

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

ULTRATEC, INC. and CAPTEL, INC.,

Plaintiffs,

v.

SORENSEN COMMUNICATIONS, INC.
and CAPTIONCALL, LLC,

Defendants.

OPINION AND ORDER

13-cv-346-bbc

In this civil action, plaintiffs Ultratec, Inc. and CapTel, Inc. contend that defendants Sorenson Communications, Inc. and CaptionCall, LLC have infringed eight of plaintiffs' patents, and defendants have counterclaimed that plaintiffs infringe one of defendants' patents. Now before the court is plaintiffs' motion for leave to file a second amended complaint in order to add allegations of infringement for two patents (U.S. Patent Nos. 6,567,503 and 7,660,398) and 14 claims. Dkt. #49.

Plaintiffs filed this motion on November 15, 2013, two-and-a-half months after the deadline to amend pleadings, August 30, 2013. When plaintiffs file a motion to amend their complaint after the deadline in the court's scheduling order, the court considers (1) whether plaintiffs have shown "good cause" to amend the scheduling order, Fed. R. Civ. P. 16(4)(b) and (2) whether justice requires amendment of the complaint, Fed. R. Civ. P. 15(a)(2). Alioto v. Town of Lisbon, 651 F.3d 715, 719 (7th Cir. 2011). "In making a Rule 16(b)

good-cause determination, the primary consideration for district courts is the diligence of the party seeking amendment.” Id. Diligence is determined by considering whether the party seeking amendment has delayed filing its motion to amend and, if so, whether it had good reason for the delay. Id.

Plaintiffs say that the reason for their delay is that defendants did not produce the documents necessary to state these new claims until November 5, 2013, ten days prior to their filing this motion. Plaintiffs served their requests for documents on July 8, 2013. Defendants responded with objections on August 8, 2013 and produced a set of documents on September 5, 2013, with further productions on October 16, 2013 and November 5, 2013.

When, as is the case here, the deadline for amendments to pleadings was so close to the deadline for responses to discovery, plaintiffs had the obligation to act quickly in response to allegedly delinquent discovery. Rather than arguing with defendants over the objections for nearly a month and ultimately waiting until after the amendments deadline to file their motion to amend, the proper response would have been for plaintiffs to file a motion to compel discovery as soon as they believed defendants were unresponsive. Extreme Networks, Inc. v. Enterasys Networks, Inc., 3:07-cv-00229-bbc, 2007 WL 5448209 (W.D. Wis. Dec. 31, 2007) (rather than filing an untimely motion to amend, “[i]f plaintiff was not getting documents necessary to develop its case, the appropriate response was a motion to compel, which it never filed.”).

Furthermore, plaintiffs do not explain their delay in filing their motion for two

months after defendants' production on September 5, 2013. It is clear from the materials submitted by both parties that the vast majority of citations for plaintiffs' new claims rely on documents produced on September 5, 2013; plaintiffs have not explained why the documents in this production were insufficient for filing an amended complaint that would satisfy federal pleading standards. They say that documents produced in October provided more details and a basis for two out of the many "accused services" listed in their claims, but a claim may be pleaded before plaintiff has every detail that forms the basis for that claim. That is what discovery is meant to provide. Fed. R. Civ. P. 11 ("By presenting to the court a pleading, . . . an attorney . . . certifies that . . . the factual contentions have evidentiary support or, if specifically so identified, *will likely have* evidentiary support *after . . . discovery.*") (emphasis added). Therefore, plaintiffs have not shown that they acted with diligence.

Plaintiffs' motion fails under the second consideration as well: it is not clear that justice requires amendment of their complaint. Fed. R. Civ. P. 15(a)(2). Amending pleadings at this stage of the proceeding would cause undue delay and unfair prejudice to defendants. Feldman v. American Memorial Life Insurance Co., 196 F.3d 783, 793 (7th Cir. 1999) ("[L]eave to amend is 'inappropriate where there is undue delay . . . [and] undue prejudice to the opposing party by virtue of allowance of the amendment' [among other things] . . .") (quoting Perrian v. O'Grady, 958 F.2d 192, 194 (7th Cir.1992)). The two-month delay in filing the motion after defendants' September 5 document production is not insignificant in this court. Parties cannot expect that the court can drop everything else and give attention to their motion for a tardy amendment. The late filing placed defendants at a disadvantage

in preparing to meet the deadlines for expert reports and summary judgment motions. Sides v. City of Champaign, 496 F.3d 820, 825 (7th Cir. 2007) (affirming district court's decision to deny leave to amend complaint to plaintiff who filed motion before deadline but who had learned facts necessary for motion months earlier because defendant would have faced undue prejudice to prepare his defense before court deadlines).

I conclude that because plaintiffs could have brought their motion sooner, they have not acted with the requisite diligence and their delay would cause unfair prejudice to defendants if their motion were granted.

ORDER

IT IS ORDERED that the motion to amend the complaint, dkt. #42, filed by plaintiffs Ultratec, Inc. and CapTel, Inc., is DENIED.

Entered this 31st day of January, 2014.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge