IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT BILLET PROMOTIONS, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
IMI CORNELIUS, INC., et al.	:	NO. 95-1376

MEMORANDUM AND ORDER

HUTTON, J. November 19, 1997

Presently before the Court are Plaintiff Robert Billet Promotions, Inc.'s Motion for Leave to File Amended Complaint and Defendant IMI Cornelius, Inc.'s Answer thereto. For the foregoing reasons, the Plaintiff's Motion is denied.

I. BACKGROUND

The facts of this case have been thoroughly discussed in this Court's April 18, 1996 Memorandum and Order and the Third Circuit's February 13, 1997 Opinion. Briefly, Plaintiff, Robert Billet Promotions, Inc. ("RPB"), manufactures, distributes and sells the Drink Tank, a patented portable beverage dispenser. In late 1993 and early 1994, RPB approached defendant, IMI Cornelius, Inc. ("Cornelius"), with a proposal that the two companies collaborate in the production and distribution of the Drink Tank, in order to expand the product's market area and revenue. RPB claims that after preliminary negotiations the parties reached a May 4, 1994 agreement-in-principal that Cornelius would be the exclusive manufacturer, distributor and seller of the Drink Tank, and RPB would continue to promote the product. However, the parties did

not agree on many details of the relationship, including price and quantity, and did not reduce the May 4 agreement to writing. RPB claims that for many months it made concessions and forwent opportunities in reliance upon the oral agreement, until February 25, 1995, when Cornelius walked away from the deal citing price considerations.

On March 8, 1995, RPB filed the present action seeking damages from Cornelius under seven theories of liability. The first count, and the one relevant at this juncture, was for breach of oral contract. In this count, RPB claimed that the May 4, 1997 agreement-in-principle was "a valid and enforceable oral contract pursuant to which Cornelius agreed to act as RPB, Inc.'s exclusive manufacturer, distributer and seller of the Drink Tank on behalf of RPB Inc." (Pl.'s Compl. at ¶ 81). RPB claimed that as Cornelius breached the contract by subsequently refusing to manufacture the Drink Tank, Cornelius was liable for damages in excess of $100,000.00. (Id. at ¶ 82-83).

Upon Cornelius' Motion for Summary Judgment, this Court found that the May 4 oral agreement was too indefinite to establish an enforceable obligation. See Robert Billet Productions, Inc. v. IMI Cornelius, Inc., No. 96-cv-1435, at 6 (E.D.Pa. April 18, 1996). Quoting the deposition of Robert Billet, the Court found that as of May 4, the parties had not agreed to such crucial elements as price, quantity, or the duration of the agreement. See id. at 7. The Court rejected RPB's attempt to supply these terms from a July 21, 1994 draft agreement that the parties never executed. It found

that the document, titled “Proposal (Revised 7/21/94)," was one of a series drafted in the course of negotiations, and did not memorialize or expand upon the May 4 agreement. As the oral agreement was excessively vague, and the July 21 draft was just one of many attempts to reach a written agreement, there was no basis on which to grant RPB relief. Therefore, the Court granted summary judgment in favor of Cornelius on the breach of oral contract theory.

On appeal, the Third Circuit agreed that the May 4 agreement-in-principle was “too indefinite to permit the court to fashion an appropriate remedy.” Robert Billet Productions, Inc. v. IMI Cornelius, Inc., No. 96-cv-1435, at 5 (3d Cir. February 13, 1997) (citing Linnet v. Hitchcock, 471 A.2d 537, 540 (Pa. Super. 1984)). However, the Third Circuit held that this Court had erred in its treatment of the July 21 draft. Although RPB’s theory of liability was premised upon Cornelius’ breach of an oral contract, the Third Circuit found that “[t]he critical question is ... whether RPB ever accepted the proposed terms contained in Cornelius’ July 21 letter.” Id. at 6. Finding a remaining issue of fact on this question, the Third Circuit reversed summary judgment against RPB, and remanded the case back to this Court for further proceedings.

Until its argument before Third Circuit, RPB had never suggested that the parties had entered into a written contract. For example, in its Response to Defendant’s Motion for Summary Judgment, RPB did not claim that the parties had executed a written agreement. (See Pl’s Resp. to Def.’s Mot. for Summ. J. at 26).

Rather, RPB claimed that the July 21 letter identified the missing terms of an amorphous contract that had already been established. (See id.) For the two and a half year history of this litigation, RPB has not claimed and Cornelius has not been called on to defend against a written contract theory. In its present motion, however, RPB requests leave to amend its Complaint to include a count for breach of a written contract--namely the July 21 draft.

II. DISCUSSION

Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading "shall be freely granted where justice so requires." Fed. R. Civ. ¶ 15(a); Hewlett-Packard Co. v. Arch Assoc. Corp., 172 F.R.D. 151, 152 (E.D.Pa. 1997). However, in applying this rule, the district court must consider whether factors such as prejudice to the opposing party, undue delay, bad faith, failure to cure deficiencies previously known, or dilatory motive counsel against permitting the amendment. See Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993) (quoting Foman v. Davis, 371 U.S. 227, 230 (1962)). The Third Circuit has read the Foman case to mean that "prejudice to the non-moving party is the touchstone for denial of an amendment." Id. at 1414.

The Court finds that RPB could have amended its Complaint to state a breach of written contract claim any time in the two and a half year history of this case. RPB has always been aware of the July 21 draft, and could have raised a written contract theory in its original Complaint. Instead, it waited until discovery closed

and this case was set for trial. Because RPB's breach of contract count was always based on the May 4 oral agreement, Cornelius was not on notice to address special scrutiny to the circumstances of the July 21 draft, and would be required to engage in additional discovery to prepare its defense. As Cornelius points out, until the Third Circuit became interested in the July 21 draft, RPB never even suggested that the draft was itself an enforceable obligation. Even in its present motion, RPB does not claim that the parties executed the draft agreement.

RPB has brought this Motion for Leave to Amend too late and granting it would unduly prejudice Cornelius by breathing dubious new life into RPB's wilting contract claim. This Court is not alone in denying a motion to amend under these circumstances. See, e.g., Lorenz, 1 F.3d at 1414 (denying motion brought three years after start of litigation); Hewlett-Packard, 172 F.R.D. at 153 (denying motion brought fifteen months after original pleading was dismissed); Johnston v. City of Philadelphia, 158 F.R.D. 352, 353 (E.D.Pa. 1994) (denying motion to add new theory of liability after close of discovery and on eve of trial); Kuhn v. Philadelphia Elec. Co., 85 F.R.D. 86, 87 (E.D.Pa. 1979) (denying motion after discovery was completed). Accordingly, the plaintiff's Motion for Leave to File Amended Complaint is denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 19th day of November, 1996, upon consideration of the Plaintiff's Motion for Leave to File Amended Complaint and the Defendant's Answer thereto, IT IS HEREBY ORDERED that Plaintiff's Motion is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.