UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TISSUE TECHNOLOGY LLC., et al.,

Plaintiffs,

v. Case No. 14-C-1203

TAK INVESTMENTS, LLC,

Defendant.

DECISION AND ORDER

In this court's order granting in part the Defendant's motion for summary judgment, I concluded that the parties' agreement appeared to contemplate that Sharad Tak—rather than Defendant Tak Investments, LLC itself—would be obligated to convey a 27% ownership interest in his company, Tak Investments, LLC, if certain promissory notes were deemed cancelled by the Plaintiffs. That decision also observed that it was unclear why Sharad Tak had not been sued personally. (ECF No. 40 at 5 n.2.)

Apparently in response to that decision, the Plaintiffs have now moved for leave to amend their complaint. As discussed in more detail below, I construe their motion as seeking to add claims: (1) to enforce the promissory notes against Tak Investments, LLC; (2) to enforce the notes against Sharad Tak personally; (3) to enforce the terms of the parties' Final Business Terms Agreement against Sharad Tak personally; and (4) to add a claim for unjust enrichment against both parties. The Plaintiffs' motion notes that amendments generally are to be liberally granted so long as justice requires and the other litigants do not suffer undue prejudice. Fed. R. Civ. P. 15(a)(2).

Bausch v. Stryker Corp., 630 F.3d 546, 562 (7th Cir.2010) ("A district court may deny leave to file an amended complaint in the case of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment.") (internal quotation marks omitted). The Defendant opposes the motion on the grounds that it would subject Sharad Tak to a claim that would otherwise be barred by the statute of limitations. It also suggests any amendments would be futile.

A. Unjust Enrichment

The Defendant argues that the unjust enrichment claim would be futile given the fact that the parties entered into contracts governing the relationship at issue. This court has previously noted that "under Wisconsin law, claims for unjust enrichment and quantum meruit only apply where the services performed were not covered by the parties' contract, where the contract is invalid or where the contract is unenforceable. *See Gorton v. Hostak, Henzl & Bichler,* 217 Wis.2d 493, 510 n. 13, 577 N.W.2d 617 (1998) (holding that when an "award is governed by the contract existing between the parties, quantum meruit and implied contract arguments are inapposite")." *U.S. ex rel. Roach Concrete, Inc. v. Veteran Pac., JV,* 787 F. Supp. 2d 851, 858–59 (E.D. Wis. 2011). In reply, the Plaintiffs concede the point and ask that the unjust enrichment claims be stricken from their proposed amended complaint.

B. Claims Against Sharad Tak

With respect to Sharad Tak, the first order of business is to determine which claims the Plaintiffs seek to bring against Tak personally. In truth, the proposed amended complaint is not entirely clear. Under the general heading of "Breach of Contract," Paragraph 32 explicitly requests

entry of judgment on the four notes but does not specify *against whom* such a judgment is sought. (ECF No. 43-1 at 5.) Read broadly, the claim to enforce the notes could be interpreted as being brought against Tak personally. As discussed below, however, any such claim would be futile on its merits and untimely because it would not relate back to the filing of the original complaint.

The next question is whether the Plaintiffs are also attempting to sue Sharad Tak personally for breach of the Final Business Terms Agreement (FBTA) *in addition* to breach of the notes. In other words, are they now attempting to sue Tak on the same theory that they sued Tak Investments, LLC, in the hopes of forcing him to transfer 27% of the LLC to them? I conclude that the answer is "yes." It is true that the proposed amendment does not explicitly seek any relief based on the FBTA in the Breach of Contract section or anywhere else. Moreover, the request for relief merely seeks "judgment on each of the Notes" or, in the alternative, "judgment under the Doctrine of Unjust Enrichment." (ECF No. 43-1 at 6.) Neither of these forms of relief would implicate the FBTA. In addition, neither the brief in support nor the reply brief makes clear whether the Plaintiffs are attempting to sue Tak for breach of the FBTA.

Even so, the proposed amendment was clearly a reaction to this court's December 2, 2016 Decision and Order, in which the court wondered why the Plaintiffs had not sued Sharad Tak personally for violating the FBTA. (ECF No. 40 at 5 n.2.) Moreover, Paragraph 26 of the proposed amendment does indicate that the LLC and Tak have breached the Final Business Terms Agreement by "failing and refusing to transfer an undiluted 27% ownership interest of the highest class in" the LLC. (ECF No. 43-1 at 5.) Finally, I note that the Plaintiffs' argument on the statute of limitations question is premised on the FBTA. As discussed further below, they argue that the claims are timely because they only accrued when the notes were deemed cancelled. Such an argument would

not make sense if the Plaintiffs were only seeking to proceed on claims based on the notes themselves. Given the larger context, and the fact that pleadings are to be read liberally, I conclude that the references to the FBTA and Tak's breach of that agreement are enough to allege a breach of the FBTA on the part of Tak personally. In the event this was not the Plaintiffs' intent, they may clarify that in due course. In sum, I conclude that the proposed amended complaint seeks to sue Tak personally for breach of the promissory notes as well as the FBTA provision requiring him (in the Plaintiffs' view) to turn over 27% of Tak Investments, LLC.

1. Enforcement of the Notes

Having attempted to construe the proposed amended complaint, I must now consider whether the proposed claims are viable. I conclude that any claim against Tak personally for enforcement of the notes would fail for at least two reasons. First, although he signed the notes, he did so on behalf of the LLC. (ECF No. 1-1 at 1-4.) Simply signing on behalf of a company does not make the individual personally liable. If the Plaintiffs want to pierce the corporate veil, that is a completely different question. For now, however, there seems no basis on which to sue Tak personally for breaches of the notes entered into by Tak Investments, LLC.

An additional reason such a claim would be futile is that it would violate the statute of limitations. The notes are quite straightforward. They indicate that principal shall be due in the amount of (for example) $440,000 on April 16, 2008; $440,000 on April 16, 2009; with the remainder due on April 16, 2010. (ECF No. 1-1 at 1.) The claim therefore accrued at the latest on April 16, 2010 — the date of the last payment due — and so the Plaintiffs had six years in which to enforce them under Wis. Stat. § 893.43, the state statute of limitations governing contract actions. Such a claim is therefore untimely.

In some cases a statute of limitations problem can be overcome through the Federal Rules that allow a claim to "relate back" to the filing of the original complaint. I am satisfied that any promissory note claim against Sharad Tak would *not* relate back. Fed. R. Civ. P. 15(c). As applicable here, Rule 15(c) provides that when an amendment "changes the party or the naming of the party against whom a claim is asserted," the amendment will relate back if that party "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C)(ii). The Supreme Court has noted this requirement, for example, when it found that a plaintiff's obvious "misunderstanding" between entities with the similar names of "Costa Crociere" and "Costa Cruise" excused its otherwise untimely claim. *Krupski v. Costa Crociere S. p. A.,* 560 U.S. 538, 555 (2010). However, relation back would be inappropriate if there were no indication of mistaken identity: "Respondent Adams made no such mistake. It knew of Nelson's role and existence and, until it moved to amend its pleading, chose to assert its claim for costs and fees only against OCP." *Nelson v. Adams USA, Inc.,* 529 U.S. 460, 467 n.1 (2000).

The Seventh Circuit, too, has strictly applied the "mistake" requirement:

> We have interpreted Rule 15(c)(3) to permit an amendment to relate back to the original complaint only where 'there has been an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake.' Moreover, we have emphasized that the mistake requirement is independent from whether the purported substitute party knew that action would be brought against him. King has not satisfied this mistake requirement. King did not mistakenly sue the wrong party. Nor did he mistakenly sue the BOP instead of suing an individual BOP officer.

King v. One Unknown Fed. Corr. Officer, 201 F.3d 910, 914 (7th Cir. 2000) (citations omitted).

Here, the Plaintiffs cannot deny that they deliberately decided (for whatever reason) to leave

Sharad Tak out of the two lawsuits they have brought. Tak himself signed many of the relevant agreements personally, and he was the individual with whom they negotiated. This was not a case of mistaken identity but a deliberate decision to sue the LLC rather than Tak individually. Accordingly, Rule 15 would not allow relation back of the new claim proposed against Tak personally. *See Whittaker v. Nothern Illinois Univ.,* No. 00 C 50447, 2002 WL 992660, at *2 (N.D. Ill. May 14, 2002) ("Because it is thus obvious that Whittaker knew all along of Folowell's 'role and existence' in the complained-of conduct, but simply chose not to sue him in her original complaint, Rule 15(c)(3) does not allow her to 'relate back' her claim against Folowell.")

In sum, to the extent the complaint attempts to bring a claim for breach of the promissory notes against Tak personally, such a claim would be futile because he was not a maker of the notes and, even if he was, the claim would not relate back.

2. Violation of the FBTA

As noted earlier, it appears that the proposed amended complaint also attempts to bring a claim against Tak for violations of the FBTA. Tak signed that agreement twice — once on his own behalf and once on behalf of the LLC — and the agreement names him as a party individually. (ECF No. 43-1 at 8, 12.) Thus, contrary to the Defendant's view, Tak *is* a party to that agreement and there is no inherent reason he could not be sued for its breach. Accordingly, such an amendment would not be futile.

That leaves the question of the statute of limitations. Above I concluded that the statute of limitations would bar enforcement of the notes because more than six years has passed since the claims accrued. Here, the Plaintiffs assert that although the FBTA was signed at the same time as the notes (April 2007), any claim based on a breach of that agreement did not accrue until much

later. To recall, that agreement provides as follows: "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, LLC] . . ." (ECF No. 43-1 at 9, ¶ G.) Thus, any breach of this provision of the FBTA could only accrue upon such time as the notes were "deemed cancelled" by the Plaintiffs and Tak failed to deliver 27% of the company to the Plaintiffs. According to the proposed amended complaint, this did not occur until August 2014. (ECF No. 43-1 at ¶ 23.) As such, I agree with the Plaintiffs that any claim based on Tak's breach of the FBTA is not barred by the six-year statute of limitations. *CLL Associates Ltd. Partnership v. Arrowhead Pacific Corp.*, 174 Wis. 2d 604, 609, 497 N.W.2d 115, 117 (1993) (contract claim accrues on date of breach).

Finally, I recognize that the fact that the claim might be timely does not mean that an amended pleading should automatically be allowed. I conclude, however, that given the liberal rules governing amended pleadings, the amendment should be granted. As the Plaintiffs note, Tak has been involved in this action from the beginning by virtue of his ownership of the LLC, and so he will not be prejudiced by the amendment. And because the claim is timely, the concerns with Rule 15(c)(1)(C)(ii) do not apply because the claim does not need to relate back to the original complaint. Instead, it is a timely claim alleged against a new defendant.

In sum, to the extent the proposed amended complaint seeks to bring a claim against Sharad Tak for breach of the promissory notes, the motion will be denied. I construe the proposed amendment as also bringing a claim based on breach of the FBTA, however, and that claim will be allowed to proceed.

C. Claims Against Tak Investments, LLC

Finally, the proposed amendment also brings claims for breach of the promissory notes against Tak Investments, LLC, the maker of the notes. (ECF No. 1-1 at 1-4.) The notes have a total face value of $16.4 million.

The Defendant protests the proposed amendment on the ground that the Plaintiffs have essentially pled themselves out of court. To recall, in two different lawsuits now their claim has been premised on the assertion that they have "deemed" the notes to be cancelled, and so it would be entirely inconsistent to allow them to proceed with an action to enforce the very notes they said they cancelled. Although it is true that a party may plead itself out of court by pleading too much, the unusual nature of the parties' agreements makes it impossible to conclude, at this stage, that one side's decision to "deem" the notes cancelled necessarily means that it has unilaterally and unequivocally renounced them or released the maker from liability. Moreover, the pleadings stage is not the proper time for sorting out the entire universe of a plaintiff's possible claims, some of which might *eventually* prove inconsistent. Here, it seems likely that the Plaintiffs would prefer to obtain 27% of the LLC from Sharad Tak, but if that claim failed they would, as a backup, seek to enforce the notes themselves. I cannot say at this stage that such an effort would necessarily be futile.

D. Conclusion

For the reasons given above, the motion to amend the pleadings is **GRANTED** in part. The clerk will file the proposed amended complaint (ECF No. 43-1) on the docket. The unjust enrichment claim is **DISMISSED**, as is any claim to enforce the promissory notes against

Defendant Sharad Tak. The Clerk is directed to set this matter on the Court's calendar for a Rule 16 status conference to address further scheduling.

SO ORDERED this 3rd day of April, 2017.

/s William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court