

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHRISTINE VARAD,)	
)	
Plaintiff,)	
v.)	CIVIL ACTION
)	NO. 06-11370-MLW
REED ELSEVIER INCORPORATED,)	
d/b/a/ Lexis Nexis Corporation,)	
Lexis Nexis Accurint)	
)	
Defendant.)	

**MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT’S MOTION FOR SUBSTITUTION
AND PLAINTIFF’S MOTION TO AMEND**

April 4, 2007

DEIN, U.S.M.J.

I. INTRODUCTION

This matter is presently before the court on defendant’s “Motion for Substitution of Seisint, Inc. for Defendant Reed Elsevier Inc. and to Dismiss the Complaint Against Reed Elsevier Inc.” (Docket No. 4). By this motion, Reed Elsevier Inc. (“Reed”) is requesting that it be dropped as a party and that Seisint, Inc. (“Seisint”) be substituted in its place. In support of its motion, Reed asserts that it is simply the parent company of Seisint and that it is not the proper entity to defend this suit. While Reed may be correct, plaintiff strenuously objects to the substitution and has elected to proceed against Reed. Therefore, and for the reasons set forth below, the motion to substitute is DENIED.

Also before the court is plaintiff's "Motion To Amend Complaint Pursuant To Fed. R. Civ. P. 15." (Docket No. 33). By this motion, the plaintiff, Christine Varad ("Varad"), is seeking to change the references to the d/b/a used by Reed. Since this court finds that Varad is not altering the substance of the complaint, and the defendant will have the opportunity to respond to the new allegations regarding the d/b/a's allegedly used by Reed, the plaintiff's motion is ALLOWED.

II. STATEMENT OF FACTS¹

On August 8, 2006, Varad filed this action against Reed alleging unfair and deceptive business practices based on alleged inaccuracies in a background check. (Compl. (Docket No. 1) at 2, ¶ 1). In her complaint, Varad challenges actions undertaken in the name of "Lexis Nexis" or some variation thereof. By the motion to substitute, Reed contends that it was not properly named in this action, and that Seisint undertook the conduct about which Varad is complaining.

Specifically, in her complaint Varad alleges that on April 17, 2006, she requested a complete copy of her file that Lexis Nexis Accurint ("Accurint") had disseminated to Gall and Gall Company, among others. (Compl. at 2, ¶ 2). She requested the file in order to correct allegedly false information that appeared in a background check report prepared by Gall and Gall for her employer. (Id. at 2, ¶¶ 2, 3). Gall and Gall had named Accurint as the source of the allegedly false information. (Id. at 2, ¶ 4). According to the

¹ For the purposes of this motion only, the facts alleged by Varad in her complaint are accepted as true.

complaint, Accurint failed to provide access to the file to Varad on the grounds that Accurint was not a reporting agency, and had no obligation to do so. (Id. at 3, ¶ 7). Varad contends that by refusing to provide her with the file she requested, Accurint negligently, willfully and knowingly violated the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 et seq., and Mass. Gen. Laws ch. 93, §§ 50-62. (Id. at 2-3, ¶¶ 1-7a). She claims that she suffered injuries, including defamation, loss of employment and professional licensing opportunities, and severe financial loss. (Id. at 3, ¶ 12).

On June 3, 2006, the plaintiff send a demand letter pursuant to Mass. Gen. Laws ch. 93A to the “Operations Manager, Lexis Nexis Accurint” at an address in Boca Raton, Florida. (Id. at 2, ¶ 1). A response was apparently sent on June 20, 2006 by John M. Byrne (“Byrne”). Therein, Byrne is identified as “Director and Senior Corporate Counsel,” with no reference to a specific company. (Id. at attached Byrne Letter). The letter is written on “Lexis Nexis” letterhead, and Byrne’s email address is shown as being located at “lexisnexis.com.” (Id.). There also is a street address in Boca Raton, Florida, which is the same address as the one used in the plaintiff’s 93A demand letter. (Id.).

On October 10, 2006, Reed filed the instant motion to substitute, alleging that Varad had sued the wrong entity. Reed argues that the conduct alleged in the complaint pertains to a non-party, Seisint, Inc (“Seisint”), and not Reed. In support of its motion, Reed submitted an Affidavit from Byrne (“Byrne Aff.” (Docket No. 6)). Therein, Byrne is identified as the Director and Senior Corporate Counsel for Seisint. (Byrne Aff. ¶ 1). He asserts Seisint owns “Accurint,” a database product, and further that although Reed

has owned Seisint since September 2004, the two companies remain separate legal entities. (Id. ¶¶ 3-6). He contends that all of his correspondence with Varad was sent on behalf of Seisint, and that Reed has had no communication with Varad regarding her allegations. (Id. ¶¶ 7, 8). Furthermore, according to Byrne, the Boca Raton address used by the parties was that of Seisint. (Id.). Based on this affidavit, Reed asserts that Seisint is the proper defendant and that the case against Reed should be dismissed. Reed's counsel has been authorized to accept service on behalf of Seisint.

In her opposition to Reed's motion, Varad claims that she did not name the wrong party. She contends that on June 20, 2006, Byrne responded to her initial demand letter on stationary bearing the Lexis Nexis trademark, which is a federal trademark exclusively registered to Reed. (Pl.'s Br. (Docket No. 9) at 2). She further contends that in all written and oral communications, "Lexis Nexis" and "Lexis Nexis Accurint" were identified as the responding party, and that Seisint was never mentioned. (Id. at 2-3). Varad claims that Byrne's failure to reference Seisint in his response to her 93A demand letter is a binding admission that "Lexis Nexis, Lexis Nexis Accurint" was the proper party. (Id. at 3).

In its Reply, Reed submitted evidence that "Accurint" is a product owned by "Seisint, Inc." and is a registered trademark of Seisint, Inc. (Def. Reply (Docket No. 16) at 1). Thus, Reed argues, Seisint is the proper defendant. Nevertheless, at oral argument, Varad continued to assert that she wanted to pursue her claims against Reed.

On March 5, 2007, Varad filed a Rule 15 Motion to Amend Complaint. (Docket No. 33). Therein, she is seeking to change Reed's d/b/a from "Lexis Nexis Corporation, Lexis Nexis Accurint" to d/b/a "LexisNexis, LexisNexis Risk & Information Analytics Group, Inc." Reed filed an opposition to this motion on March 20, 2007 (Docket No. 34). Reed contends that its d/b/a is irrelevant if, as it contends, Reed is not the proper defendant.

III. ANALYSIS

A. Reed's Motion to Substitute

Reed brought its motion to substitute pursuant to Fed. R. Civ. P. 21 ("Rule 21"), which states, in relevant part: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Rule 21, which concerns misjoinder or non-joinder of parties, is inapplicable in cases such as this one where a party is seeking to directly substitute one party for another party. Thus, it has been held that Rule 21 "provides for dropping from or adding a party to those already named as parties to the suit. In other words, the rule contemplates the retention of a party or parties after the other party or parties are dropped or before they are added. It is not a rule providing for substitution[.]" Schwartz v. Metro. Life Ins. Co. 2 F.R.D. 167, 168 (D. Mass. 1941). See also In re Hopkins, 4 B.R. 590, 592 (Bankr. D. Mass. 1980) ("Rule 21 was not adopted to give relief to a plaintiff who sues the wrong party, but to a plaintiff who sues too many parties, or not enough parties") (internal quotations omitted). In the instant case, the plaintiff has made it clear that she intended to

bring suit against Reed, and that she wants to pursue Reed and not Seisint. Since the plaintiff has declined the defendant's offer to substitute the party who has admitted engaging in the conduct about which the plaintiff is complaining, the plaintiff may proceed against the defendant she has chosen. Rule 21 is not the appropriate vehicle for dismissing the case against Reed on the merits.

Nor can Reed take advantage of Fed. R. Civ. P. 25 ("Rule 25"), which provides for the substitution of parties. Rule 25 limits substitutions to situations "where the proper parties have been joined and, because of death, incompetency, transfer of interest, and death or separation from office of public officers, another may be substituted." In re Hopkins, 4 B.R. at 592 (quoting Schwartz, 2 F.R.D. at 167). See also Massaro v. Vernitron Corp., 102 F.R.D. 210, 212 (D. Mass. 1984) ("The cases that allow for the substitution of those who become a real party in interest under Rule 25(c) involve situations where rights have been assigned by explicit agreement, or where a receiver was appointed who assumed control of the management and custody of a business and of pursuing and preserving all claims.") (internal citations omitted). Since Reed and Seisint are distinct corporations, it is not appropriate for this court to substitute one defendant for another against the plaintiff's wishes.

Finally, in a limited number of circumstances, Rule 21 may serve as a vehicle to substitute parties where Rule 25 does not apply and substitution would be appropriate "in the discretion of the court and in the interest of justice[.]" 7 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1686 (3d ed. 2007). Thus, substitution has

been allowed as “the wiser answer to the problem of expediting trials and avoiding the unnecessary delay and expense of requiring an action to be started anew where a substitution is desired though the subject matter of the actions remains identical.” Nat’l Maritime Union of Am. v. Curran, 87 F. Supp. 423, 426 (S.D.N.Y. 1949). Such circumstances may include situations where: (1) “the same person is the party both before and after substitution, but desires to change the capacity in which he is bringing the action[;]” (2) the United States government has “taken over an action” as the real party in interest; and (3) there has been “a mistake as to the person entitled to bring suit.” Id.

The relevant cases establish that if Varad had agreed to the substitution, Seisint could have been substituted for Reed under Rule 21 and the action continued “without the delay and expense of a new suit, which at long last [may] merely bring the parties to the point where they now are.” Hackner v. Guar. Trust Co. of NY, 117 F.2d 95, 98 (2d Cir. 1941), cert. denied, 313 U.S. 559, 61 S. Ct. 835, 85 L. Ed. 2d 1520 (1941). Nevertheless, since Varad wants to pursue her action against Reed, it is not for this court to select the appropriate defendant.² See Massaro, 102 F.R.D. at 212 (court declines to exercise discretion to substitute plaintiff).

² Nothing herein shall be deemed to reflect on the merits of Varad’s contention that Byrne was obligated to identify Seisint in the response pursuant to Mass. Gen. Laws ch. 93A, or that the failure to do so was in any way binding.

B. Varad's Motion to Amend

In her motion to amend, Varad seeks to amend her complaint to substitute Reed's d/b/a to "LexisNexis, LexisNexis Risk & Information Analytics Group, Inc." The substance of the amended complaint is identical to the original complaint, stating the same cause of action and grounds for relief. Since the action against Reed is proceeding, Varad may amend her allegations regarding the proper d/b/a of Reed.³ Reed will have the opportunity to respond to the amended complaint.

IV. CONCLUSION

For the reasons stated herein, Reed's "Motion for Substitution of Seisint, Inc. for Defendant Reed Elsevier, Inc. and to Dismiss the Complaint Against Reed Elsevier, Inc." (Docket No. 4) is DENIED. Varad's "Motion to Amend Complaint Pursuant to Fed. R. Civ. P. 15" (Docket No. 33) is ALLOWED.

/ s / Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge

³ Reed opposes Varad's Rule 15 motion only on the ground that the d/b/a name for Reed is irrelevant, given its contention that Reed is itself not the proper defendant. (Docket No. 34).