IN THE 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. Case No. 14CV1203

TAK INVESTMENTS, LLC,

Defendant.

PLAINTIFF'S REPLY BRIEF

Tak Investments LLC has never once alleged that plaintiffs and defendant did not have a 'meeting of the minds' or contract to be honored between the parties, rather, only that parts of its agreements are unenforceable. The great irony is that the defendant, successful in arguing its own contractual duties could not be performed because of an unenforceable clause, prepared by its own lawyers, suggests that somehow justice would be served if the Plaintiffs were not allowed an opportunity to amend their pleadings. The true irony of the defendant's position is that the defendant invoked impossibility to perform under Paragraph G of the Final Business Terms Agreement to advance its Motion for Summary Judgment but now claims that because that part of the agreement between the parties was deemed invalid, and even though the plaintiffs had acted pursuant to the terms thereto, the defendant should now be able to walk away from its obligations. Justice cannot be served with that proposed conclusion.

The defendant has raised numerous issues in its responsive brief, at times without citation to authority. Each of the issues raised by the defense will be dealt with below. Further, despite the defendant's protestations, the plaintiffs have filed the subject motion and advanced its claims and theories based upon this Court's Decision and Order of December 2, 2016 upon the parties' competing Motions for Summary Judgment. The inescapable conclusion is that justice requires the plaintiffs be allowed to amend the complaint.

ARGUMENT

A. The Court should grant the Plaintiffs' Motion to Permit Amendment of Complaint

The defendant posits that the Court has "two decisions to make". The defendant asserts that the two questions are 1) whether the Court should grant the Plaintiff's motion; and, 2) whether the proposed amendment relates back to the original complaint. Under Rule 15(a) of the Federal Rules of Civil Procedure, permitting the amendment of the pleadings is required where justice must be done. A clearer case could not be made for that proposition. The defendant's second question concerns the relation back doctrine, which is also a Rule 15 issue.

Federal Rule of Civil Procedure 15(a)(2) provides for the amendment of pleadings before trial. The plaintiffs seek leave from the Court to permit the amendment of the Complaint. There is no doubt that the discretionary standard applies. Yet, the defense seeks to prohibit the plaintiffs from their opportunity to test their claims on the merits, despite the fact the parties had reached agreement in 2007 on the terms of sale for the Oconto Falls tissue mill and that the Plaintiffs had fully performed thereunder, to wit: deeding and transferring all right, title and interest in the mill to the defendant. The law clearly prefers that cases should be decided on the merits. *Wimes v. Eaton Corp.*, 573 F. Supp. 331 (ED. Wis. 1983) *citing*, *Foman v. Davis*, 371 U.S. 178 at 182, 9 L. Ed.2nd 222, 83 S. Ct. 227 (1962). It is not even contested that the

defendant and proposed defendant received substantial benefit as a result of the described transaction. It stands unrefuted the plaintiffs have not only received nothing, but have lost substantial sums as a result.

In trying to make its case, the defendant suggests that Tak Investments LLC and the proposed additional defendant, Sharad Tak, would be prejudiced by nothing more than the operation of time as it relates to the original notes. There is no further elucidation by the defendant as to how or why it would be prejudiced. Since what is at issue is written agreements, and the request is to have those agreements enforced, or resulting from an unjust enrichment claim, there is no legitimate prejudice that can be claimed. There is no question but that the entirety of this case stems from the Notes and Final Business Terms Agreement entered into by and between the parties in 2007. There is no credible claim that witnesses are missing or deceased or that any other similar, truly prejudicial events have otherwise limited the defense. Rather, the defendant seeks to point out the length of time from the point the contracts were executed until today's date. There have been no actual showings of prejudice which would deprive the defendant of fairness in assessing liability or damages. In *Market Street Assocs. Ltd. Partnership v. Frey*, 941 F.2d 588 (7th Cir.1991), with Judge Posner writing for the court, discussed the duty of good faith in contracting and pointed out that the difficulty is good faith in executing under the parties" agreement:

> The formation or negotiation stage is precontractual, and here the duty is minimized. It is greater not only at the performance but also at the enforcement stage, which is also postcontractural. "A party who hokes up a phony defense to the performance of his contractual duties and then, when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith."

Market Street Assocs. Ltd. vs Frey, supra at 595. *citing, Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357 at 363 (7th Cir. 1990). Here, the defendant's post contract actions in failing to perform in any fashion and having the audacity to cite as its reasons its own impossibility to perform while also claiming that based on that impossibility and the plaintiff having "cancelled" the notes, following the procedure ascribed in the contract is exactly the "hoked up" defense that fits neatly into Judge Posner's contract philosophy as bad faith.

The Defendant cites *United States ex rel. Roach Concrete, Inc. v. Veteran Pac., JV*, 787 F. Supp. 851 (2011) for the proposition that the plaintiffs have plead their case out of court. Of course, in all candor, the undersigned was not aware of that case when the proposed amended complaint was filed with the motion now before the Court. Counsel had pled cases in the alternative, as was done here, many times in the past without challenge. On the other hand, the *Roach Concrete* case is distinguishable in that in the present case, the defense is seeking to have the last remaining part of the contract portion of the case, the promissory notes, dismissed in that the plaintiffs had "cancelled" them in order to try to avail themselves of the ownership interest in the defendant company. It is respectfully requested that the Court strike the unjust enrichment allegations of the proposed Amended Complaint or allow the Plaintiff to submit another proposed complaint. Also, should the Court deem the promissory notes portion of the case to be non-viable, then that portion of the proposed amended complaint can be stricken and the case can proceed on the unjust enrichment claim. In either event, it is requested that justice be done, as the Court sees fit, so that the plaintiffs are not foreclosed from justice in this case.

The defense makes a further statute of limitations argument suggesting that the plaintiffs' claims are time barred. Wis. Stat. §893.43 provides that a six-year statute of limitations applies. The statute of limitations on a contract action starts to run on the date of the breach. *CLL Assoc.*

Ltd. Partnership v. Arrowhead Pac. Corp., 174 Wis.2d 604, 497 N.W.2d 115 (S.Ct.,1993). Breach is defined as the point when performance of a duty under a contract is due and the party fails to perform. *Steele vs Pacsetter Motor Cars Inc.*, 2003 Wis. App. 242, 267 Wis.2d 873. In the prior litigation leading up to this case, the defendant took the position that the case had to be dismissed since one of the notes was not in the possession of the plaintiffs. The plaintiffs then obtained a reassignment of that note and gave the defendant notice of their demand on August 15, 2014. (*See*, Declaration of Ronald Van Den Heuvel dated January 6, 2017 and exhibits appended thereto). When the defendant failed to respond to that notice, this lawsuit was commenced. The action accrued upon breach but no sooner than the "third anniversary of the date of the Investment Notes." The Notes were executed on April 16, 2007. They were not even due until April 16, 2010. Notice was given within the six year statute of limitations and this lawsuit was, likewise, commenced well within the six year statute of limitations. This aspect of the defense argument must fail.

B. Relation back

The second broad based claim of the defendant is whether the proposed amended pleading relates back to the original complaint. The defense suggests the plaintiffs have ignored this question, but in fact, it was addressed in the plaintiffs' brief. Nevertheless, it is absolutely and abundantly clear that all of these claims relate back to the contracts executed by and between the parties in April 2007, which are the exact subject of this lawsuit. The proposed amended pleading only recasts the claims which all emanate from that April 2007 transaction. There is absolutely nothing new to the defendant that was not put into play by the pleadings already on file.

The original complaint stems from a meeting of the minds at the time of the execution of the Notes and the Final Business Terms Agreement in April 2007. There is no question but that the Final Business Terms Agreement and the four Promissory Notes currently before this Court were executed resulting from a meeting of the minds. The defendants have never suggested that the contract signed by Sharad Tak, whether individually or for his company, was something other than their agreement. When the parties executed their agreements, they had agreed to honor the commitments therein. Later, when pursuant to the parties' agreement, the plaintiffs tried to exercise their contractual rights, they were met with resistance by their counterpart claiming the Final Business Terms Agreement was invalid because Tak Investments LLC could not issue an ownership interest in itself. This Court agreed. However, there are two substantial factors that militate against the defendant's claim that permitting the plaintiffs' to amend their complaint would be unjust. First, it was the defendant who claimed that Paragraph G of the Final Business Terms Agreement was invalid despite the fact that it was drawn up by counsel for the defendant. The plaintiffs operated under the very fair assumption that the contracts entered into by the parties were binding and then proceeded to exercise their rights under those contracts seeking the 27% business interest as the parties had agreed. However, the defendant wishes to suggest that acting in conformance with the contract somehow precludes recovery by the plaintiff companies. The defendant's theory is crafty but ignores fairness and justice. The defense would have the Court ignore the underlying transactions which are the basis of this lawsuit. All of the matters currently before the Court come from the same set of facts, the same transactions and the same contracts, directly addressed by FRCP 15(c)(1)(B).

The fact that the defense wants to eviscerate its own contracts is not surprising. However, if the contracts are not to be honored, then justice and fairness demand that the unjust enrichment claim be allowed to proceed. Federal Rules of Civil Procedure 15(c)(1) governs relation back of amendments to pleadings. *Id.* If FRCP 15(b) is the most applicable to the claims before the Court as suggested, all of these matters grow out of the sale of the Oconto Falls paper mill and the contracts that made that happen.

C. Release

The defense argues that by taking the procedural steps in order to obtain the 27% interest in the defendant limited liability company, electing that method to proceed was somehow a "release" of the defendant. There does not appear to be a legal basis for this claim. Of course, it could not possibly operate as a release since the law in Wisconsin is quite clear that in order for a release to be valid, the language of the release must be clear, unambiguous, and must inform the person who executes the release to be informed as to what is being executed. *Yauger v. Skiing Enterprises*, 207 Wis.2d 76, 557 N.W.2d 60 (1996). The defense fails to develop this argument and certainly does not seem to be making a case that there was an executed release. Rather, the defendant simply throws an idea out there seeking some kind of support. In a similar manner, Wisconsin law provides that if accord and satisfaction is to operate as a bar, it must be a clear and full understanding and may not even be enforceable where the terms "accord and satisfaction" appear in the document under consideration. *Cistene v. Tollard*, 95 Wis.2d 678 at 681-82, 291 N.W.2d 636 at 638 (Ct. App. 1980). *See also*, *Gruenberger v. Zielkowski*, 213 Wis.2d 45, 570 N.W.2d 911 (Wis. App. 1997) (unpublished case limited precedent). In the case at bar, the defense is trying to assert that Mr. Van Den Heuvel and his companies somehow waived their rights on the underlying claims when he elected to proceed pursuant to the terms of

the Notes and Final Business Terms Agreement in order to obtain the 27% in the defendant companies. The argument cannot be countenanced since the law in Wisconsin is quite contrary to that alleged by the defendant.

D. Sharad Tak individually

Sharad Tak signed the Final Business Terms Agreement, though the Notes in question were only signed by Mr. Tak in his capacity as a member of limited liability company. (*See*, Declaration of Ronald Van Den Heuvel dated January 6, 2017 and exhibits appended thereto). The question is begged, why would Mr. Tak sign the Final Business Terms Agreement if he did not have any responsibility or duties pursuant to the contract? The fact is the Final Business Terms Agreement and the Notes in question were all executed at the same time and as part of the same transaction. A party to a contract has a duty to perform that contract. *Milwaukee Cold Storage Company v. York Corp.*, 3 Wis.2d 13, 87 N.W.2d 505 (1958); *Associates Financial Services Company v. Eisenberg*, 51 Wis.2d 85, 168 N.W.2d (1971). The fact the writings were contemporaneously executed indicates that they are considered together as an integrated contract. Mr. Tak signed all of the agreements in question. The plaintiffs should be allowed to take discovery, at a minimum, to determine what was meant by Mr. Tak's execution of the Final Business Terms Agreement and its relationship to the four Promissory Notes at stake herein. This is particularly so should the plaintiffs be allowed to proceed under an unjust enrichment theory. His involvement in this transaction and lawsuit certainly give rise to the prospect of liability as to Mr. Tak. There is no prejudice to him, or at least none that has been set forth. It is respectfully requested that the Court permit the plaintiffs leave to amend and in that regard, to also include Mr. Tak as a named defendant.

CONCLUSION

The plaintiffs seek the opportunity to amend their pleadings so as to accomplish a fair and just result and so as to avoid the manifest unfairness advocated by the defense.

Dated this 17th day of February, 2017.

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