

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

HYPERPHRASE TECHNOLOGIES, LLC
and HYPERPHRASE INC.

Plaintiffs,

OPINION AND ORDER

v.

02-C-0647-C

MICROSOFT CORPORATION,

Defendant.

This is a civil suit in which plaintiffs are contending that defendant infringed several of their patents relating to software technology. Defendant has moved for summary judgment, contending that this court can decide as a matter of law that there is no infringement and that plaintiffs' patents are invalid. Now, defendant has filed a new motion, seeking leave to amend its pleadings to include the additional affirmative defense of inequitable conduct. Specifically, defendant alleges that the inventor of the patents at issue failed to credit others' contributions to the inventions.

Defendant's motion will be denied. The deadline for amending the pleadings was April 15, 2003. See Preliminary Pretrial Conference Order, dkt. #10, at 2. Defendant did

not file its new motion for leave to amend until August 11, 2003, four months after the deadline in the scheduling order, two weeks after briefing was completed on defendant's motion for summary judgment and less than two months before this case is scheduled for trial.

Defendant asks that its tardiness be excused because it could not have discovered the information earlier. However, defendant has not shown that plaintiffs prevented it from obtaining the information. Instead, it makes a conclusory assertion that plaintiffs should have provided the necessary documents in response to an interrogatory request without explaining how plaintiffs were nonresponsive to the request or why it thinks that the request covered the missing documents (or even when defendant made the request). Moreover, if defendant believed that plaintiffs were withholding important information, the appropriate response would have been to seek an extension of the deadline before it expired or file a motion to compel. Defendant did neither of those things.

Finally, defendant admits that determining the existence of inequitable conduct is a fact-intensive question, that it does not yet have the evidence needed to prove its defense and that it will need to conduct additional discovery. Thus, at this point, defendant's new argument is still speculative. Further, defendant's conclusory assertion that plaintiffs "need not take any additional discovery" on this issue is unpersuasive. The cut-off for discovery is September 5, 2003. Given the uncertain nature of the defense and the fact that trial is

scheduled to begin on October 6, 2003, I do not believe that extending the deadline for discovery is appropriate.

In short, because defendant has not shown good cause for amending its pleadings at this late date or demonstrated that plaintiffs will not be unfairly prejudiced, defendant's motion for leave to amend its answer, affirmative defenses and counterclaims will be denied.

ORDER

IT IS ORDERED that defendant Microsoft Corporation's motion for leave to amend its answer, affirmative defenses and counterclaims is DENIED.

Entered this 2nd day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge