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.,

Case No. 14-C-1203

Plaintiffs,

v.

TAK INVESTMENTS, LLC and SHARAD TAK,

Defendants.

TAK INVESTMENTS, LLC'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This contract case is scheduled for trial to the Court on September 18, 2017. It should be decided, on the law, before then: first, the damage claims against Tak Investments, LLC ("Tak Investments"), premised on notes issued without consideration and barred by the statute of limitations and, then, the equitable claim against Sharad Tak, individually, premised on the same "cancelled" notes, some now assigned to other parties.

Taken separately, neither set of claims can survive. Taken together, as they are in a single Amended Complaint, the claims are at war with each other and cannot stand. The Court is painfully aware of this litigation, from the series of motions and decisions since the first federal court complaint filed on December 21, 2012. Now, however, Ron Van Den Heuvel and Sharad Tak have been deposed, and their testimony makes a trial unnecessary and invites summary resolution to spare the Court's time and even more expense for the parties.

ARGUMENT

In their responsive brief, Plaintiffs fail to present anything calling into question Tak Investments' pending motion for summary judgment. It is entitled to judgment as a matter of law both because the statute of limitations bars Plaintiffs' claim for enforcement of the Investment Notes and because those four notes the Plaintiffs would enforce are without consideration and without financial consequence. This Court more than three years ago presaged the outcome here when it wrote that the Plaintiffs "effectively promised that [they] would never seek to collect the $16,400,000 in notes." *Tissue Technology, LLC, et al v. Tak Investments, LLC*, Case No. 12-C-1305. ECF No. 37 (April 28, 2014).[1] Yet, here they are.

This Court has specifically reserved a ruling on the two issues now presented by this motion, and it did so in its order denying Tak Investments' motion to certify an interlocutory appeal. "It is possible that Plaintiffs do not have a viable claim against Tak Investments for the breach of the promissory notes, either because the amended claim does not relate back to the original claim and is thus barred by the statute of limitations or because the claim is incompatible with the Plaintiffs' principal claim that the notes were cancelled." (ECF No. 57 at 4.) While the Court then anticipated a bench trial, that is unnecessary.

This is an unusual case, springing from an unusual set of circumstances and events. Perhaps most unusual is the fact that Plaintiffs now seek to prosecute a claim against Tak Investments on the Investment Notes that directly contradicts their originally-pled claim premised on the deemed cancellation of those same notes, a claim resurrected in the form of an equitable claim against Sharad Tak, individually, under the Final Business Terms Agreement's transfer provision. Given the Plaintiffs' failure to respond with evidence to establish a genuine

[1] A true and correct copy of this Order on Defendant's Motion for Summary Judgment from Case No. 12-C-1305 is attached as **Exhibit 1**.

dispute of material fact on Tak Investments' two bases for summary judgment, the Court should grant the motion and enter judgment in favor of both Tak Investments and Sharad Tak.[2]

I. The Statute Of Limitations Bars Plaintiffs' Claim Against Tak Investments.

Plaintiffs accuse Tak Investments of seeking "to avoid its responsibilities" in asking the Court to apply the statute of limitations to bar Plaintiffs' claims pursuant to the Investment Notes. (Pls.' Br., ECF No. 69 at 2.) Yet, Tak Investments is entitled to the statute's protection no less than any other party to a contract in Wisconsin. Statutes of limitation serve an important role in ensuring that claims are promptly litigated and that defendants are protected from fraudulent or stale claims. *Korkow v. Gen. Cas. Co. of Wis.*, 117 Wis. 2d 187, 199, 344 N.W.2d 108 (1984) (citations omitted).

Based on the Plaintiffs' own submission, the parties agree that the Plaintiffs' claim for breach of the promissory notes accrued on April 16, 2010. Yet the Plaintiffs fail to address the equally apparent fact that, while this litigation began within six years of that date, their Complaint contained not a hint of a claim for breach of the Investment Notes. Indeed, that entire 2014 Complaint was premised – just as it was in the previous iteration of this lawsuit filed in 2012 and dismissed – on the Plaintiffs' allegation that they had deemed cancelled the very notes they now would have the Court enforce. The Plaintiffs cannot have it both ways. By definition, a cancelled note cannot support a claim for breach of the note.[3]

---

[2] The Plaintiffs filed their Amended Complaint naming Sharad Tak individually on April 3, 2017. (ECF No. 49.) He filed a responsive pleading on August 8, 2017, ECF No. 68, and, consistent with the affirmative defenses pled there, he is filing concurrently with this final brief a motion for judgment on the pleadings on the election of remedies doctrine, as well as a motion for summary judgment premised on the fact that Mr. Tak is not a member of Tak Investments, LLC. The Defendants are also requesting a hearing on the pending motions along with a pre-trial status conference.

[3] "A party to a contract cannot both affirm and disaffirm it to suit the party's purposes at different times. Rather, a party must elect to treat it either as void or as valid and then stand by that election." 1 Jay E. Grenig, *Wisconsin Pleading and Practice* § 7.6 (5th ed. 2017).

The Plaintiffs did indeed file *a* Complaint within the statute of limitations for enforcing the Final Business Terms Agreement, on September 30, 2014, but that Complaint did not seek enforcement of the notes. (ECF No. 1.) It sought an entirely different remedy without even suggesting that the notes were in default. They could not have been in default, moreover, because the Plaintiffs had deemed them cancelled.

There was not a single factual allegation in the 2014 Complaint that Tak Investments was in breach of any of the four Investment Notes. Instead, the original Complaint's 21 paragraphs were limited to allegations concerning the parties (Compl. ¶¶ 1-5), jurisdiction and venue (¶¶ 6-8), the execution of the Investment Notes (¶ 9), the Final Business Terms Agreement (¶¶ 10-11), and the assignment and re-assignment of the $4,400,000 Investment Note (¶¶ 12-16), with the Plaintiffs forthrightly deeming the Investment Notes cancelled and their resulting demand for transfer of the 27 percent interest in Tak Investments (¶¶ 17-21), a claim already dismissed with prejudice by this Court. (ECF No. 40.)

At no point did the original Complaint allege, as the Plaintiffs now bravely contend it did, "a breach of contract based upon four Promissory [sic] Notes that were attached to the Complaint." (Pls.' Br., ECF No. 69 at 3.)[4] Had it done so, the Court would necessarily have dismissed, on its face, the equitable claim to transfer the 27 percent interest in Tak Investments because that claim had a basis only if the notes were deemed cancelled. That was the claim litigated and eventually dismissed.

The relation-back doctrine (discussed in Tak Investments' other briefs in this matter, *see* ECF No. 61 at 4, ECF No. 46 at 12-18, ECF No. 54 at 7-8, ECF No. 56 at 1-5) remains

[4] The Plaintiffs, disconcertingly and inaccurately, refer to the notes as "Promissory Notes." They are "Investment Notes," accurately described by the Court in its initial summary judgment decision dated April 28, 2014 in the first case. Case No. 12-C-1305, ECF No. 37 at 3.

dispositive on the issue of whether the statute of limitations bars the Plaintiffs' claims. Contrary to the Plaintiffs' suggestion, ECF No. 69 at 3, the issue has not been decided by this Court with respect to Tak Investments.

This Court's prior relation-back decision focused on the applicability of the doctrine to Sharad Tak, a defendant not then named in this action and not named at all until the Amended Complaint was filed on April 3, 2017. (ECF No. 48 at 5.) The Court has yet to address the applicability of the relation back doctrine to the new claim for breach of the notes now alleged by Plaintiffs against Tak Investments. That Amended Complaint for the enforcement of the notes either relates back to the original 2014 Complaint, which alleged that the same notes were cancelled, or it does not. If it does not, the claim against Tak Investments perishes like the claims before it.

The Amended Complaint's new claim for breach of the notes against Tak Investments cannot relate back to the original Complaint. Under Rule 15, Fed. R. Civ. P., relation back is appropriate only when the amendment merely restates the essential allegations of the original Complaint and claims that those same "core" 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 [only] 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…"). Relation back is not a means to bootstrap time-barred claims onto viable actions where such claims do not rest on the same core allegations.

Here, under no plausible reading could the Plaintiffs' original claim for specific performance against Tak Investments on cancelled notes have the same core as the factual allegations underlying the new claim for the enforcement of the same notes. One alleges that the Plaintiffs deemed the four notes cancelled, seeking equitable relief in the form of specific performance to transfer an ownership interest, while the other both alleges still that the deemed cancellation occurred yet simultaneously seeks enforcement of the same notes. The first Complaint sought to enforce one contract. This Amended Complaint seeks to enforce four different contracts – that is, the notes. The first Complaint said that the four Plaintiffs, the "OFTI Group," were entitled to specific performance. In now seeking the payment of the four notes in the now Amended Complaint, the sole Plaintiff that could have standing to enforce the notes would be Tissue Technology, LLC, the alleged payee, assuming that entity in fact holds the notes as alleged.[5]

The original Complaint does not, even by inference, allege that Tak Investments had breached the Investment Notes. Faced with this reality, Plaintiffs resort to the novel, though hollow, contention that their claim "was for, in essence, security for the four Promissory [sic] Notes issued by Tak Investments, LLC." (Pls.' Br., ECF No. 69 at 2.) According to the Plaintiffs, they "sought cancellation of the Notes pursuant to the Final Business Terms

[5] In the course of discovery, still ongoing, the Defendants have discovered evidence that the notes have been, and today remain, assigned to third parties. As Mr. Van Den Heuvel stated in an e-mail dated July 6, 2010, "…the notes issued by TAK Investments, LLC to Tissue Products Technology Corp. have been assigned in whole and or part to various creditors." (Van Den Heuvel Dep. Ex. 11; Tr. of Van Den Heuvel Dep. 157:8-24, Decl. of Jonathan T. Smies ¶ 2, Ex. 1.) Remarkably, this was just over two months *after* Plaintiffs alleged that they provided notice of cancellation on April 20, 2010 in the first lawsuit. Case No. 12-C-1305, Compl., ECF No. 1. A document produced by Plaintiffs reflects the fact that the Investment Notes were assigned to "VHC" and "Associated." (Van Den Heuvel Dep. Ex. 16, Decl. of Jonathan T. Smies ¶ 5, Ex. 4.) This kind of assignment led the Court in its initial summary judgment decision to dismiss the first case.

Agreement—which request for cancellation was rejected by defendant Tak Investments, LLC and defendant Sharad Tak." (Id.) Yet, there is no evidence that the Plaintiffs had any security interest connected with the four Investment Notes; instead, the Plaintiffs agreed in the Final Business Terms Agreement to a contractual provision allowing them the sole discretion to deem the notes cancelled and demand an interest in Tak Investments. The cancellation was not something Plaintiffs "sought" or "request[ed]"; it was, rather, a contractual option only Plaintiffs could exercise. (Pls.' Br., ECF No. 69 at 2.) And that is precisely what they did.

In any event, whether or not the Defendants "rejected" the cancellation of the notes is beside the point. (Pls.' Br., ECF No. 69 at 2.) The cancellation was not theirs to accept or reject. By deeming the notes cancelled, the Plaintiffs chose their remedy. Neither Tak Investments nor Mr. Tak could have "rejected" the Plaintiffs' decision to deem the Investment Notes cancelled. While Tak Investments did contest the Plaintiffs' original claim for specific performance, its defense was based on the fact that Plaintiffs did not possess all of the notes they claim to have cancelled. This Court agreed in its April 28, 2014 summary judgment decision in the 2012 case.

With respect to the relation back doctrine, there was no question of mistaken identity here, *see, e.g., McKinnie v. Meirtran, Inc.*, No. 07-160, 2008 WL 4239001, at *3-4 (E. D. Wis. Sept. 15, 2008), as there was when Judge Stadtmueller permitted an amended complaint in the face of the statute of limitations.[6] The Plaintiffs were as familiar with Sharad Tak then as they were with his affiliated entities. In addition, there is a very serious question of notice and due process. *See, e.g., Mitchell v. CFC Financial LLC*, 230 F.R.D. 548, 550 (E.D. Wis. 2005).

[6] A copy of this unreported decision is attached as **Exhibit 2**.

For his part, of course Sharad Tak was aware of the litigation against Tak Investments, but he had no reason to be concerned about his personal liability in equity until the Court noted the potential (subject to its further review) in its April 3, 2017 decision. The new claim for damages on the notes precluded, and still precludes, any equitable claim to transfer an ownership interest. Indeed, the U.S. Court of Appeals has held that there can be no relation back unless "the original complaint gave the [new] defendant enough notice of the nature and scope of the plaintiff's new claim that he shouldn't have been surprised by the amplification of the allegations of the original complaint in the amended one." *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 573 (7th Cir. 2006).

The Amended Complaint's new claim against Tak Investments for enforcement of the notes does not relate back to the original Complaint. Under no reading could the original Complaint have given Tak Investments fair notice of the Plaintiffs' claim for the contradictory enforcement of the "cancelled" Investment Notes. Indeed, the original Complaint alleged that the notes were cancelled. This is not an instance of an amended pleading that states a new legal theory based on the core facts originally pled. Since the Amended Complaint presents a wholly different set of facts and theories inconsistent with those originally alleged, the Amended Complaint's claim against Tak Investments does not relate back to the original Complaint. It is untimely and barred by the statute of limitations as a matter of law.

II. Mr. Van Den Heuvel's Testimony Establishes There Was No Consideration For The Four Investment Notes.

Plaintiffs' response to Tak Investment's argument concerning the lack of consideration for the notes demonstrates that there was no consideration. At his deposition, Mr. Van Den Heuvel himself admitted that no money was paid to Tak Investments in exchange for the four notes on April 16, 2007. (Decl. of Jonathan T. Smies, Ex. 1, Tr. of August 2, 2017 Deposition of Ronald Van Den Heuvel ("Van Den Heuvel Dep.") at 105:10-13.) Mr. Van Den Heuvel also admitted that none of these amounts were reflected on any document relating to the sale of the paper mill in Oconto Falls to a Tak entity. (Van Den Heuvel Dep. 145:19-21.)

The closing statement Mr. Van Den Heuvel attaches to his affidavit also reflects the fact that the Investment Notes played no role in funding the sale of the Oconto Falls mill. (ECF No. 69-3 at 3.) Thus, Plaintiffs' claim that the Investment Notes were intended to bridge a last-minute gap in the funding of the sale of the mill and "reflect the additional debt that Ron Van Den Heuvel and his companies would incur in exchange for the Final Business Terms Agreement" makes no sense. (Pls.' Br., ECF No. 69 at 5.) To give the Plaintiffs the benefit of doubt, they repeatedly have confused the terms "Investment Notes" and "Promissory Notes." (Id.) *See supra* at n. 4.

Instead, Mr. Van Den Heuvel testified that he and Mr. Tak intended that Tak Investments make four notes for the benefit of one of Mr. Van Den Heuvel's entities – this despite the fact that nothing would be paid to and no asset given to Tak Investments, LLC – which issued the notes. This was an effort to provide Mr. Van Den Heuvel, as he testified, the means to attempt to convince third-party creditors to remove liens on various assets to help make the closing of the sale of the mill a reality. Mr. Van Den Heuvel testified:

> I had to get some people that would take Mr. Tak's name on the note in lieu of cash because I had—when [the loan] dropped from 80 to 65 [million dollars] and a five million working line, there wasn't enough cash at closing to clear the title. So I had to use about 16 million of investment notes, and I had to get other people that had liened on the mill to take those in lieu of—in lieu of cash.

(Van Den Heuvel Dep. 26:8-15.) This Court itself noted the usefulness of the notes to the Plaintiffs, not Tak Investments, when it described the assignment of one note to William Bain. (Case No. 12-C-1305, ECF No. 37 at 10-14.)

Mr. Van Den Heuvel admitted at deposition that Tak Investments received no funds in return for the four notes. (Van Den Heuvel Dep. 105:10-13.) The Defendants were not party to Mr. Van Den Heuvel's "use" of the notes to address his creditors' concerns. Plaintiffs' contention in their brief – that "The Promissory [sic] Notes were executed in order to make up that difference [after Goldman reduced the loan amount] and to reflect the additional debt…." (ECF No. 69 at 5) – only confuses matters. The Investment Notes played no role in the sale of the Oconto Falls paper mill. (ECF No. 69-3 at 3.) Nothing in the closing statement referenced either the Investment Notes or the Final Business Terms Agreement. (Id.; Van Den Heuvel Dep. 145:19-21.) Tak Investments was not acquiring the assets of the mill, ST Paper was. (Smies Decl. Ex. 2; Van Den Heuvel Dep. Ex. 1, ECF No. 69-1 at 60-100.) There was no "additional debt" to close the transaction, just debt that Mr. Van Den Heuvel or entities affiliated with him already had with third-parties that happened to hold liens.

The Investment Notes created no "debt" for Tak Investments to repay. Hence, there was no value in the Investment Notes – certainly none to Tak Investments. Perhaps Mr. Van Den Heuvel thought the Investment Notes would convince these creditors to lift their liens, a dubious proposition at best. It is surely not legal consideration. This Court said it best in 2014, noting the indemnification provision that required the Plaintiffs to make any payments: "The payee,

OFTI, effectively promised that it would never seek to collect the $16,400,000." (Case No. 12-C-1305, ECF No. 37 at 4.) Yet, the Plaintiffs now seek just that remedy.

Now, near the eve of trial, with Tak Investments' summary judgment motion pending, there remains the question of damages. Even if the Court assumes the notes were not cancelled, even if the Court assumes that the Plaintiffs actually hold all four notes, and even if the Court further assumes that the notes relate back and were made with consideration, how has the "non-payment" of the notes harmed the Plaintiffs? They gave nothing for them. They advanced no funds. They transferred no tangible or intangible property. Perhaps the Plaintiffs can satisfy an 18th century definition of "consideration," but they must face a 21st century contract requirement that a "breach" cannot result in a windfall. "The object of compensatory damages for breach of contract is to make the injured party whole. The stated philosophy…is to place the injured party in the same financial position as if the promise had not been broken." 2 Michael B. Apfeld et al., *Contract Law in Wisconsin* § 13.6 (4th ed. 2017), citing *Unico, Inc. v. Acton Street Corp.*, 888 F. Supp. 103, 105 (E.D. Wis. 1995) (injured party not entitled to be placed in better position because of breach of contract).

In their response brief, the Plaintiffs do not respond at all to this Court's own cogent description of the Investment Notes:

> In light of these indemnification provisions, it is evident that the parties to the Final [Business Terms] Agreement did not intend the notes to function as traditional promissory notes. The payee, OFTI, effectively promised that it would never seek to collect the $16,400,000. Instead, it appears that the notes functioned as an incentive for Tak to consummate Phase 2 Financing and enter into an additional contract worth over $315,000,000. Paragraph 2(H) stated that if Tak consummated Phase 2 Financing on or before the tenth anniversary of the notes, the Notes would be deemed cancelled. In addition, ¶ 2(G) provided that if Tak consummated Phase 2 Financing after the notes had been cancelled and the 27% share had been transferred, OFTI would return the 27% share to Tak. Thus, the notes provided Tak an incentive to consummate Phase 2 Financing quickly. If Tak consummated Phase 2 Financing before the third anniversary of the notes,

> Tak would not be required to transfer a 27% share to OFTI. If OFTI deemed the notes cancelled after the third anniversary, Tak would suffer the 27% loss until it consummated Phase 2 Financing.

Tissue Technology, LLC et al. v. Tak Investments, LLC, ECF No. 37 at 4. It is undisputed that Phase 2 Financing never occurred. But that is neither here nor there in this case. The Plaintiffs elected to assign the Investment Notes to third parties, for their own reasons and their own benefit, deeming the same notes cancelled, and now also seek to enforce the notes. These acts are inconsistent and provide no basis for any relief.

No Plaintiff paid any money or conferred any benefit in connection with the making of the four notes by Tak Investments, LLC. Accordingly, there is no consideration as a matter of law and – even if so, no damages – and the Court should dismiss the Plaintiffs' claims against Tak Investments premised on the enforcement of the notes.

III. The Court Should Deny Plaintiffs' "Renewed" Summary Judgment Motion.

Should the Court decline to grant Tak Investments' motion for summary judgment, the Court should still deny – again – Plaintiffs' improperly-raised request for summary judgment. The defects in Plaintiffs' request are apparent. While they sought summary judgment earlier in this case (ECF No. 24), it was on their original Complaint, which contained no claim for enforcement of the Investment Notes. Plaintiffs have yet to seek summary judgment on their Amended Complaint. Plaintiffs cannot renew a motion they never brought.

But even had they sought summary judgment on the claim for enforcement of the Investment Notes, summary judgment would be inappropriate for a variety of reasons, given the evidence confirmed in Mr. Van Den Heuvel's deposition, including the assignment of the Investment Notes to third parties. Mr. Van Den Heuvel testified that all four Investment Notes were assigned to various third parties, including two banks and a company affiliated with his

family. Mr. Van Den Heuvel testified that "all four of them [the Investment Notes] were assigned at one time." (Van Den Heuvel Dep. 152:1-2.) He cannot enforce what he does not have.

While Mr. Van Den Heuvel claimed that such assignments were no longer valid, and that the Plaintiffs now possess all four of the Investment Notes, an e-mail from October 15, 2016, produced in this litigation, is evidence that at least two of the Investment Notes are still assigned to third parties. In that e-mail, Ed Kolasinski, the Chief Financial Officer of Reclamation Technology Systems, LLC, a company affiliated with Mr. Van Den Heuvel, told Mr. Van Den Heuvel that if this litigation results in a payment of money, the first obligation to be paid would be a "Direct assignment of $9,000,000" on the "Settlement or Payment on Investment Notes Case – Priority." (Smies Decl. ¶ 6, Ex. 5.) This strongly suggests that, at a minimum, the $4,000,000 and $5,000,000 Investment Notes remain assigned to third parties. If the Court does not enter judgment as a matter of law on the claim against Tak Investments, additional evidence demonstrating that Plaintiffs do not possess the Investment Notes will be presented at the trial scheduled for next month.

CONCLUSION

For all of the above reasons, the Court should grant Tak Investments' motion for summary judgment, dismissing this case yet again. Even without a separate motion, moreover, the equitable claim against Sharad Tak should be dismissed as well. The Plaintiffs cannot pursue an equitable remedy against him on "cancelled" notes now sought to be revived somehow and enforced.

Dated this 25th day of August, 2017.

s/ Jonathan T. Smies
Jonathan T. Smies
State Bar No. 1045422
GODFREY & KAHN, S.C.
200 South Washington Street, Suite 100
Green Bay, WI 54301-4298
Phone: 920-432-9300
Fax: 920-436-7988
Email: jsmies@gklaw.com

Attorneys for Defendant Tak Investments, LLC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v. Case No. 12-C-1305

TAK INVESTMENTS LLC,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs brought this diversity action seeking a specific performance remedy against Defendant Tak Investments, LLC ("Tak"). Plaintiffs allege that pursuant to a contractual agreement, Tak is obligated to transfer to Plaintiffs an undiluted 27% ownership interest of the highest class in Tak. (Pls' Compl. ¶ 15, ECF No. 1.) On October 11, 2013, Tak filed a motion for summary judgment, asserting two discrete grounds for judgment in its favor: (1) Plaintiffs' claim is barred by *res judicata*; and (2) Plaintiffs failed to satisfy a condition precedent, which prevented the ownership transfer provision from being triggered. (ECF No. 21.) For the reasons stated below, Tak's motion will be denied on the ground of claim preclusion but granted for Plaintiffs' failure to satisfy a condition precedent.

I. BACKGROUND

Tissue Technology, LLC ("TTL"), Partners Concepts Development, Inc. ("PCDI"), Tissue Products Technology Corp. ("TPTC"), and Oconto Falls Tissue, Inc. ("OFTI") (collectively,

EXHIBIT 1

"OFTI"), are controlled by Ronald Van Den Heuvel and share a principal place of business in De Pere, Wisconsin. Each of the corporate plaintiffs is a Wisconsin corporation with its principal place of business in Wisconsin. (Compl. ¶¶ 2 - 4, ECF No. 1.) TTL has five members, four of whom are residents of Wisconsin and the fifth of whom is a resident of Illinois. (Jurisdictional Statement, ECF No. 27.) Tak is controlled by Sharad Tak and is a Delaware limited liability company with a principal place of business in Gaithersburg, Maryland. It has two members, one a Maryland resident and the other a resident of Florida. (Def's Answer ¶ 5, ECF No. 14.)

On April 16, 2007, Van Den Heuvel and Sharad Tak entered into two agreements. The first agreement was the "Second Amended and Restated Asset Purchase Agreement," which modified a September 19, 2006 asset purchase agreement (the "Asset Purchase Agreements"). (ECF No. 23-1 at 51.) In the April 16, 2007 Asset Purchase Agreement, ST Paper, LLC, an entity controlled by Sharad Tak, agreed to purchase from Van Den Heuvel's business entities substantially all of the assets of a paper mill located in Oconto Falls, Wisconsin, for $86,400,000. (*Id.* at 53.) The second agreement was entitled "Final Business Terms Agreement" (hereinafter the "Final Agreement"). (ECF No. 1-2.) The Final Agreement contemplated a potential, future purchase by Tak (or Sharad Tak) of property owned by Eco Fibre, Inc., another entity controlled by Van Den Heuvel. (Final Agreement ¶ 2(H), ECF No. 1-2.) This potential future purchase was defined as "Phase 2 Financing," in which Tak, or an entity controlled by Sharad Tak, would "construct a linerboard and/or tissue machine at the site presently owned by Eco Fibre, Inc. . . . using Spirit [an entity either controlled by or affiliated with Van Den Heuvel] as general contractor with a minimum construction contract of $315,000,000." (*Id.*)

The Agreement included the issuance of "Investment Notes," which it defined as "the four Notes equaling $16,400,000 executed in favor of TPTC by Investments [Tak] on the date hereof." (Final Agreement at 1, ECF No. 1-2.) On the same day, Tak issued four promissory notes to TPTC in the amounts of $3,000,000, $4,400,000, $4,000,000, and $5,000,000 (totaling $16,400,000). (ECF No. 1-1.) Each of the notes indicated that payment shall be due annually, with the largest payment due at the three-year mark. For example, for the $4,400,000 note, $440,000 was due on April 16, 2008, $440,000 was due on April 16, 2009, and $3,520,000 was due on April 16, 2010. (ECF No. 14-1.) The Final Agreement also included the following provision:

> Through the third anniversary of the date of each Investment Note, the OFTI Group agrees to pay any payments due for interest or principal required per the terms of the Investment Notes. . . . 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 Investments [Tak].

(Final Agreement ¶ 2(G), ECF No. 1-2.) Paragraph 2(G) provided that through the third anniversary of the notes, OFTI agreed to pay any payments due for interest or principal as required by the notes. OFTI also agreed to indemnify Tak and hold it harmless against any "damages, losses, deficiencies, actions, demands, judgments, fines, fees, costs and expenses, including, without limitation, attorneys' fees, of or against Investments [Tak]" resulting from OFTI's failure make such payments. This indemnification included claims made against Tak by any future holder of the notes. (*Id.*) Paragraph 2(I) provided that OFTI agreed to indemnify Tak against all claims to enforce the notes brought by OFTI or future holders, "other than the enforcement of the pledge described above," presumably referring to the 27% ownership transfer provision. Paragraph 2(I) did not contain a termination date for this indemnification.

In light of these indemnification provisions, it is evident that the parties to the Final Agreement did not intend the notes to function as traditional promissory notes. The payee, OFTI, effectively promised that it would never seek to collect the $16,400,000. Instead, it appears that the notes functioned as an incentive for Tak to consummate Phase 2 Financing and enter into an additional contract worth over $315,000,000. Paragraph 2(H) stated that if Tak consummated Phase 2 Financing on or before the tenth anniversary of the notes, the Notes would be deemed cancelled. In addition, ¶ 2(G) provided that if Tak consummated Phase 2 Financing after the notes had been cancelled and the 27% share had been transferred, OFTI would return the 27% share to Tak. Thus, the notes provided Tak an incentive to consummate Phase 2 Financing quickly. If Tak consummated Phase 2 Financing before the third anniversary of the notes, Tak would not be required to transfer a 27% share to OFTI. If OFTI deemed the notes cancelled after the third anniversary, Tak would suffer the 27% loss until it consummated Phase 2 Financing.

On April 17, 2007, Van Den Heuvel, acting as President of TPTC, assigned the $4,400,000 note to William Bain, stating the following in writing:

> TPTC acknowledges and agrees that certain monetary obligations are owed to William Bain ("Bain"). In partial consideration for such amounts owed by TPTC to Bain, TPTC hereby assigns the Promissory Note ("Note"), between [Tak] and TPTC, and proceeds from such Note dated April 16, 2007. Any payments made under the terms of the Note shall be paid directly to Bain or as designated by Bain.

(ECF No. 14-2.) On March 5, 2008, Tak and TPTC amended and restated the $4,400,000 note, amending the payee from TPTC to TTL. (ECF No. 14-3.) On the same day, Van Den Heuvel and Bain amended the assignment to reflect this change, but otherwise the amended and restated assignment indicated that "the Note shall continue to be assigned to Bain per the terms of the Assignment." (ECF No. 14-4.)

OFTI alleges that on or about April 20, 2010, after the third anniversary of the date of the Investment Notes, it sent notice to Tak that the Investment Notes were deemed cancelled. (Pls' Compl. ¶ 12; April 20, 2010 Letter, ECF No. 1-3.) Tak denies that it ever received OFTI's notice of cancellation, but asserts that even if notice was sent, the assignment to Bain eliminated OFTI's authority to cancel all of the notes. (Def's Answer ¶ 12, ECF No. 14.) Tak contends that because OFTI failed to satisfy this condition precedent, Tak is not obligated to transfer an undiluted 27% ownership interest to OFTI. Further, Tak argues that OFTI's claim is barred by *res judicata*, or claim preclusion, because PCDI already brought (and lost) a contract action in state court against Tak for breach of a separate provision of the Final Agreement. The court now examines whether Tak is entitled to judgment as a matter of law.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the submitted evidence demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "Material" means that the factual dispute must be outcome-determinative under law. *Contreras v. City of Chicago*, 119 F.3d 1286, 1291 (7th Cir. 1997). A "genuine" issue must have specific and sufficient evidence that, were a jury to believe it, would support a verdict in the non-moving party's favor. Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving party has the burden of showing there are no facts to support the non-moving party's claim. *Celotex*, 477 U.S. at 322. In determining whether summary judgment is proper, a court must construe the evidence in the light most favorable to the non-moving party. *Ramos v. City of Chicago*, 716 F.3d 1013, 1014 (7th Cir. 2013). There is no genuine issue of

material fact, and therefore no reason to go to trial, when no reasonable jury could find in the non-moving party's favor. *Smith v. Lafayette Bank & Trust Co.*, 674 F.3d 655, 657 (7th Cir. 2012).

III. ANALYSIS

A. Claim Preclusion

The court first examines whether OFTI's claim is barred by claim preclusion. On September 28, 2010, PCDI filed a complaint in the Brown County Circuit Court against Tak, among other defendants, asserting in part thatTak breached the Final Agreement by failing to transfer to OFTI a 22% ownership interest of the highest class in Tak. (*See Partners Concepts Dev. Inc. v. ST Paper, LLC et al.*, Brown County Cir. Ct. Case No. 10–CV–2714, ECF No. 23-1.) The provision of the Final Agreement relied upon by PCDI provided the following:

> In the event the collateral pledged to Johnson Bank by the OFTI Group in connection with the financial accommodations provided to Investments [Tak] is either drawn upon by Johnson Bank or provided to Investments [Tak], the OFTI Group shall obtain an undiluted 22% of the highest class of ownership interest in Investments [Tak] provided that some or all of such ownership interest may be pledged to Johnson Bank.

(Final Agreement ¶ 2(J), ECF No. 1-2.) PCDI alleged in the complaint that as part of the Asset Purchase Agreements, PCDI "agreed to pledge $11,831,253 in cash collateral to secure for [Tak and its affiliates] financing needed to complete the Asset Purchase Agreements from a commercial lending entity doing business as Johnson Bank." PCDI further alleged that Tak and its affiliates defaulted on the bank loan, prompting Johnson Bank to draw upon PCDI's cash collateral. PCDI therefore alleged that pursuant to ¶ 2(J), Tak was obligated to transfer 22% of its ownership interest to OFTI. (PCDI's Cir. Ct. Compl. ¶¶ 9-13, ECF No. 23-1.)

On October 18, 2010, Tak denied PCDI's allegations and asserted a counterclaim, alleging that PCDI breached the terms of the Final Agreement by failing to render certain sales and marketing services. (ECF No. 23-2.) Tak filed a motion for summary judgment on September 9, 2011, and PCDI failed to timely file any response to Tak's motion. (ECF Nos. 23-3, 23-4, 23-6.) As a result, the circuit court granted Tak's motion for summary judgment and dismissed PCDI's breach of contract action with prejudice. (ECF No. 23-6.) Tak contends the claim raised by OFTI in the present suit is precluded because the circuit court action was a final adjudication of OFTI's contract claims under the Final Agreement.

The doctrine of claim preclusion provides that a final judgment "is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." *DePratt v. West Bend Mut. Ins. Co.,* 113 Wis.2d 306, 310, 334 N.W.2d 883 (1983). In a federal claim premised on diversity of citizenship, the court applies state preclusion law where, as here, the adjudication argued to have preclusive effect was issued by a state tribunal. *Virnich v. Vorwald*, 664 F.3d 206, 215, n.3 (7th Cir. 2011). Under Wisconsin law, the elements of claim preclusion are: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." *Wickenhauser v. Lehtinen*, 2007 WI 82, ¶ 22, 302 Wis. 2d 41, 57-58, 734 N.W.2d 855, 864 (internal citations omitted). The doctrine of claim preclusion "is premised upon the maxim that litigation must come to an end so as to ensure fairness to the parties and sound judicial administration," and "the doctrine is applied with a broad brush so as to achieve these goals." *A.B.C.G. Enters., Inc. v. First Bank Se., N.A.*, 184 Wis. 2d 465, 472-73, 515 N.W.2d 904, 906–07 (1994) (internal citations omitted).

OFTI does not contest that the privity and final judgment prongs of the preclusion test are satisfied. This case therefore hinges on whether the second prong of the test is satisfied, that is, whether the causes of action in the circuit court action and this federal action are "identical" for purposes of claim preclusion. To determine whether claims presented in two separate suits are identical, Wisconsin has adopted the transactional approach set forth in RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). *Kruckenberg v. Harvey,* 2005 WI 43, ¶ 25, 279 Wis.2d 520, 694 N.W.2d 879. Under this approach, the court examines whether the claims arise from a "common nucleus of operative facts." *Id.* ¶ 26. The transactional approach is a pragmatic approach, and courts consider such factors as "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* ¶ 25 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 (2) (1982)). The approach also "reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so." *Id.* ¶ 27 (internal citations omitted).

Tak contends that OFTI's present claim could have been included in PCDI's circuit court complaint because the claim arises from an alleged breach of the same contract and the alleged injury had accrued by the filing of the circuit court complaint on September 28, 2010. It is true that both claims assert breaches of the Final Agreement. As for the timing, OFTI alleges that it provided notice to Tak that it deemed the Investment Notes cancelled on or about April 20, 2010. (Pl's Compl. ¶ 12.) Therefore, since OFTI apparently believed the condition precedent set forth in ¶ 2(G) of the Agreement had been satisfied months before it filed suit alleging a breach of ¶ 2(J) of the same contract, Tak argues that the claims should have been brought simultaneously. OFTI counters

that the facts underlying each claim are distinct and that the parties understood the Final Agreement to embody several different transactions.

Although the two provisions at issue, ¶ 2(G) and ¶ 2(J), are embodied in the same document, the transactional test is a pragmatic approach, and the Wisconsin courts have rejected bright-line applications. *See, e.g.*, *Menard, Inc. v. Liteway Lighting Products*, 2005 WI 98, ¶¶ 31–33, 282 Wis. 2d 582, 600–01, 698 N.W.2d 738, 747 (rejecting the court of appeals' bright-line rule that shipment and acceptance of goods must be treated as a unit, and reaffirming that the test focuses on whether the two causes of action arise out of the same common set of material facts). "The Wisconsin courts focus on facts, not legal theories, to determine whether an action is precluded." *Wilhelm v. County of Milwaukee*, 325 F.3d 843, 846 (7th Cir. 2003). Consequently, the fact that the two provisions are embodied in the same document is not dispositive. *Accord Cummins, Inc. v. TAS Distrib. Co., Inc.*, 676 F. Supp. 2d 701, 709 (C.D. Ill. 2009) (under Illinois' application of the transactional test, "the fact that two suits between the same parties concern the same contract does not necessarily mean that the second suit is barred."), *aff'd*, 700 F.3d 1329 (Fed. Cir. 2012).

Though based on the same agreement, OFTI's previous state court action was based on different facts than this case. In the Brown County action, OFTI sought an order directing Tak to transfer 22% of the highest class of ownership interest in Tak which it was entitled to receive under ¶ 2(J) of the Agreement when Tak defaulted on its loan and Johnson Bank drew upon the funds that OFTI had posted as collateral. OFTI also sought reimbursement from Tak for the funds taken by the bank less the amount Tak had already pledged to repay in a separate note. (ECF No. 23-1.) This action, in contrast, seeks specific performance of ¶ 2(G) which required Tak to transfer 27% of the highest class of interest in Tak upon OFTI's cancellation of the Investment Notes. Both the

underlying facts and the relief sought in this action are separate and distinct from those in the Brown County action.

While OFTI could have asserted its claim under ¶ 2(G) in the Brown County action, it was not required to do so. OFTI had the option to deem the notes cancelled after three years and take a 27% share of Tak, but it was merely an option. OFTI could also have waited longer to deem the notes cancelled if it thought that such an approach would encourage Tak to enter Phase 2 Financing. At this stage of the litigation, it is unclear whether Tak received OFTI's notice of cancellation or whether Tak issued any kind of response indicating a refusal to transfer the 27% share. It is also unclear whether the prospect of Phase 2 Financing was alive or effectively dead based on the parties' relationship when OFTI filed suit in September 2010. Ultimately, it does not matter. Given the complex and contingent nature of ¶ 2(G), it would be unfair to require OFTI to have filed suit under ¶ 2(G) in September 2010 solely because it attempted to enforce a separate provision of the contract at that time.

In sum, Tak has failed to demonstrate that OFTI's two claims are identical for purposes of issue preclusion, and practical considerations counsel against the doctrine's application. Summary judgment is therefore denied on the issue of claim preclusion.

B. Condition Precedent

Paragraph 2(G) of the Final Agreement provided that "[i]f 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 Investments [Tak]." (Agreement ¶ 2(G), ECF No. 1-2.) As Tak interprets this provision, ¶ 2(G)

was an "all or nothing" condition: OFTI was required to deem all four notes cancelled after the third anniversary of the Investment Notes to trigger Tak's obligation to transfer the ownership interest. (Def's Br. at 10, ECF No. 22.) Tak contends that when OFTI assigned the $4,400,000 note to Bain, OFTI relinquished its right to deem that note cancelled, and thus OFTI no longer had the power to satisfy the condition precedent.

OFTI does not disputeTak's claim that ¶ 2(G) required OFTI to deem all four Investment Notes cancelled in order to trigger the ownership transfer provision. Instead, OFTI claims that it fully satisfied the condition precedent because even though OFTI assigned one of the Investment Notes to Bain, OFTI and Bain orally agreed that OFTI would retain the authority to cancel the note at any time. OFTI has offered an affidavit from Bain attesting the following:

> Notwithstanding the Assignment and Amended Assignment, I expressly agreed with Van Den Heuvel that TPTC, TTL, and Van Den Heuvel had full power and authority to enforce the Note and Amended Note and to exercise all rights in respect thereto. Pursuant to this agreement, TPTC, TTL, and Van Den Heuvel had the power and authority to cancel the Note and Amended Note.

(Aff. of William Bain ¶ 6, ECF No. 29-2.)

The parties agreed that the Final Agreement and the Investment Notes would be construed in accordance with Wisconsin law. Under Wisconsin law, a condition precedent must be "exactly fulfilled or no liability can arise on the promise which such condition qualifies." *Woodland Realty, Inc. v. Winzenried*, 82 Wis. 2d 218, 224, 262 N.W.2d 106, 109 (1978) (internal citation omitted). Any material deviation from the condition precedent prevents liability on the contingent promise. *Id.* Here, if the contract required that all four notes be cancelled, and the $4,400,000 note was not cancelled, this would constitute a material deviation from the condition precedent found in ¶ 2(G). Contractual language is construed according to its plain or ordinary meaning, and courts look to

extrinsic evidence only when a contract provision is ambiguous. *See Tufail v. Midwest Hospitality, LLC*, 2013 WI 62, ¶¶ 27–28, 348 Wis. 2d 631, 643, 833 N.W.2d 586, 592.

Wisconsin law provides that "upon a valid and unqualified assignment, the assignee stands in the shoes of the assignor and assumes the same rights, title and interest possessed by the assignor." *Moutsopoulos v. Am. Mut. Ins. Co. of Boston*, 607 F.2d 1185, 1189 (7th Cir. 1979) (citing *Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis.2d 322, 327, 260 N.W.2d 680, 683 (1978)). It is a well-established principle of contract law that a valid assignment of an existing right also extinguishes the right in the assignor. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317 (a)(1), illus. 1 (1981) ("A has a right to $100 against B. A assigns his right to C. A's right is thereby extinguished, and C acquires a right against B to receive $100.") A party may partially assign an interest, provided that the assignment expressly delineates the rights transferred to the assignee from those retained by the assignor. *See Tullgren v. Sch. Dist. No. 1 of Vill. of Whitefish Bay*, 16 Wis. 2d 135, 142, 113 N.W.2d 540, 545 (1962) (observing that unless assignor expressly reserves rights, either on face of assignment or by separate agreement with assignee, assignment is absolute and assignor has no further interest in the subject matter of the assignment); RESTATEMENT (SECOND) OF CONTRACTS § 317 (1) ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance is extinguished *in whole or in part* and the assignee acquires a right to such performance.") (emphasis added).

Here, Van Den Heuvel assigned the $4,400,000 note to Bain on behalf of his business entities, and the assignment indicated that "any payments made under the terms of the Note shall be paid directly to Bain or as designated by Bain." (ECF No. 14-2.) This language unambiguously assigned the right to collect payment on the note to Bain, and the document did not expressly reserve

any rights to the assignor, Van Den Heuvel. Consequently, this was an absolute rather than a partial assignment, and Van Den Heuvel and his business entities relinquished the right to deem the note cancelled. *See Price v. Ross*, 62 Wis. 2d 335, 343–44, 214 N.W.2d 770, 774 (1974) (holding that according to plain meaning of assignment, the right to collect full payment had been transferred from assignor to assignee and assignor retained no right to modify the monthly payment amount).

Since the language of the assignment is unambiguous, the court may not consider Bain's affidavit as part of its analysis. However, even if the court had found the assignment language to be ambiguous, Bain's affidavit provides no help to OFTI. Bain asserts that notwithstanding the assignment, Van Den Heuvel retained "full power and authority to enforce the Note and Amended Note and to exercise all rights in respect thereto." (Aff. of William Bain ¶ 6, ECF No. 29-2.) Although it is possible for an assignor to assign some rights while reserving others, OFTI essentially argues that Van Den Heuvel assigned to Bain the right to collect payment on the note while reserving to himself the right to cancel the note (and thereby nullify Bain's ability to collect payment). This leads to the absurd result that a party could assign a note for consideration and then cancel the note after realizing his benefit of the bargain, leaving the assignee with nothing. Such an arrangement would be no assignment at all, as no absolute right has actually been transferred. Moreover, the danger of recognizing such an arrangement is highlighted by the facts of this case. On September 7, 2010, Horicon Bank filed an action against Bain in the Brown County Circuit Court alleging that he defaulted on a $240,000 loan. (ECF No. 14-5 at 4-6.) Horicon Bank sought to recover the amount of the loan but also stated a claim for replevin to recover proceeds from the $4,400,000 note, which Bain had used as collateral to secure the loan. (ECF No. 14-5 at 8.) Thus, if Van Den Heuvel had actually retained the authority to cancel the note, then he would have had

the power to unilaterally deprive Horicon Bank of its security interest. In short, the right to fully enforce the note could not reside in both Van Den Heuvel and Bain at the same time.

Accordingly, the Court concludes that because Van Den Heuvel assigned one of the four Investment Notes to Bain, OFTI lacked authority to deem all four notes cancelled on April 20, 2010. As a result, OFTI could not satisfy the condition precedent required to trigger the ownership transfer outlined in ¶ 2(G) of the Final Agreement at that time. There is also no evidence that Bain properly assigned his interest in the note back to Van Den Heuvel at any subsequent time. OFTI has therefore failed to meet its burden at summary judgment, and Tak is entitled to judgment as a matter of law on OFTI's contract claim.

IV. CONCLUSION

For the foregoing reasons, Tak's motion for summary judgment (ECF No. 21) is granted in part and denied in part. The motion is denied on ground of claim preclusion but granted for OFTI's failure to satisfy a condition precedent. OFTI's claim for breach of contract is hereby dismissed. As for Tak's counterclaim, the parties shall follow the scheduling order and the directives in the text order issued March 20, 2014.

SO ORDERED this 28th day of April, 2014.

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

2008 WL 4239001
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

Dionne McKINNIE, individually and on behalf of all others similarly situated, Plaintiffs,
v.
MEIRTRAN, INCORPORATED, Defendant.

No. 07-CV-160.
|
Sept. 15, 2008.

Attorneys and Law Firms

David M. Victor, Richard A. Lilly, Robert K. O'Reilly, John D. Blythin, Ademi & O'Reilly LLP, Cudahy, WI, for Plaintiffs.

Adam C. Toosley, Clark Hill SC, Chicago, IL, for Defendant.

ORDER

J.P. STADTMUELLER, District Judge.

***1** On December 13, 2007, plaintiff Dionne McKinnie filed a second amended complaint in the United States District Court for the Eastern District of Wisconsin against Meirtran, Incorporated ("Meirtran") alleging violations of the Electronic Fund Transfers Act ("EFTA"), 15 U.S.C. § 1693. Meirtran moves to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6)("Rule 12(b)(6)") or alternatively, for summary judgment pursuant to Fed.R.Civ.P. 56 ("Rule 56").

BACKGROUND

On April 27, 2006, plaintiff withdrew money from an automated teller machine ("ATM") located in Racine, Wisconsin. (Def.'s Proposed Findings of Fact ("DPFF") ¶ 1). Plaintiff alleges that Meirtran, the operator of the ATM, charged a usage fee for use of the ATM without providing adequate prior notice of the charges as mandated by the EFTA.

On February 20, 2007, plaintiff filed a summons and complaint against ShopKo Stores Operating Co. LLC ("ShopKo") alleging that it maintained the ATM in question. (Comp.¶ 21). On April 2, 2007, plaintiff filed an amended complaint changing the named defendant to Rockford Tech-Systems, Inc. ("RTS"), and claiming that Rockford maintained the ATM. (Am.Compl.¶ 23). RTS was served on June 7, 2007. (DPFF ¶ 6). During this time, RTS and Meirtran shared the same counsel, Meirtran's president was also a "principal" of RTS, and RTS's president was also the secretary of Meirtran. (Pl.'s Additional Proposed Findings of Fact ("PAPFF") ¶¶ 1-3). Meirtran has filed several copies of email correspondence from its counsel addressed to plaintiff's counsel. (DPFF ¶ 7 and Ex. D, E, F). In the first email, dated July 5, 2007, Meirtran's counsel advised plaintiff's counsel that Meirtran, not RTS, owned the ATM in question. In another email, dated July 17, 2007, Meirtran's counsel requested plaintiff's counsel substitute Meirtran for RTS as defendant. (DPFF Ex. E).

After filing an answer, RTS moved for summary judgment. Upon stipulation of the parties, the summary judgment motion was dismissed and the court granted plaintiff leave to amend the pleadings, ordering that RTS be removed as a party and substituted by Meirtran. (Order Dec. 13, 2007, Docket # 23). The stipulation also waived service of summons on Meirtran. (Order Dec. 13, 2007, Docket # 23 ¶ 5). On December 13, 2007, plaintiff filed a second amended complaint naming Meirtran as the defendant. On January, 21, 2008, Meirtran filed the motion now before the court claiming that plaintiff's claim against it is barred by the statute of limitations.

ANALYSIS

The court will consider Meirtran's motion as one for summary judgment pursuant to Rule 56, rather than a motion for dismissal pursuant to Rule 12(b)(6). A Rule 12(b)(6) motion requires the defendant to show that the plaintiff has failed to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). The statute of limitations is an affirmative defense rather than a necessary element of plaintiff's claim for relief. *See* Fed.R.Civ .P. 8(c); *see U.S. v. Northern Trust Co.*, 372 F.3d 886, 888 (7th Cir.2004) (holding that a Rule 12(b)(6) motion for failure to state a claim not barred by the statute of limitations was "irregular"). Therefore, a plaintiff can state a claim upon which relief can be granted regardless

EXHIBIT 2

of possible affirmative defenses available. *See id.*

***2** Summary judgment is appropriate where the moving party establishes that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are those facts that "might affect the outcome of the suit," and a dispute about a material fact is "genuine" if a reasonable finder of fact could find in favor of the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U .S. 242, 248 (1986). Summary judgment is appropriate where a party has failed to make "a showing sufficient to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 256-57. A party opposing summary judgment must set forth specific facts showing that there is a genuine issue for trial and may not rely on allegations or denials of the adverse party's pleading. Fed . R.Civ.P. 56(e). In conducting its review, the court views all facts and draws all reasonable inferences in favor of the nonmoving party. *Tanner v. Jupiter Realty Corp.*, 433 F.3d 913, 915 (7th Cir.2006).

Meirtran moves to dismiss plaintiff's second amended complaint claiming that plaintiff's claim is time-barred because it was filed over seven months after the statute of limitations had run. Meirtran asserts that plaintiff had to file her claim against Meirtran by April 27, 2007, one year from the date of the alleged violation. Plaintiff did not filed her second amended complaint until December 13, 2007. The parties do not dispute that plaintiff's original and amended complaints were both timely filed. However, Meirtran argues that plaintiff's second amended complaint should not relate back to plaintiff's prior complaints because plaintiff was not "mistaken" as to who the proper defendant was in the case. Plaintiff responds that her second amended complaint should relate back to her amended complaint against RTS, thereby making her claim against Meirtran timely.

After the statute of limitations on a claim has run, the Federal Rules of Civil Procedure allow a party to amend his or her pleadings to change a party to the claim if the following conditions are met:

> [T]he 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 ... and ... within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (I) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) 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)(B-C).

The first condition is met in this case. Plaintiff's second amended complaint asserts the same claim under the EFTA as plaintiff attempted to set out in her original and first amended complaints.

***3** The second condition requires that Meirtran received notice of plaintiff's action within 120 days of the original pleading such that Meirtran would not be prejudiced in its ability to defend on the merits. *See* Fed.R.Civ.P. 15(c)(1)(C); Fed.R.Civ.P. 4(m) (requiring defendants be served within 120 days after complaint is filed). Notice need not be formal, and may be imputed where the new defendant and original defendant have sufficient "identity of interest." *Norton v. Int'l Harvester Co.*, 627 F.2d 18, 20-21 (7th Cir.1980); *see Mitchell v. CFC Financial LLC*, 230 F.R.D. 548, 550 (E.D.Wis.2005). Identity of interest exists where parties are so closely related in their activities that bringing suit against one provides notice to the other. *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1499 (2008). Examples include where the two parties have "substantially identical officers, directors or shareholders, or share legal counsel and counsel is likely to have communicated to the new defendant that it may be joined in the action." *Mitchell*, 230 F.R.D. at 550 (citations omitted). Here, RTS was served on June 4, 2007, within 120 days after plaintiff filed her original complaint against ShopKo on February 20, 2007. (DPFF ¶ 6). At that time, RTS's president was also the secretary of Meirtran, Meirtran's president was a principal of RTS, and RTS and Meirtran shared the same counsel. In fact, it was these entities' shared counsel that notified plaintiff's counsel via email regarding Meirtran's ownership of the ATM. The court finds that Meirtran had sufficient notice of the issues in plaintiff's complaint within the statutory period such that it will not be prejudiced in defending itself on the merits.

The final inquiry is whether Meirtran knew or should have known that, but for plaintiff's mistake, Meirtran would have been originally named as a defendant. The court will allow an amended complaint to relate back to the original where an error has occurred regarding the

identity of the proper party and where that proper party "is chargeable with knowledge of the mistake." *King v. One Unknown Fed. Corr. Officer* 201 F.3d 910, 914 (7th Cir.2000) (citations omitted). A plaintiff seeking to substitute a defendant will not get the benefit of the relation back rule where that plaintiff merely lacked knowledge of the identity of the proper defendant. *See id.* at 914-15 (finding plaintiff not mistaken as to the proper defendant where suit initially brought against "unknown" defendants); *Baskin v. City of Des Plaines,* 138 F.3d 701, 704 (7th Cir.1998) (finding plaintiff not mistaken where suit initially brought against "unknown police officers"); *Eison v. McCoy,* 146 F.3d 468, 469-72 (7th Cir.1998) (finding plaintiff not mistaken where suit initially brought against officers "whose proper names are presently unknown"). Nor will a plaintiff's amended complaint relate back where the plaintiff was made aware of his or her mistake within the limitations period and failed to amend for strategic reasons. *See G.F. Co. v. Pan Ocean Shipping Co.,* 23 F.3d 1498, 1503 (9th Cir.1994). Rather, relation back is reserved for those who mistakenly sued the wrong party initially. *See id.* at 1503-04 (finding plaintiff mistaken where original complaint named agent of proper party and agent answered complaint "ambiguously").

***4** Here, plaintiff appears to have been mistaken as to the name of the entity legally responsible for the ATM in question. There is no question that shared counsel of RTS and Meirtran was aware of plaintiff's mistake, and attempted to notify plaintiff of it multiple times. (DPFF ¶ 7). However, these emails came in July of 2007, after the statutory period had already run. No evidence suggests that plaintiff was aware that Meirtran was the proper party and chose not to include Meirtran for strategic reasons before the limitations period ran. Moreover, RTS answered plaintiff's first amended complaint somewhat ambiguously by admitting that it maintained the ATM in question. (RTS's Answer ¶ 23 Docket # 12). Therefore, the court finds that plaintiff's second amended complaint meets the requirements of Rule 15(c) of the Federal Rules of Civil Procedure and relates back to plaintiff's original complaint. Hence, plaintiff's claim against Meirtran is not time-barred.

Accordingly,

IT IS ORDERED that the defendant's motion to dismiss or, in the alternative, for summary judgment (Docket # 27) be and the same is hereby **DENIED.**

All Citations

Not Reported in F.Supp.2d, 2008 WL 4239001

End of Document