

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GOGOCAST, INC.,	:	
Plaintiff,	:	
	:	
v.	:	
	:	
LG ELECTRONICS U.S.A., INC.,	:	
LG ELECTRONICS, INC. and	:	
AVNET, INC.,	:	
Defendants.	:	
	:	C.A. No. 12-524ML
AVNET, INC.,	:	
Counterclaim-Plaintiff,	:	
	:	
v.	:	
	:	
GOGOCAST, INC.,	:	
Counterclaim-Defendant.	:	

MEMORANDUM AND ORDER

Well after the close of fact discovery, Plaintiff/Counterclaim-Defendant GoGoCast, Inc., (“GoGoCast”) seeks to delay and complicate this simple suit to collect an invoice through its Motion for Leave to File Third-Party Complaint (ECF No. 22). Disingenuously claiming surprise to justify its delay, GoGoCast contends that its proposed third-party complaint against NEC Display Solutions of America, Inc., NEC Corporation of America and NEC Corporation (collectively “NEC”) should be permitted pursuant to Rule 14(a) of the Federal Rules of Civil Procedure because any liability that this Court may assess against it arising from the counterclaim of Avnet, Inc., (“Avnet”) would almost certainly result in NEC’s liability to GoGoCast to the same extent. This motion has been referred to me for determination. For the reasons that follow, it is denied.

I. BACKGROUND

This litigation was initiated by GoGoCast's complaint against Avnet, as well as LG Electronics U.S.A., Inc., and LG Electronics, Inc. (collectively, "LG"). The complaint asserted claims based upon products manufactured by LG and sold by Avnet. On September 14, 2012, Avnet answered with a counterclaim asserting that GoGoCast had failed to pay Purchase Order No. 2053 in the amount of \$255,063 for goods delivered by Avnet and accepted by GoGoCast. The counterclaim emphasizes that it relates to goods different from those referenced in GoGoCast's complaint: "The Goods are separate and apart from the 'Equipment' or other products referenced by GoGoCast in its Complaint." ECF No. 8, at 8 ¶ 5. GoGoCast answered the counterclaim, denying Avnet's averments and alleging, *inter alia*, as affirmative defenses that the invoice had been paid and that Avnet's breach of express and implied warranties should either bar or diminish its ability to collect.

A month later, on November 1, 2012, GoGoCast, Avnet and LG appeared for the Rule 16 conference. As required by the Local Rules of this Court, DRI LR Cv 16(b), Avnet filed a detailed Statement of Claims, clearly setting out that it purchases and resells monitors and media players manufactured not only by LG, but also by NEC, the former being the subject of GoGoCast's complaint, while the latter the subject of Avnet's counterclaim. The Statement provides a short but complete description of Avnet's claim arising from the allegedly unpaid invoice. Immediately following the Rule 16 conference, the Pretrial Scheduling Order was entered, setting September 20, 2013, for the close of fact discovery and December 13, 2013, for the filing of dispositive motions. ECF No. 17.

Following the Rule 16 conference, the parties focused both on discovery and on the possibility of settlement. In June 2013, Avnet propounded discovery focused on developing

information pertinent to its counterclaim; however, GoGoCast's attention was elsewhere – during the fact discovery period it propounded no discovery regarding Avnet's counterclaim.

Ultimately, the settlement negotiations concluded with the dismissal with prejudice of all of GoGoCast's claims against both LG and Avnet, "including all claims that were brought, or could have been brought by the parties." ECF No. 19. After fact discovery closed on September 20, 2013, the dismissal stipulation was affirmed by a text order entered on October 8, 2013, which makes clear that Avnet's counterclaim against GoGoCast for payment of its invoice for NEC products is all that remains in the case. Two weeks later, GoGoCast filed this motion, seeking to bring NEC into the case as a third-party defendant.

Avnet's counterclaim against GoGoCast is streamlined and simple. It alleges merely that Avnet is a distributor of monitors and media players, that it sold and delivered goods manufactured by NEC to GoGoCast in August and September 2011, which were accepted by GoGoCast, that Avnet billed GoGoCast by Purchase Order No. 2053 and GoGoCast has not paid. Avnet seeks to recover the amount of the invoice (\$255,063), with interest and costs, and nothing more. Fact discovery has been closed since September 20, 2013, so that this simple claim is ripe for the filing of a motion for summary judgment, due according to the Pretrial Scheduling Order on December 13, 2013. ECF No. 17. If the Court finds factual issues that preclude summary judgment, pretrial memoranda are due within thirty days after decision on the dispositive motion. Id. Trial will follow soon after.

GoGoCast's proposed third-party complaint against NEC is totally different in scope. It is based on the business relationship between GoGoCast and NEC and alleges that NEC induced GoGoCast to buy NEC equipment and software through promises, representations and warranties regarding fitness and performance capabilities. It claims damages for breach of express and

implied warranties, acting in bad faith, and for the making of false representations and promises, including loss of the money paid for the non-functional equipment, the costs of installation of the equipment, additional amounts spent to address the operational failure of the equipment and lost profits, including damages to business reputation. In all, the proposed third-party complaint seeks a total of more than \$2 million in damages.

II. ANALYSIS

Rule 14 permits a defending party like GoGoCast to bring a nonparty into the case, which “is or may be liable to [the defending party] for all or part of the claim against it.” Fed R. Civ. P. 14(a)(1). The purpose of the Rule is to avoid the delay and duplication of litigation caused by forcing a defendant to bring its claim for contribution or indemnification in a subsequent separate action. 6 Wright & Miller, Federal Practice & Procedure § 1442, at 339-40 (3d ed. 2010). The Rule contemplates that a party like GoGoCast, originally aligned as plaintiff, but also defending a counterclaim, may implead a third-party defendant for contribution or indemnification for some or all of the damages sought by the counterclaim. Fed. R. Civ. P. 14(b).

Rule 14(a) allows the filing of a third-party complaint as of right any time up to fourteen days after serving the original answer. After that, the decision whether to allow the claim lies within the sound discretion of the trial court. Colon v. Blades, 268 F.R.D. 143, 145 (D.P.R. 2010) (citing Zeus Projects Ltd. v. Perez y Cia. de P.R., Inc., 187 F.R.D. 23, 33 (D.P.R. 1999)).

In exercising its discretion, this Court should consider the following factors:

- (1) whether the third-party claim would prejudice the plaintiff, (2) the risk of unduly complicating the issues or unnecessarily delaying the resolution of the controversy, (3) the timeliness of the motion to implead, (4) the merit of the third-party claim, and (5) any additional expenses the claim may impose on the parties.

Id.; see Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 393 (1st Cir. 1999) (court “should allow impleader on any colorable claim of derivative liability that will not unduly delay or otherwise prejudice the ongoing proceedings”). Importantly, a motion to bring in a third party may be denied when the delay in attempting to implead the third-party defendant amounts to laches, especially when the delay prejudices the parties or would delay the trial or when the putative third-party plaintiff cannot reasonably explain the delay. Colon, 187 F.R.D. at 145; 6 Federal Practice & Procedure § 1454, at 498-501.

GoGoCast’s proposed third-party complaint stumbles at the threshold inquiry whether it actually seeks the sort of derivative or dependent relief that Rule 14 contemplates. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978) (“A third-party complaint depends at least in part upon the resolution of the primary lawsuit . . . Its relation to the original complaint is thus not mere factual similarity but logical dependence.”). The burden of establishing that the third-party complaint is proper under Rule 14(a) rests squarely on GoGoCast. Lessard v. Tyco Elecs. Corp., C.A. No. 09-112S, 2009 WL 3319784, at *3 (D.R.I. Oct. 13, 2009). In performing this analysis, the Court should construe the third-party complaint against the Rule 12(b)(6) plausibility standard. Id.

Here, the pleadings are oblique at best – beyond GoGoCast’s conclusory statement in its argument to the effect that NEC’s liability to it is at least partially¹ dependent on GoGoCast’s liability to Avnet, ECF No. 22, at 6 ¶ 19, the pleading itself fails to shed enough light to permit the Court to make an informed judgment as to the how the third-party complaint against NEC seeks to recover the sum that Avnet sued for in its counterclaim. Zurich Am. Ins. v. Lord Elec. Co. of P.R., 828 F. Supp. 2d 462, 468-69 (D.P.R. 2011) (third-party plaintiff’s claims must

¹ GoGoCast’s decision to include more claims in its third-party complaint, so that it seeks a far greater recovery from NEC than Avnet seeks from it, is permissible under Rule 14(a). Lehman, 166 F.3d at 393-94.

demonstrably rest on secondary or derivative liability). While the Court can speculate that a derivative claim may be present from the assertion in the NEC third-party complaint that GoGoCast paid NEC for certain goods, which may be those for which Avnet seeks payment in its counterclaim, that is not stated in the pleading. See ECF No. 22-1 ¶ 28. The Court can also speculate that GoGoCast might be claiming a right to contribution or indemnification from NEC arising from a breach of warranty claim that is dependent on GoGoCast's liability to Avnet for the full price. In all, it is a close call whether this proposed pleading is the proper subject of a third-party complaint under Rule 14(a). Compare Lehman, 166 F.3d at 394-95 (as long as third-party action falls within general contours limned by Rule 14(a) and will not cause unfair prejudice, court should allow it), with Venuti v. Riordan, 702 F.2d 6, 9 (1st Cir. 1983) (where defendant did not make clear precisely how it qualified for indemnity by the state, within discretion of district court to deny Rule 14(a) motion for joinder), and Lessard, 2009 WL 3319784, at *5 (when pleading does not definitively lead to conclusion that claims trigger indemnity, motion to dismiss third-party complaint denied without prejudice to challenge on more fully-developed record).

There is no need to grapple with this threshold question because GoGoCast's proposed third-party complaint fails when this Court considers its timing – delayed without a credible explanation until after the close of fact discovery – and the prejudicial impact it would have on Avnet's counterclaim. See Riccitelli v. Water Pik Techs., Inc., 203 F.R.D. 62, 64-66 (D.N.H. 2001) (motion to file third-party complaint denied when it would cause undue delay of trial scheduled for four months later and raises substantial new claims that would need significant time for discovery by contrast with plaintiff's simple negligence claim).

GoGoCast's attempt to massage history so as to colorably claim that it somehow was not on notice of the nature of Avnet's claim simply does not work. Avnet could not have been clearer in both its counterclaim and in its Rule 16 Statement. Further, Avnet has not slept on its rights; it initiated its own discovery well prior to the fact discovery close and, consistent with the Local Rules and this Court's orders, has virtually completed that discovery. GoGoCast has propounded no discovery – it obviously assumed that Avnet's counterclaim would be settled and therefore did nothing about it. With discovery closed and Avnet's simple claim to collect its invoice on the brink of final determination, GoGoCast seeks to start this case over with new claims against a new defendant that vastly exceed Avnet's counterclaim in scope. Riccitelli, 203 F.R.D. at 65 (when “third-party claims would prejudice the plaintiff by transforming a straightforward case into a complicated and confusing one,” motion should be denied). GoGoCast's delay amounts to laches and inflicts the precise prejudice on Avnet that justifies the denial of a Rule 14(a) motion. Allowing this third-party complaint would delay resolution of this case and impose additional and unnecessary expenses on the parties at this late stage of the proceedings. Colon, 268 F.R.D. at 146.

III. CONCLUSION

For all of the foregoing reasons, the Motion of Plaintiff/Counterclaim-Defendant GoGoCast, Inc., for Leave to File Third-Party Complaint (ECF No. 22) is denied.

So ordered.

ENTER:

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
November 27, 2013