UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re:	:	Chapter 11
TELIGENT SERVICES, INC,	:	Case No. 01-12974 (SMB)
Debtor.	:	
SAVAGE & ASSOCIATES, P.C. as the Unsecured Claim Estate Plaintiff for and on behalf of TELIGENT, INC., et al.,	:	
Plaintiff,	:	
-against-	:	Adv. Pro. No. 03-03378 (ALG)
WILLIAMS COMMUNICATIONS,	:	
Defendant.	:	

OPINION AND ORDER DENYING MOTION FOR RECONSIDERATION

ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE

In a Memorandum of Opinion dated May 13, 2005 (the "Decision"), the Court granted the motion to dismiss of WilTel Communications LLC ("WilTel") and denied the Plaintiff leave to amend the complaint. The Plaintiff has timely moved for reconsideration.

Motions for reargument or reconsideration require the movant to show "that the Court overlooked controlling decisions or factual matters 'that might materially have influenced its earlier decision.'" *Nat'l Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press*, 990 F. Supp. 245, 254 (S.D.N.Y. 1997) (quoting *Anglo-American Ins. Group, P.L.C. v. CalFed Inc.*, 940 F. Supp. 554, 557 (S.D.N.Y. 1996)); *In re Jamesway Corp.*, 203 B.R. 543, 546 (Bankr. S.D.N.Y. 1996). In the alternative, the movant must

"demonstrate the need to correct a clear error or prevent manifest injustice." *Sanofi-Synthelabo v. Apotex, Inc.*, 363 F. Supp. 2d 592, 594 (S.D.N.Y. 2005) (citing *Griffin Indus., Inc. v. Petrojam, Ltd.*, 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999)).

The rule permitting reargument is "narrowly construed and strictly applied in order to avoid repetitive arguments already considered by the Court." *Winkler v. Metropolitan Life Ins.*, 340 F. Supp. 2d 411, 413 (S.D.N.Y. 2004); *Griffin Indus., Inc.*, 72 F. Supp. 2d at 368; *In re Best Payphones, Inc.*, 2003 WL 1089525, at *2 (Bankr. S.D.N.Y. 2003). Movants are not permitted to present new theories or to advance new facts. *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998); *Griffin Indus., Inc.*, 72 F. Supp. 2d at 368. A motion for reconsideration is "limited to the record that was before the Court on the original motion." *Periera v. Aetna Cas. & Sur. Co. (In re Payroll Express Corp.)*, 216 B.R. 713, 716 (S.D.N.Y. 1997) (internal citations omitted).

The Plaintiff seeks reconsideration of that portion of the Decision holding that the proposed amended complaint cannot be deemed to "relate back" to the date of the original complaint pursuant to Fed. R. Civ. P. 15(c). Rule 15(c) allows an amended pleading to relate back to the date of the original pleading if the movant can show that (1) both claims arose out of the same transaction or occurrence; (2) the new party received adequate notice of the plaintiff's claims within the time limits prescribed by Rule 4(m) and will not be prejudiced by the amendment; (3) the new party knew or should have known that but for a mistake concerning his identity, the new party would have been named in the earlier, timely pleading; and (4) the second and third factors must be satisfied within the prescribed limitations period. Decision, 324 B.R. 467, 477, citing *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986).

In support of her Motion, the Plaintiff first argues that the Court improperly held that Rule 15(c) requires that the defendant receive actual notice of the complaint, rather than "such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits," as required by Rule 15(c)(3)(A).

The Court did not, as the Plaintiff asserts, use an "actual notice" standard. (Mot. at 4.) Adequate notice, as required by Rule 15(c)(2), does not require service of the complaint upon the defendant. It requires that "the new party must have received, within the period for effective service provided by Rule 4(m), *such notice of the action that it will not be prejudiced in maintaining its defense*." Decision, 324 B.R. at 478 (emphasis added). Clearly, mailing a copy of the complaint to WilTel or its counsel, with whom Plaintiff was in contact, would have been simple to accomplish and would have been sufficient to satisfy the burden, as the Court indicates in the Decision. However, it was not stated that this would have been the *exclusive* method of satisfying the requirement of adequate notice. Decision, 324 B.R. at 475. The Court cited several cases in the Decision that illustrate that informal notice – received from the plaintiff or other means – would have been sufficient as a means of providing WilTel with adequate notice of the complaint. Decision, 324 B.R. at 475, 478, citing *Blaskiewicz v. County of Suffolk*, 29 F. Supp. 2d 134, 138-39 (E.D.N.Y. 1998); *Lockwood v. City of Phila.*, 205 F.R.D. 448, 451 (E.D. Pa. 2002); *In re Integrated Res. Real Estate Ltd. P'ships Sec. Litig.*, 815 F. Supp. 620, 647 (S.D.N.Y. 1993).

Plaintiff asserts in its Motion, as it did in its earlier papers, that WilTel had sufficient informal notice of the complaint through conversations with the Trustee and through WilTel's knowledge of the adversary proceeding filed against NextiraOne, so as

to satisfy Rule 15(c)(2). As the Decision stated, the purpose of the notice requirement is to make the new party aware that it is the proper defendant in the action so that it may "anticipate and therefore prepare for his role as a defendant." Decision, 324 B.R. at 478, citing *In re Integrated Res. Real Estate Ltd. P'ships Sec. Litig.*, 815 F. Supp. 620, 647 (S.D.N.Y. 1993). Mere knowledge of the existence of a complaint that does not put the defendant on notice that it is a defendant is not sufficient. *Id.* at 648. Under the circumstances relevant to this preference complaint, which relate to very specific transfers during a specific, limited period of time, WilTel's counsel's knowledge of the possibility that there were unspecified transfers that might be challenged did not give it adequate notice of an action so that it might "anticipate and prepare" for its role as a defendant in a preference suit. That is especially true where whatever notice counsel had was followed by 13 months of silence.

Next, the Plaintiff asserts that WilTel was not prejudiced by the 13 months' delay in service, as it had every opportunity to preserve its evidence. (Mot. at 9.) As stated in the Decision, the record contains unrebutted evidence that WilTel suffered a 13-month delay in service and "has credibly shown that prior to and during the delay in service, several employees who worked on the transaction between Teligent and WilTel left the company, and that the loss of such personnel will likely impede WilTel's ability to defend the adversary proceeding." Decision, 324 B.R. at 474. The Plaintiff does not negate this, nor does she provide any overlooked legal proposition or fact that would cause the Court to reevaluate its assessment that WilTel suffered prejudice by virtue of a delay that the Plaintiff has never adequately explained. *Anglo-American Ins. Group, P.L.C.*, 940 F. Supp. at 557.

For the reasons stated above, the Plaintiff's motion is denied.

IT IS SO ORDERED.

Dated: New York, New York
July 18, 2005

/s/ Allan L. Gropper
UNITED STATES BANKRUPTCY JUDGE