2d Cir. 1993) (delay does not equate to undue prejudice for purposes of allowing amended complaint). Further, it is not clear that an amended scheduling order would require Jordan to expend significant additional resources to conduct discovery and prepare for trial and it is plain that the additional discovery would not unduly delay the resolution of the dispute, as the Court has determined that a triable issue of fact exists. *See Credit Suisse First Boston LLC v. Coeur d'Alene Mines Corp.*, No. 03 Civ. 9547, 2004 WL 2903772 (S.D.N.Y. December 15, 2004).

Another reason to allow limited additional discovery is that the case presented a unique mitigation situation in which there is not a wealth of precedent for the parties or the Court to consult. Specifically, the dispute concerns a personal services contract, which is distinct from a sale of goods contract or an employment discharge case, where disputes are more common and the body of law more established. As the February Opinion noted on page 12, the Court was not furnished nor did its research find District of Columbia cases that precisely detailed the parameters of the mitigation defense for a

case such as the instant matter. WorldCom relied on employment law cases from the Second Circuit and other jurisdictions that held that once the breaching party shows that the plaintiff made no attempts to mitigate damages, the breaching party is relieved of its obligation to show the existence of other opportunities and how much those opportunities could reduce the plaintiff's damages. *See Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 54 (2d Cir. 1998), which stated that an employer "is released from the duty of establishing the availability of comparable employment if it can prove that the employee made no reasonable efforts to seek such employment." The Second Circuit adopted that rule from two other circuit courts, the Fifth Circuit and the Eleventh Circuit. WorldCom's reliance on cases from other jurisdictions was not unwarranted. In fact, Jordan and the Court also looked both to other jurisdictions and to employment law cases for insight into the mitigation defense because of the lack of a substantial body of law in D.C. For example, Jordan looked to employment law in support of his argument that WorldCom had to show that Jordan could have entered into a "substantially similar" agreement post-rejection. Although the Court found that "substantially similar" is not the appropriate standard, it also looked to employment law for guidance. Also, although to the Court's knowledge WorldCom's view of the mitigation defense has not been adopted by D.C.'s highest court, it has been by other circuits in federal employment cases, including the 3rd, 5th and 11th Circuit Courts of Appeals. *See Tubari Ltd., Inc. v. N.L.R.B.*, 959 F.2d 451 (3d Cir. 1992); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527 (11th Cir. 1991) (holding that "if ... an employer proves that the employee has not made reasonable efforts to obtain work, the employer does not also have to establish the

availability of substantially comparable employment."); *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir.1990) (same).

In the D.C. case that the February Opinion heavily relies on, *Wisconsin Ave. Nursing Home v. D.C. Human Rights Comm'n*, 527 A.2d 282 (D.C. 1987), that court took an approach that the February Opinion largely followed, as that court remanded the case for a determination of damages after finding that the plaintiff had failed to mitigate damages by seeking other employment. However, the Court reads *Wisconsin Ave.*'s ruling as also suggesting that WorldCom's mitigation theory in the instant matter is not unreasonable, as that court used a "cf." cite to a case closely aligned with WorldCom's position. *See Wisconsin Ave. Nursing Home*, 527 A.2d at 292, citing *Sangster v. United Air Lines, Inc.*, 633 F.2d 864 (9th Cir. 1980) and using a parenthetical that stated "denial of any back pay appropriate when claimant failed to mitigate damages." Thus, WorldCom's approach to the elements of its mitigation defense was diligent.

Carnrite v. Granada Hospital Group, 175 F.R.D. 439 (W.D.N.Y. 1997) illustrates when a lack of knowledge regarding applicable legal theories does not rise to the level of good cause under Rule 16(b). There, the plaintiff sought to amend his complaint after the scheduling order's deadline to add a claim for attorneys' fees. The plaintiff's counsel claimed that, through his inadvertence, the original complaint did not articulate a discrete claim under New York's Labor Law Section 191, which is necessary to recover attorneys' fees. The Court did not find that the attorney's claim of inadvertence, when the parties should have been on notice of well-established legal principles, rose to the level of good cause necessary to modify a scheduling order.

Thus, for the reasons stated above, WorldCom's motion to extend discovery is granted. WorldCom shall be allowed to conduct discovery for an additional 90 days; including the takings of depositions, issuing written discovery, and document production requests; and limited in scope to the issues raised in the February Opinion concerning the monetary extent to which Jordan could have mitigated his contract damages. As to WorldCom's request for additional expert discovery, WorldCom's expert shall be permitted to provide additional backup for his previous conclusions, without altering those conclusions, and Jordan shall be allowed to conduct an additional deposition of WorldCom's expert.

Further, nothing herein will preclude Jordan from conducting additional discovery along the same parameters as set forth above.

The parties are to submit a revised discovery schedule to the Court.