

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

Chapter 11

Cosmetics Plus Group, LTD., et al.,

Case No. 01-14471(PCB)

Debtors.

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Cosmetics Plus Group, LTD. and
Cosmetics Plus South LTD.,

Adv. Pro. No. 03-8032A

Plaintiffs,

-against-

American International Group, Inc., and
New Hampshire Insurance Company

Defendants.

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APPEARANCES:

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Attorney for Debtor

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By: Nicholas L. Paone, Esq.

MEMORANDUM DECISION GRANTING DEBTORS' LEAVE TO AMEND COMPLAINT

BEATTY, Prudence Carter, U.S.B.J.

The debtors commenced this adversary proceeding against their insurance carriers seeking insurance coverage for damages incurred at two of their retail stores during the September 11th terrorist attack at the World Trade Center. The debtors move for leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a), made applicable to bankruptcy proceedings through Bankruptcy Rule 7015, to set forth a cause of action for consequential damages for breach of the business interruption coverage terms of the Debtors insurance policies. The defendants oppose the motion asserting that the proposed cause of action does not state a viable claim under the policies and applicable law.

For the reasons which follow, the Debtors' motion is granted.

BACKGROUND

On August 10, 2001, Cosmetics Plus Group, Ltd. and its affiliated companies (the "Debtors") filed a petition under Chapter 11 of the Bankruptcy Code (the "Code"). At the time of the filing, the Debtors were engaged in the retail sale of cosmetics, fragrances, health and beauty aids and related accessories in the greater New York metropolitan area. The Debtors operated twenty-two retail stores, together with their corporate offices and a warehouse facility. The Debtors leased their retail stores from various landlords. The Debtors filed this case with the intent of liquidating, and as debtors in possession they conducted court sanctioned going out of business sales at their many stores.

Approximately one month after the petition was filed, the September 11th terrorist attack on the World Trade Center took place. The Debtors' retail store located on the World Trade Center Concourse was destroyed and the store located at 170 Broadway was badly damaged.

On February 5, 2003, the Debtors commenced this adversary proceeding against their insurance carriers, American International Group, Inc., and New Hampshire Insurance Company (the

“Defendants”) seeking insurance coverage for loss and damages incurred at these two stores during the attacks. The Complaint pleads contains three counts. The first count alleges that the Defendants refusal to pay for damaged fixtures, equipment and the like at the 170 Broadway store is a breach the insurance agreements, the second count alleges the breach of business interruption coverage for both stores and the third count alleges that the actions of the Defendants violate the Deceptive Business Act of the New York General Business Law. The Defendants filed an answer on April 25, 2003. Considerable discovery has been completed in this matter and there are currently pending cross-motions for summary judgment.

The Debtors have moved for leave to amend the Complaint to add a claim for consequential damages in light of a recent decision by Judge Sheindlin of the United States District Court for the Southern District of New York in the matter of Hold Bros. Inc., et al. v. Hartford Casualty Ins. Co., et al. 2005 WL 183140 (S.D.N.Y.), which decision allowed such a claim to stand stand. The Defendants oppose the motion on the grounds that the proposed amended complaint fails to set forth a cause of action for consequential damages for breach of the business interruption coverage both under relevant case law and under the of the terms of the insurance policies.

DISCUSSION

The Debtors move to amend the Complaint pursuant to Federal Rule 15(a) which provides in pertinent part that leave to amend “shall be freely given when justice so requires.” Fed.R.Civ.P. 15(a); See also Foman v. Davis, 371 U.S. 178, 182 (1962) (generally, permission to amend should be freely granted). The decision is within the court’s discretion and when a plaintiff specifically requests leave to amend, as here, the failure to grant leave to amend is an abuse of judicial discretion unless the moving party acted in bad faith, there would be prejudice to the opposing party, there has been undue delay in bringing

the motion or the proposed amendment would be futile. Foman, 371 U.S. at 182.; Caputo v. Pfizer, Inc., 267 F.3d 181, 191 (2d Cir. 1991); In re Worldcom, Inc., 2006 WL 693370 at *12 (Bankr. S.D.N.Y.). When applying these factors, the Court should draw inferences in favor of granting the motion to amend. In re Worldcom at *12.

The court finds that there has been no evidence put forth demonstrating that the Debtors have not acted in bad faith in bringing this motion. The Court further finds, without ruling on the merits of the underlying claim, that the proposed amendment is not futile on its face. Finally, the court finds that the Defendants will not be unduly prejudiced by the granting of the Debtors motion.

Therefore, the Court hereby GRANTS the Debtors' motion to amend the Complaint

So Ordered.

Date: New York, New York
June 19, 2006

/s/ Prudence Carter Beatty
United States Bankruptcy Judge