UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

TISSUE TECHNOLOGY LLC, PARTNERS CONCEPTS DEVELOPMENT, INC., OCONTO FALLS TISSUE, INC., and TISSUE PRODUCTS TECHNOLOGY CORP.,

Plaintiffs,

v.

TAK INVESTMENTS, LLC,

Defendant.

Case No. 14-C-1203

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND PLEADINGS

Defendant Tak Investments, LLC ("Tak Investments"), by and through its counsel, Godfrey & Kahn, S.C., submits the following memorandum in opposition to Plaintiffs' Motion for Leave to Amend Pleadings [ECF No. 43]. If the Court denies the Plaintiffs' motion, the case will end – finally.

INTRODUCTION

This is the third time and, procedurally, the second lawsuit in which Plaintiffs have sought to enforce a 2007 Final Business Terms Agreement against Tak Investments. Like it dismissed the first case, filed in 2012, this Court on December 2, 2016, granted summary judgment in favor of Tak Investments on Plaintiffs' contract claim, though it afforded Plaintiffs an opportunity to seek leave to amend their Complaint. (ECF No. 40.) Yet the Plaintiffs now would abuse the Court's invitation and, as well, its patience. They cannot invoke the federal rules to ignore the statute of limitations by using a handful of boilerplate pleading words to resurrect their case, twice dismissed on the merits. Moreover, they cannot recast their Complaint

to try to state a claim for breach of four different contracts, contracts that Plaintiffs themselves claim to have cancelled.

Instead of seeking to enforce the Final Business Terms Agreement, as they did in their original Complaint, Plaintiffs now seek to enforce the four promissory notes (the "Investment Notes") the Plaintiffs cancelled. In the alternative, Plaintiffs seek an award based upon unjust enrichment, despite the existence of the since-cancelled contracts between the parties. Finally, Plaintiffs are seeking leave to add Sharad Tak personally as a defendant in his individual capacity – something they have failed to do for nearly seven years.

Leave to amend generally should be freely granted when justice requires, but there are circumstances where discretion and justice should deny leave to amend a pleading, particularly where undue prejudice to the defendants would result or where the amendment would be futile. *See Gonzalez-Koeneke v. West*, 791 F.3d 801, 807 (7th Cir. 2015). Here, the Motion for Leave to Amend should be denied because Tak Investments would suffer undue prejudice because it would be subject to a claim that has far outrun the applicable statute of limitation. Further, the Amended Complaint is futile on a number of levels.

The Plaintiffs cannot breathe life into contract claims that have expired, nor can they seek a claim for unjust enrichment in light of the fact nothing in their pleadings calls into question the validity of the contracts they signed. The Amended Complaint asserts factual allegations directly contradicted by previous pleadings that recite the Plaintiffs' cancellation of the very notes they would now have the Court enforce. All of this should lead the Court to exercise its discretion and deny the Motion for Leave to Amend.

Although Plaintiffs failed entirely to address the matter in their principal brief, a court faced with a motion for leave to amend has two decisions to make. The first is whether or not to

grant the motion. There is a separate question, however: whether the proposed amended pleading relates back to the original complaint. The Plaintiffs ignore this key question. They seek to revive contract claims under the Investment Notes, signed on April 16, 2007, which have run from the applicable six-year statute of limitations. To be viable claims, Plaintiffs must convince this Court that the amendment in their proposed pleading relates back to the original Complaint, which was filed within the six-year period. They cannot do so.

Accordingly, Tak Investments respectfully requests that the Court deny the Plaintiffs' motion.

BACKGROUND

The Court is well-acquainted with this dispute. This case has its origin in a 2007 transaction between the OFTI Group, comprised of the Plaintiffs, entities controlled by Ronald Van Den Huevel, and Tak Investments, an entity affiliated with Sharad Tak. This transaction is memorialized in the Final Business Terms Agreement (Compl., Ex. 2).

Final Business Terms Agreement

On April 16, 2007, the OFTI Group and Tak Investments entered into a written agreement entitled "Final Business Terms Agreement." It defined the "Investment Notes" as "the four Notes equaling $16,400,000 executed in favor of [Tissue Products Technology Corporation]" by Tak Investments that same day. (Compl., Ex. 2 at 1.) The Agreement also provided:

> If such Investment Notes are deemed cancelled by the OFTI Group after the third anniversary of the date of the Investment Notes, the OFTI Group shall receive an undiluted 27% ownership interest of the highest class in [Tak] Investments and such ownership shall be above and beyond the ownership interest in item 2.K of this agreement….

(Compl., Ex. 2, ¶ 2(G)) This is the *sole* contractual provision under which Plaintiffs sought relief in their original Complaint's claim that Tak Investments had to transfer an ownership interest to the Plaintiffs. (Compl. ¶¶ 11, 17-21.)

The Prior Action

The Plaintiffs previously filed an action on December 12, 2012, claiming that on April 20, 2010, they notified Tak Investments that the Investment Notes were deemed cancelled.[1] As a result, Plaintiffs sought a 27 percent ownership interest in Tak Investments though the applicable term of the Final Business Terms Agreement. After concluding that a condition precedent to the obligation of Tak Investments to transfer the 27 percent interest had not been met – that is, that Plaintiffs did not actually possess all of the notes at the time they deemed them cancelled – the Court granted Tak Investments summary judgment and dismissed the case. (E.D. Wis., No. 12-CV-1305, ECF No. 37.)

The Present Action

Plaintiffs filed their latest action on September 30, 2014, seeking the same relief they sought in case 12-CV-1305 – specific performance based upon their claim to have been in possession of all the notes when the notes were deemed cancelled, August 15, 2014. A copy of the August 15, 2014 correspondence cancelling the notes was attached to the Complaint as Exhibit 3. That correspondence, a letter from Mr. Van Den Heuvel, advised the Defendant that pursuant to Paragraph G of the Final Business Terms Agreement, the Investment Notes "are hereby deemed cancelled by the OFTI Group."[2]

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[1] The Court may take judicial notice of the prior action, *Tissue Technology, LLC, v. Tak Investments, LLC*, No. 12-CV-1305 (E.D. Wis. filed Dec. 12, 2012). *See* Fed. R. Evid. 201(b); *Olson v. Bemis Co.,* 800 F.3d 296, 305 (7th Cir. 2015) (observing that "court records are among the most commonly noticed facts").

[2] The proposed Amended Complaint itself also asserts that the Plaintiffs notified Tak Investments of the fact the notes were cancelled. "On or about August 15, 2014, after the third anniversary of the date of the Investment Notes,

footnote continued on next page…

On December 2, 2016, the Court granted in part Tak Investments' motion for summary judgment. (ECF No. 40.) The Court concluded that the Final Business Terms Agreement did not require Tak Investments, a limited liability company that does not own any of its own membership units, to convey a 27 percent interest in itself to the Plaintiffs. (*Id.*) The Plaintiffs now seek leave to file an amended complaint. It is a complaint not merely "amended," however, but transformed and impermissibly so.

ARGUMENT

I. The Court Should Deny Leave to Amend.

The Court always has discretion to deny the motion for leave to amend where, as here, undue prejudice would result and, most importantly, the proposed amendment would be futile. *See Gonzalez-Koeneke*, 791 F.3d at 807 (district courts "have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile") (quoting *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008)). Given the deficiencies in Plaintiffs' proposed amended complaint, and its predecessors, the Court should deny the motion.

A. Undue Prejudice Would Result from Amendment.

In the first version of this lawsuit in 2012, more than four years ago, and in the Complaint in this action filed in 2014, and even in the proposed Amended Complaint, Plaintiffs maintain that they have deemed cancelled the four Investment Notes that matured in April of 2010. For the first time ever in these cases, and only in responding to Tak Investments' summary judgment motion, Plaintiffs requested that the Court award them damages amounting to the unpaid

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the OFTI Group notified [Tak] Investments and Sharad Tak that the Investment Notes were deemed cancelled." (ECF No. 43-1, ¶ 23.) The correspondence providing this notice is attached to the proposed Amended Complaint as Exhibit 3.

principal and interest on the cancelled Investment Notes. The proposed Amended Complaint seeks to assert what amounts to contract claims for breach of the four notes.

There is no dispute that the time in which Plaintiffs could have brought an action for breach of the Investment Notes has passed. Tak Investments executed the Investment Notes on April 16, 2007, and all four Investment Notes matured three years later, on April 16, 2010. Any claim against Tak Investments for breach resulting from failure to pay the notes would have accrued by April 17, 2010. Since this date is more than six years in the past, any claim for breach of contract relating to the notes is barred – outside the six-year statute of limitations for contract actions prescribed by Wis. Stat. § 893.43.

The proposed amendment would deprive Tak Investments of the repose provided by the statute of limitations, and the undue prejudice is plain. Whether the statute of limitations has run on a claim a plaintiff would assert in an amended pleading is an unavoidable consideration in determining whether a defendant would be prejudiced by the amendment. *See Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787 (7th Cir. 2004) (implying that running of statute of limitations could be relevant to prejudice analysis). The U.S. Court of Appeals has held that a district court does not abuse its discretion in denying leave to amend when the proposed amendment would be barred by a statute of limitations. *Mitchell v. Collagen Corp.*, 67 F.3d 1268, 1274 (7th Cir. 1995), *judgment vacated on other grounds*, 518 U.S. 1030 (1996). By definition, Tak Investments would face undue prejudice in having to defend claims for breach of the Investment Notes that fall outside of the statute of limitations.

This is particularly true for the proposed claim against Mr. Tak individually. He has *never* been a named defendant. Putting aside all of the reasons the Complaint cannot be amended against Tak Investments, it surely cannot be "amended" to now name a new party. The

same statute of limitations and rules of pleading that protect corporate defendants like Tak Investments protect individuals. Whatever Mr. Tak's connection to the transactions and documents at issue, the Plaintiffs have known it for nearly ten years. They did nothing.

B. The Proposed Amendment is Futile.

Beyond the undue prejudice to Tak Investments and Sharad Tak, the proposed Amended Complaint is futile. In determining whether permitting amendment would be futile, the Court initially will evaluate whether the proposed Amended Complaint fails to state a claim. *See Adams v. City of Indianapolis*, 742 F.3d 720, 734 (7th Cir. 2014). Here, the Amended Complaint offered by the Plaintiffs fails to state a claim for at least three different reasons.

First, Plaintiffs have pleaded themselves out of court by alleging that the very Investment Notes they claim Tak Investments and Sharad Tak have breached have been cancelled. Second, the proposed Amended Complaint's claim for unjust enrichment is futile because the Plaintiffs' own allegations fail to establish that the contracts themselves were invalid or unenforceable. Additionally, the claims advanced are barred by the applicable statute of limitations. Finally, the allegations in the proposed pleading as they relate to Sharad Tak attempt to impose extra-contractual duties upon him as well as contractual duties he did not undertake individually.

The Proposed Amendment is Directly Contradicted by the Complaint

Through Mr. Van Den Heuvel, Plaintiffs have twice notified Tak Investments that the four promissory notes upon which they would now found their claim were cancelled. The proposed Amended Complaint itself concedes that the Plaintiffs notified Tak Investments the notes were cancelled. "On or about August 15, 2014, after the third anniversary of the date of the Investment Notes, the OFTI Group notified Investments and Sharad Tak that the Investment Notes were deemed cancelled." (ECF No. 43-1, ¶ 23.) The correspondence providing this notice

is attached to the proposed Amended Complaint as Exhibit 3. In that correspondence, Mr. Van Den Heuvel stated: "Notice is hereby given, pursuant to paragraph G of the Final Business Terms Agreement, that the Investment Notes are hereby deemed cancelled by the OFTI Group." (ECF No. 43-1 at 18.)

The notice of cancellation amounts to a release, the effect of which discharges any obligation on the part of Tak Investments to perform any obligation owed pursuant to the notes. A release is a unilateral contract. *See Krenz v. Medical Protective Co.*, 57 Wis. 2d 387, 391, 204 N.W.2d 663 (1973). Plaintiffs' notice is a statement that Plaintiffs released Tak Investments from any liability pursuant to the Investment Notes. By these clear and unequivocal statements, Plaintiffs have waived any right to enforce the Investment Notes and should be barred from doing so.

Plaintiffs have pleaded themselves out of court by asserting both that they cancelled and released the proposed Defendants of any obligation pursuant to the Investment Notes (triggering, in their view, the 27 percent transfer obligation) and that the Defendants are in breach of those same Investment Notes. A party "may plead itself out of court by pleading facts that establish an impenetrable defense to its claims." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008) (citing *Massey v. Merrill Lynch & Co.*, 464 F.3d 642, 650 (7th Cir. 2006)). "A plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits." *Id*. (citation and internal quotation marks omitted). Any facts volunteered by a plaintiff in the complaint may be used to demonstrate that the plaintiff is not entitled to relief. *Id*. Here, Plaintiffs' own allegations that the Investment Notes are cancelled cannot be squared with their claim to enforce these same waived and released claims. The

inherent and irreconcilable contradiction at the heart of the proposed Amended Complaint makes the pleading futile for failure to state a claim.

The Claim for Unjust Enrichment is Futile Given the Contracts

In addition to the claim for breach of contract, the proposed Amended Complaint presents a claim of unjust enrichment. That claim, too, is legally incompatible with the contract claim. Unjust enrichment is not available given the fact nothing in the proposed pleading calls into question the validity of the contracts.

A claim for unjust enrichment has the following elements: (1) the conferral of a benefit (2) with the knowledge of the party benefitted and (3) under circumstances where it would be inequitable to permit that party to retain the benefit without payment. *United States ex rel. Roach Concrete, Inc. v. Veteran Pacific, JV*, 787 F. Supp. 2d 851, 858 (E.D. Wis. 2011) (applying Wisconsin law). Further, as this Court has observed, a claim for unjust enrichment only applies "where the services performed were not covered by the parties' contract, where the contract is invalid or where the contract is unenforceable." *Id.* (citing *Gorton v. Hostak, Henzl & Bichler*, 217 Wis. 2d 493, 510 n.13, 577 N.W.2d 617 (1998)).

While the Federal Rules of Civil Procedure permit pleading in the alternative, *see* Fed. R. Civ. P. 8(d)(2), a plaintiff may not incorporate allegations concerning the existence of a contract into a claim for unjust enrichment. *See Roach Concrete*, 787 F. Supp. 2d at 859. Where nothing in the complaint suggests any facts from which one could infer that the contract is invalid or unenforceable, unjust enrichment is not available. *Id*. As this Court has observed:

> Where a plaintiff asserts a breach of contract claim and fails to allege any facts from which it could at least be inferred that the contract on which that claim is based might be invalid, the plaintiff is precluded from pleading in the alternative claims that are legally incompatible with the contract claim. This is but an application of the rule that a plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits.

Id. (citing *Tamayo*, 526 F.3d at 1086) (internal quotation marks and brackets omitted).

Here, nothing in the proposed Amended Complaint – or any of its predecessors – calls into question the validity or enforceability of the contracts between the parties. Indeed, the pleading itself realleges and reincorporates all of the prior allegations concerning the contracts into the paragraphs containing the unjust enrichment claim. (ECF No. 43-1, ¶ 33) ("Plaintiffs reallege and reincorporate herein as if fully set forth [sic] all of the preceding allegations."). Under these circumstances, the unjust enrichment claim is legally incompatible with the contract claim and, therefore, futile.

The Proposed Amendment is Futile Given the Statute of Limitations

A third reason the Plaintiffs' proposed Amended Complaint is futile is the fact the Investment Notes contract claims are barred by the applicable statute of limitations. "A district court may properly deny a motion to amend as futile if the proposed amendment would be barred by the statute of limitations." *Rodriguez v. United States*, 286 F.3d 972, 980 (7th Cir. 2002) (citing *King v. One Unknown Fed. Corr. Officer*, 201 F.3d 910, 914 (7th Cir. 2000)). The Investment Notes all matured in early 2010. The proposed Amended Complaint was submitted with the Plaintiffs' motion nearly nine months beyond the six-year period in which Plaintiffs could have commenced an action for breach of the Investment Notes. Accordingly, the amendment sought by the Plaintiffs would be futile.

The Proposed Amendment is Futile as it Relates to Sharad Tak

In a scant three paragraphs, Plaintiffs attempt to explain that justice requires adding, for the first time, Sharad Tak as an individual defendant for a ten-year old transaction between corporate entities that has been the subject of multiple lawsuits. Plaintiffs ambiguously contend that Mr. Tak should be a party because Mr. Tak signed the Final Business Terms Agreement and

"has the duty to deliver" the 27 percent interest in Tak Investments, a duty to perform the contract "with care, skill, reasonable expedience and faithfulness," and because Mr. Tak "is responsible for ensuring the terms of the contract are met." (ECF No. 44 at 4-5.)

Mr. Tak signed the agreement for Tak Investments. He did not sign the contract in his individual capacity. Moreover, the "Maker" of each of the four notes is "Tak Investments, LLC," no one else. If the Plaintiffs' amendment proposal were accepted, every corporate officer (and counsel) who signed a corporate document in her corporate capacity would automatically be a defendant in litigation involving that document. That is not the law.

Plaintiffs' argument boils down to a claim that Mr. Tak has some extra-contractual duties that require him to be brought into this dispute and that he is essentially a guarantor of the performance of Tak Investments. But no such duties exist, and Mr. Tak did not execute any guaranty. Plaintiffs' putative claim against Mr. Tak is futile.

First, Plaintiffs cannot convert a contract claim – against Mr. Tak personally or Tak Investments – into a duty-based tort claim because there is no basis to allege Mr. Tak owed the Plaintiffs any independent duty. Wisconsin law does not recognize an inherent cause of action for negligent performance of a contract. *Non Typical, Inc. v. Transglobal Logistics Group, Inc.,* No. 10-C-1058, 2012 WL 1910076, at *3 (E.D. Wis. May 28, 2012).[3] Actions sounding in tort may only be asserted if there is a duty *independent* of the performance of the contract. *Id.* "Under this test, the existence of a contact is ignored when determining whether the alleged misconduct is actionable in tort." *Id*. (citing *McDonald v. Century 21 Real Estate Corp.*, 132 Wis. 2d 1, 6, 390 N.W.2d 68 (Ct. App. 1986); *Dvorak v. Pluswood Wisconsin, Inc.*, 121 Wis. 2d 218, 220, 358 N.W.2d 544 (Ct. App. 1984)). If there is no proof of an independent duty, a

[3] Pursuant to Civil L.R. 7(j)(2), a true and correct copy of this unreported decision is attached as **Exhibit 1**.

plaintiff is limited to claiming breach of contract. *Id.* No such duty exists here, so any attempt by the Plaintiffs to impute tort liability to Mr. Tak should fail.

Moreover, neither Mr. Tak nor any corporate officer has any sweeping personal responsibility of "ensuring the terms of the contract are met." Had Mr. Tak agreed to act as a guarantor of the performance of Tak Investments, he would have executed a guaranty. Plaintiffs do not allege that Mr. Tak is a guarantor, nor could they. Again, the implications of holding a corporate official potentially liable as an individual are staggering.

The fact that Mr. Tak signed the Final Business Terms Agreement does not mean he can be obligated to perform contractual duties strictly undertaken by Tak Investments, whether they arise pursuant to the Final Business Terms Agreement or the Investment Notes made by Tak Investments. The proposed Amended Complaint is futile in its effort to add Mr. Tak to this litigation.

II. If the Court Grants Leave to Amend the Complaint, the Allegations of the Amended Complaint Cannot Relate Back to the Original Complaint.

In its second summary judgment decision, the Court noted that "[i]t is conceivable" that the Plaintiffs' new breach of contract claim could "relate back" to the 2014 complaint and, in the absence of briefs on the issue, the Court merely "assumed" it might not have been necessary for the breach of contract claim to have been pled specifically in the first place. (ECF No. 40 at 7-8.) And that brings us squarely to the statute of limitations and Rule 15 issues now addressed here.

The Complaint did, indeed, conclude with the ritual request for "such other relief as the court deems just and proper." But so does virtually every other complaint, federal or state, ever filed. The phrase is the essence of boilerplate. It can be found in every form book. But it does

not forgive all sins. At least since the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), federal pleading has required more. So does due process. A plaintiff cannot pursue one party under one contract and one theory, fail twice to sustain its claims, and then use the federal rules to sue an additional party under a different contract (or set of contracts) under a theory irreconcilable with its first contract theory, not to mention the statute of limitations problems that triggers.

Surprisingly absent from the Plaintiffs' brief is any argument that the allegations concerning breach of the Investment Notes relate back to the original Complaint. The Seventh Circuit has emphasized that the question of whether an amended pleading relates back to an earlier pleading pursuant to Rule 15(c) is a separate question from whether to grant leave to amend in the first place. *Joseph v. Elan Motorsports Techs. Racing Corp.*, 638 F.3d 555, 558 (7th Cir. 2011).

The absence of any argument on this issue is perhaps attributable to the fact that the new lawsuit Plaintiffs would bring – to enforce the cancelled Investment Notes – is not bound by the same common core of facts and law that gave rise to Plaintiffs' claims pursuant to the Final Business Terms Agreement. How can one claim premised on the negation of another claim later in time (i.e., the cancellation of the Investment Notes) have the same factual core? To ask the question illustrates the implausibility of contending that the new claim for breach of the Investment Notes is of sufficient unity in time and type to relate back to the old claim for breach of the Final Business Terms Agreement.

Rule 15(c) provides the only framework for determining whether an amended complaint relates back:

> An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitation allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading;

Fed. R. Civ. P. 15(c).[4] "Rule 15(c) is built upon the premise that once notified of pending litigation over particular conduct or a certain transaction or occurrence, the defendant has been given all the notice required for purposes of the statute of limitations." *Marsh v. Coleman Co.,* 774 F. Supp. 608, 612 (D. Kan. 1991) (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n.3 (1984)).

Relation back is appropriate only when an amendment merely restates the same factual allegations of the original complaint and claims that those facts support an additional theory of recovery. *See Henderson v. Bolanda*, 253 F.3d 928, 931 (7th Cir. 2001) ("Generally, an amended complaint in which the plaintiff merely adds legal conclusions or changes the theory of recovery will relate back to the filing of the original complaint if 'the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading.'") (quoting 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1497, at 95 (2d ed. 1990)); *see also Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 379 (7th Cir. 1996) (relation back permitted "where an amended complaint asserts a new claim on the basis of the same core of facts, but involving a different substantive legal theory than that advanced in the original pleading."). Relation back cannot be used as a means to bootstrap time-barred claims onto viable actions where such claims are not

[4] Whether an amendment changing the name of a party relates back to the original complaint is addressed in Rule 15(c)(1)(C). This subsection requires that for the new party to be brought into a case through amendment, the claim must satisfy the requirements of Rule 15(c)(1)(B).

based on the same factual allegations. *In re Stavriotis*, 977 F.2d 1202, 1206 (7th Cir. 1992) (holding that since separate tax years imply separate tax claims, "a claim for 1982 taxes does not relate back to an original claim for 1981 and 1984 taxes").

Whether amendment is permitted requires reference to either Wisconsin's statute of limitations or Rule 15(c)(1)(B). *Hahn v. Walsh*, 762 F.3d 617, 635 n.37 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1419 (2015). The applicable Wisconsin statute provides in pertinent part that relation back is permitted "[i]f the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading…." Wis. Stat. § 802.09(3) (2015-16). The Wisconsin Supreme Court has observed that this statute is "very nearly identical" to Rule 15(c). *Tews v. NHI, LLC*, 2010 WI 137, ¶ 63, 330 Wis. 2d 389, 793 N.W.2d 860. Therefore, for the Court to find that the claims for breach of the Investment Notes relates back to the original Complaint's claim for specific performance, premised on the Final Business Terms Agreement, it must conclude that these claims arise from the same conduct, transaction, occurrence or event.

In *Mayle v. Felix*, the U.S. Supreme Court addressed the same "conduct, transaction, or occurrence" requirement. 545 U.S. 644, 656 (2005). The Court in *Mayle* explicitly rejected the expansive reading given those terms by the Seventh Circuit in federal habeas claims, where the Seventh Circuit allowed relation back of a claim so long as the new claim stemmed from the petitioner's trial, conviction, or sentence. *Id*. Instead, the Court held that the proper analysis requires consideration of whether the "claims added by amendment arise from the same core facts as the timely filed claims," and whether "the new claims depend upon events separate in 'both time and type' from the originally raised episodes." *Id*. at 657 (citation omitted). Thus, Rule 15(c)(1)(B) may relax the statute of limitations, but it "does not obliterate" it. *Id*. at 659.

"[H]ence relation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." *Id*.

Courts routinely find that an amended pleading does not relate back where the factual allegations for a new claim are missing from the original complaint. *See, e.g., Cunliffe v. Wright*, 51 F. Supp. 3d 721 (N.D. Ill. 2014) (newly-asserted claim of race discrimination by former employee did not relate back to original complaint's allegations concerning retaliation and violation of due process rights); *Illinois Tool Works, Inc. v. Foster Grant Co., Inc.*, 395 F. Supp. 234, 250-51 (N.D. Ill. 1974) (new claim for infringement of different patent on the same product already subject to a patent infringement complaint found not to relate back) (*aff'd*, 547 F.2d 1300 (7th Cir. 1976)).

In *Cleary v. Philip Morris Inc.*, the Seventh Circuit held that allegations against a tobacco manufacturer for deceptive marketing of additional brands of "low tar," "light" and "ultralight" cigarettes did not relate back to original complaint, which only made allegations concerning one brand of cigarette. 656 F.3d 511, 515-16 (7th Cir. 2011). The appellate court affirmed the district court's decision to deny the request to amend because nothing in the original complaint alerted the company to potential claims regarding its other brands:

> [T]he plaintiffs' original pleading did not mention other brands of cigarette products but only made allegations regarding Marlboro Lights. Expanding the class to include other "light" and "low tar" products would extend the potential liability to new class members (those who purchased or smoked brands other than Marlboro Lights), and it would involve new conduct and transactions (Philip Morris's marketing and sale of brands other than Marlboro Lights). The plaintiffs chose not to make allegations related to other cigarette brands in the original pleading. And based on this pleading, Philip Morris did not have notice that the case might encompass claims against other brands. The district court correctly found that the expanded claim did not arise out of the same transaction or occurrence, and it properly denied the plaintiffs' request to amend their claim.

Id.

Here, there is no common core of operative facts that bind together the claims Plaintiffs originally brought with the claims they would bring in their amended complaint. The events giving rise to the two claims are different in both time and type. Indeed, they rest on separate documents. The claim initially asserted by Plaintiffs for specific performance hinged upon the Final Business Terms Agreement and the notice being given to Tak Investments that the Investment Notes were cancelled. According to Plaintiffs, this would have required a transfer of an equity interest in Tak Investments to Plaintiffs if proper notice had been given sometime after three years from the date of the Final Business Terms Agreement. In contrast, the new claim Plaintiffs would assert for breach of the Investment Notes matured by the date the last payment was due in 2010.

To permit an amendment that includes a claim for breach of the Investment Notes, which the pleadings in this case have consistently alleged to be cancelled, would deprive Tak Investments of the fair notice of Plaintiffs' claim required by due process and Rule 8(a) of the Federal Rules of Civil Procedure. Nothing in the initial complaints provided Tak Investments notice that it could face claims for enforcement of the Investment Notes. To the contrary, the notes were "deemed cancelled." The Court should decline the Plaintiffs' request to attempt to resurrect these waived and time-barred claims in this litigation.

It is not enough that the Final Business Terms Agreement refers to the Investment Notes. It is not enough that the initial complaints used boilerplate language to try to capture any conceivable claim and extend the statutes of limitation in perpetuity. To try to impose corporate liability on an individual, moreover, it is not enough that a corporate executive signed a document for the corporation. And it is not enough to try to take refuge, time after time, in a

"liberal" construction of the rules of civil procedure. At some point, the rules are rules, and that point has been reached here.

CONCLUSION

The first suit the Plaintiffs filed to enforce the Final Business Terms Agreement missed the mark and was dismissed. Believing they had cured the deficiency leading to the first dismissal, Plaintiffs again filed this action – still seeking transfer of an interest in Tak Investments. With the Court's grant of summary judgment in Tak Investments' favor in this action, Plaintiffs now seek to assert new claims under different contracts, contracts which Plaintiffs themselves have maintained were cancelled. "But pleading is not like playing darts: a plaintiff can't keep throwing claims at the board until she gets one that hits the mark." *Doe v. Howe Military School*, 227 F.3d 981, 990 (7th Cir. 2000).

The Court should deny the motion to amend. The amendment sought would be futile and result in undue prejudice to Tak Investments and Sharad Tak. Should the Court grant leave to amend, the Court should conclude that the allegations of the amended complaint do not relate back to the original complaint. In either event, this litigation should end.

Dated this 6th day of February, 2017.

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EXHIBIT 1

2012 WL 1910076
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

NON TYPICAL, INC., and The Hanover Insurance Company, Plaintiffs,
v.
TRANSGLOBAL LOGISTICS GROUP INC., Schneider Logistics International, Inc., Hartford Accident and Indemnity Company, and Hartford Fire Insurance Company, Defendants.
Hanover Insurance Company and Citizens Insurance Company of America, Plaintiffs,
v.
Transglobal Logistics Group Inc., Schneider Logistics International, Inc., Hartford Accident and Indemnity Company, and Hartford Fire Insurance Company, Defendants.

Nos. 10–C–1058, 11–C–0156.
|
May 28, 2012.

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ORDER GRANTING MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

WILLIAM C. GRIESBACH, District Judge.

***1** Before me now is a Motion for Partial Judgment on the Pleadings filed by Schneider Logistics International, Inc. (Schneider) to dismiss the negligence claims asserted by the Plaintiffs in the above-entitled consolidated cases. For the reasons discussed herein, Schneider's motion will be granted.

BACKGROUND

This case concerns a loss resulting from the theft in Illinois of a truckload of digital cameras which was in the process of being transported from China for delivery to the Plaintiff, Non Typical, Inc. (Non Typical), in De Pere, Wisconsin. The cameras were under control of a motor carrier, Transglobal Logistics Group Inc. (Transglobal) at the time of the theft. Schneider's role, as explained by the Amended Complaints in this action, was limited to assisting Non Typical to arrange for transportation of the cameras. Schneider did not serve as either a carrier or freight forwarder; it served as a "broker."[1]

Non Typical filed its action in this Court in November 2010. Its Complaint alleged several causes of action against Transglobal, but just one (for negligence) against Schneider. (ECF No. 1.) Schneider moved to dismiss the negligence claim because it failed to state a claim upon which relief could be granted. (ECF No. 7.) Instead of contesting the Motion to Dismiss, Non Typical filed an Amended Complaint which alleged additional claims against Schneider, including breach of contract, breach of implied covenant of good faith and fair dealing, and promissory estoppel. (ECF No. 12.) Schneider moved to dismiss all of the causes of action against it in the Amended Complaint. (ECF No. 13.) The Court decided Schneider's Motion to Dismiss on May 11, 2011. It dismissed Non Typical's claims against Schneider for breach of the duty of good faith and fair dealing and promissory estoppel, but denied the Motion to Dismiss with respect to the contract and negligence claims. (ECF No. 27.)

In the meantime, Non Typical's insurers, Hanover Insurance Company (Hanover), and Citizens Insurance Company of American (Citizens), filed an action to assert their subrogated interests arising out of payments they made to Non Typical for theft of the cameras in the United States District Court for the Southern District of New York. (ECF No. 1, Case No. 11–CV–00156.) On February 9, 2011, the case was transferred to this Court and later consolidated with the Non Typical case pursuant to Rule 42(a)(2) of the Federal Rules of Civil Procedure. (ECF No. 16.) Schneider then moved to dismiss the

claims by Hanover and Citizens for the same reasons it moved to dismiss Non Typical's claims. (ECF No. 23.)

Based on the Court's decision on Schneider's Motion to Dismiss Non Typical's claims, Hanover and Citizens agreed to amend its Complaint to allege only contract and negligence claims against Schneider. In return, Schneider withdrew its Motion to Dismiss. (ECF Nos. 29 and 30.) On July 29, 2011, Hanover and Citizens filed a Second Amended Complaint which added Hartford Accident and Indemnity Company and Hartford Fire Insurance Company (collectively, Hartford) as Defendants. The only claims asserted against Schneider are for breach of contract and negligence. (ECF No. 55.) Non Typical followed shortly thereafter with its own Second Amended Complaint to add Hartford as a Defendant. Consistent with the Court's decision on Schneider's Motion to Dismiss, Non Typical's Second Amended Complaint asserts only breach of contract and negligence claims against Schneider. (ECF No. 58.)

LEGAL STANDARD

***2** Rule 12(c) of the Federal Rules of Civil Procedure permits a party to seek judgment on the pleadings after the pleadings have closed. *Buchanan–Moore v. County of Milwaukee,* 570 F.3d 824, 827 (7th Cir.2009). A motion under Rule 12(c) is reviewed under the same standard employed when reviewing a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *Id.* (citing *Pisciotta v. Old Nat'l. Bancorp,* 499 F.3d 629, 633 (7th Cir.2007)). A motion for judgment on the pleadings will not be granted where there are unresolved issues of material fact. *Moss v. Martin,* 473 F.3d 694, 698 (7th Cir.2007).

DISCUSSION

1. Preemption

Schneider first contends the Federal Aviation Administration Authorization Act of 1994 (FAAA) preempts the negligence claims against it. The FAAA includes the following provision for federal preemption of state laws that attempt to regulate transportation by motor carriers:

> [A] State ... may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). One purpose for federal preemption under the regulatory scheme was to eliminate non-uniform state regulation of motor carriers which had caused significant inefficiencies, increased costs, reduced competition, inhibited innovation and technology, and limited the expansion of markets. *Rowe v. N.H. Motor Transp. Ass'n,* 552 U.S. 364, 368, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008). Courts have honored the intent of Congress and have determined that the language "related to" in the FAAA should be interpreted broadly.

The Seventh Circuit has interpreted this scheme to mean a state law is preempted if that law expressly references airlines rates, routes, or services or has a significant economic impact upon them. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1432 (7th Cir.1996). State common law counts as an "other provision having the force and effect of law." *See American Airlines, Inc. v. Wolens,* 513 U.S. 219, 233 n. 8, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 388, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992); *see also Medtronic, Inc. v. Lohr,* 518 U.S. 470, 502–03, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (plurality opinion), *id.* at 503–05 (Breyer, J., concurring), *id.* at 509–12 (O'Connor, J., concurring in part and dissenting in part) (characterizing tort remedies as regulatory provisions for purposes of preemption clauses in another statute).

While Plaintiffs argue for a narrow reading of preemption in this field, particularly against brokers, courts in this Circuit have broadly interpreted preemption under the ADA and the FAAA. *See, e.g., Williams v. Midwest Airlines, Inc.,* 321 F.Supp.2d 993, 995–96 (E.D.Wis.2004) (holding that a passenger's tort claims arising out of an airline's refusal to board him were preempted); *see also Travel All Over the World, Inc.,* 73 F.3d at n. 8 (noting punitive damages are preempted because they represent "an enlargement or enhancement [of the bargain] based on state laws or policies external to the agreement" (citations omitted)). Other district courts outside this Circuit have responded similarly. *See, e.g., Yellow Transportation, Inc. v. DM Transportation Management Services, Inc.,* No. Civ. A. 2:06–CV–1517–LDD, 2006 WL 2871745 (E.D.Pa. July 14, 2006) (holding that claims of misrepresentation, unjust enrichment, quantum meruit, and fraud by an

interstate motor carrier against a freight broker were preempted by 49 U.S.C. § 14501(c)(1)); *Kashala v. Mobility Servs., Int'l, LLC,* No. 07–CV–40107–TSH, 2009 WL 2144289 (D.Mass. May 12, 2009) (dismissing a negligence claim against a transportation broker for loss and damages to personal property because the claims against the broker were preempted by the FAAA); *Huntington Operating Corp. v. Sybonney Express,* No. H–08–781, 2010 WL 1930087 (S.D.Tex. May 11, 2010) (holding that 49 U.S.C. § 14501 broadly preempted and thus dismissing negligence claims against the broker).

***3** Given this precedent and the history of a broad interpretation of federal preemption, I agree with Schneider that the negligence claim is preempted by the FAAA. Relevant precedent indicates tort claims (such as negligence) can be preempted even though state tort law does not directly reference rates, routes, or services. And because the statute expressly lists brokers, I see no reason to treat them differently from traditional carriers. This finding is further consistent with the amount at stake in the case. Non Typical maintains Schneider's potential liability is in excess of a million dollars. Schneider thus alleges that permitting negligence claims against it in its role as broker would "plainly have an economic effect on the rates it charges and how it provides its transportation brokerage services." (ECF No. 96 at 7.) *See, e.g., S.C. Johnson & Son,* 2011 WL 4625655 at *4 ("enforcement of plaintiff's fraudulent misrepresentation claim would have a prescriptive effect, essentially regulating the practices of defendant carriers (as in *Wolens*) or would result in replacement of the parties' original bargain with something else (as in *Mesa Airlines*). In either case, enforcement of plaintiff's claim would relate to defendant carriers' prices, routes, or services."). I thus am convinced that the negligence claims against Schneider are preempted by the FAAA scheme.

2. Failure to State a Claim Under Wisconsin Law

Schneider alternatively moves to dismiss the negligence claim on the ground that Plaintiffs have failed to state a claim under Wisconsin law. Both of the Second Amended Complaints allege breach of contract claims against Schneider. Although the precise terms of the contract may be in dispute, it is undisputed that Non Typical and Schneider had an agreement for Schneider to serve as a broker to assist Non Typical in arranging for transportation of the cameras from China to Wisconsin. Non Typical and its insurers have alleged Schneider breached this contract by not exercising reasonable care in selecting Transglobal as one of the carriers for transportation of the cameras and by failing to verify that Transglobal had enough insurance to cover loss of the cameras. They also assert separate causes of action against Schneider for negligence.

Wisconsin does not recognize an inherent cause of action for every negligent performance of a contract. A tort action, such as a negligence claim, may only be asserted if there is a duty *independent* of the performance of the contract. Under this test, the existence of a contract is ignored when determining whether alleged misconduct is actionable in tort. *McDonald v. Century 21 Real Estate Corp.,* 132 Wis.2d 1, 6, 390 N.W.2d 68 (Ct.App.1986); *see also Dvorak v. Pluswood Wisconsin, Inc.,* 121 Wis.2d 218, 220, 358 N.W.2d 544, 545 (Ct.App.1984). If a plaintiff cannot prove the existence of an independent duty, his remedy is limited to suing for breach of contract. *Madison Newspapers v. Pinkerton's Inc.,* 200 Wis.2d 468, 475, 545 N.W.2d 843 (Ct.App.1996).

***4** The Second Amended Complaint contains no claims of negligence founded upon *independent* duties owed by Schneider. It alleges, in part, that Non Typical notified Schneider that the goods were high-value goods (ECF No. 58 ¶ 45) and that Schneider breached its obligation to inform Transglobal that the high-value cameras were to be properly secured at all times during transport and storage. (*Id.* ¶ 52, 545 N.W.2d 843.) According to Plaintiffs, this duty is an independent one because it reaches beyond the confines of the contract and focuses on the failed duties of Schneider with respect to communications between the parties and the standard of care in the transportation industry. (ECF No. 93 at 10.) But Schneider would not have had any reason to communicate with either Non Typical or Transglobal if it did not have a contract with Non Typical. Schneider's obligation to communicate with them in a particular way, if any, was part of its contractual obligation to Non Typical, not part of a duty to Non Typical separate and apart from the contract. Plaintiffs further attempt to argue that the issue is premature, as the precise terms of the contract may be in dispute, but whether or not this is true it has no bearing on whether Schneider had an independent duty giving rise to a tort action. Non Typical's further argument that Schneider's motion is precluded by the law of the case is rejected as well. The issue was not clearly presented on the previous motion, and it is clear from the Court's decision that its treatment of the issue was not intended as final. Schneider's motion for judgment on the pleadings is thus also granted on this ground.

CONCLUSION

In sum, the negligence claims against Schneider are preempted by the FAAA. The negligence claims are alternatively dismissed for failing to state a claim under Wisconsin law. Schneider's motion for partial judgment on the pleadings (ECF No. 90) is accordingly GRANTED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1910076

Footnotes

1 Schneider's status in the transaction was discussed in the Court's decision on Schneider's Motion to Dismiss. The Court decided that the pleadings did not allege a claim under the Carmack Amendment, 49 U.S.C. § 14706, because Schneider is not alleged to have provided actual transportation of property. (ECF No. 27 at 4.) In this transaction, Schneider was a "broker" because it did not transport the cameras.