

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH II

BROWN COUNTY

GLORY LLC,

Plaintiff,

vs.

TISSUE TECHNOLOGY LLC,

Defendant.

FILED
OCT 23 2012

CLERK OF COURTS
BROWN COUNTY, WI

CASE NO. 09-CV-439

ORIGINAL

TRANSCRIPT OF MOTION HEARING
October 16, 2012

Transcript of the proceedings had in the above action before the HONORABLE THOMAS J. WALSH, Circuit Court Judge, Branch II, Brown County, held at the Brown County Courthouse, in the City of Green Bay, Brown County, Wisconsin, commencing on the 16th day of October, 2012.

APPEARANCES: JACOB CURTIS, Attorney at Law, Milwaukee, Wisconsin, appeared on behalf of the Plaintiff.

JOHN PETITJEAN, Attorney at Law, Green Bay, Wisconsin, appeared on behalf of the Defendant.

ALSO PRESENT: Ronald VanDenHeuvel.

THE COURT: I'm going to call Glory LLC versus Tissue Technology LLC, 09-CV-439. Can I have the appearances, please?

MR. CURTIS: Good afternoon, Your Honor. Jacob Curtis with Reinhart, Boerner, Van Deuren, appearing on behalf of Glory LLC.

MR. PETITJEAN: Attorney John Petitjean appears on behalf of Tissue Tech and Mr. VanDenHeuvel, who also appears here in person.

THE COURT: We are here on a motion to vacate dismissal and enter order. First of all, I need the parties to know that I know Mr. VanDenHeuvel professionally, and I -- we've even served on the board of directors for the Cerebral Palsy Incorporated. I wouldn't call us social friends. We don't get together and go out, but I've seen him on a number of occasions at a number of events.

I don't know if that's of any concern to the plaintiff. If you have any concerns in that regard, I personally don't see that it's going to interfere with my ability to make decisions on this case, but I feel I need to disclose that. If you have any concerns at all, and certainly if you do, I'd be happy to recuse myself and move the case along.

MR. CURTIS: Thank you, Your Honor. I'm

confident the court can view this information
impartially.

THE COURT: Very good. Mr. Poppe, I don't
know if you have any comments about that or

MR. POPPE: I just asked Mr. Vandenbrouck,
and he had no objection. That's what I was doing with
the paper in front of my face.

THE COURT: Okay. All right. I've read over
the I've read over the motion

MR. POPPE: Your Honor, I do have a letter
attached to hand the court. It's only one page. But
anyhow

THE COURT: Okay.

MR. POPPE: Copies have provided to
counsel.

(Pause)

THE COURT: Have you had an opportunity to
review the affidavit of Mr. Vandenbrouck?

MR. POPPE: I have, Your Honor.

THE COURT: Okay. Well, then this is your
motion as I understand it to you and

MR. POPPE: Thank you, Your Honor,
essentially, plaintiffs are asking for entry of
judgment pursuant to the Settlement Agreement.

THE COURT: That is all I have reviewed plaintiffs

motion, and so I will try not to repeat myself, but I guess I would just direct the Court's attention to, I guess I would say, paragraph one under the Settlement Agreement, which is attached to our motion as Exhibit A, and then also paragraph two. And what the Court will see there is essentially a time line detailing when payments were due pursuant to the Settlement Agreement.

I think it's important for the Court to keep in mind that this Settlement Agreement really is the foundation of the July 22nd stipulated order for dismissal. That's the judgment. The judgment was entered on July 22nd. The foundation of that judgment is this Settlement Agreement.

As the Court can see, under paragraph two, if Tissue Tech misses any scheduled payment by more than ten days, Glory will have the right to request the Court to reopen the case and immediately enter judgment against Tissue Tech and in favor of Glory in an amount of \$800,000, less any payments made pursuant to this agreement prior to the default.

Now, the intent here is not to get into the weeds of, you know, when an e-mail was sent, when an e-mail wasn't sent. The reality is, there were issues even with respect to the first payment, but ultimately the

first payment was made.

With respect to the second payment, \$50,000 was due on or before December 1st, 2011. Second payment was not received by Glory until September 26, 2012, clearly more than ten days beyond December 1st, 2011, and that still left a third payment to be made. And that's when Glory filed its motion for entry of judgment. And so there's kind of just a few general points I want to make in addition to what's been detailed in the motion.

As I've already noted, the really important kind of date is July 22nd, 2011, which is a stipulated order for dismissal. That is the judgment in this case. I mean, essentially, what I can gather based on communications we've had with defense and really, in particular, highlighted by this affidavit that's been filed, I mean, essentially, the defendant is asking the Court to change the order that's already been entered so they can go back to what it already lost. It had the opportunity. It had the requirement to make the payment on a date certain, and it didn't do that.

We don't agree that, frankly, any sort of change to the court order can be made. I mean, really -- and this is something that we didn't have the opportunity to brief, but we'd like to point out to the Court right

now, essentially, defense is asking for the final judgment to be reopened, and here I would point the Court's attention to Wisconsin statute 806.07. And that statute essentially outlines the eight -- I wouldn't say the exceptions but eight options that a court or a party has before it to reopen a judgment.

But even before we would get to that analysis, the party needs to file a motion, which defense hasn't done. So that's the first hurdle. Under 806.07, if a party wants to reopen a judgment, it has to file a motion, and that's, obviously, important because then plaintiff in this case would have the opportunity to file its response. That's hurdle one.

Hurdle two, even if you were to get past that, would be that the Court would then have to make a finding, which, obviously, we'd require an evidentiary hearing -- and, frankly, in this case the witnesses would be Attorney Petitjean and Attorney Invoice Land, who had the majority of the discussions.

And then even if we get past that point where a hearing were to take place, the Court were ready to make some sort of finding, we would then be at the point where we would direct the Court's attention to (h) of 806.07, where there is lots of case law, the main case being Allstate Insurance versus Brunswick

letterhead; may be stamped a day or so later.

Then their e-mails show that there were -- discussions went back -- back and forth, as there had been problems in getting this paid. But the most important one is on September 25th. There was a wire from me to Attorney Voiland -- or an e-mail, I'm sorry, not -- keep thinking of old terminology. If I can get \$50,000 wired to you, will your clients withdraw the motion and continue with the settlement terms? The money would be wired tomorrow. I would need bank instructions or I could overnight a cashier's check.

On September 25th, I received the e-mail back, bank information is as follows: Can you provide me full wire details when sent? I responded -- no, I take that back. On the bottom of the page, John, I'll get the wire bank information for you. I replied, thanks.

The next thing that comes is the bank information.

On September 26th, which I think plaintiff will acknowledge -- if not, I have the confirmation of the \$50,000 being wired -- that money was wired to the bank in accordance with the wiring instructions.

Then if you go to the second-to-the-last page of the agreement -- or of the e-mails, Attorney Curtis now gives me some cryptic e-mail that Settlement Agreement provides -- this sets that forth, and you can read that

yourself. And I indicate that we have the third and final payment available to send.

I find this to be disturbing. And I'll try to calm down a little bit. This -- as to enforcing the Settlement Agreement. One, I said, there's not a judgment that's not rendered. They have a right to reopen.

If you go through the whole history of this, there has been problems with payments, but payments have been made. Clearly, they were willing to accept the second \$50,000 payment and withdraw this motion.

We now have the ability to pay -- what are we? Three weeks from September 26? Something like that. The ability to pay is here, and so now all of a sudden -- now all of a sudden we are going to come before this Court and say, hey, you know what? Let's make it eight hundred thousand. We'll give you a credit for the hundred.

Certainly the first, the second fifty, misrepresentation -- you know, negligent misrepresentation to me is about the kindest words I can say. And then to come here today and advance this before you, A, that there was a judgment or, B, that they didn't file the motion until after the second payment was made, which are both untruths, and then to

1 know that this e-mail record exists from their own
2 office and to ask the Court for this, this certainly
3 isn't within any bounds of equity.

4 They should take the \$50,000, live -- and everyone
5 should go on with their lives. But -- anyhow, that's
6 our position on this.

7 If the Court were to -- I do agree that if the
8 Court were to want to hold a hearing on this, that I
9 would have to withdraw as -- as counsel to Mr.
10 VanDenHeuvel, and also the plaintiff's firm would
11 probably because we'd be sitting here going through
12 these e-mails and trying to say, well, it says this,
13 but it doesn't say that.

14 But when I e-mail someone and say, will you
15 withdraw the motion if we wire you \$50,000 and I need
16 the wiring instructions and then you say, I will get
17 you that information, and I say, thanks, and then you
18 send me the information, that's -- if that's not offer
19 and acceptance and consideration, I -- it sure seems
20 like that to me.

21 Anyhow, I apologize for going on as I did, Your
22 Honor.

23 THE COURT: Mr. Petijean, what do you make of
24 paragraph eight on page two?

25 MR. PETITJEAN: Paragraph --

THE COURT: The Settlement Agreement.

MR. PETITJEAN: Are you talking about the motion?

THE COURT: No, I'm talking about the Settlement Agreement.

MR. PETITJEAN: I'm sorry. I was reading paragraph eight, page two, of their motion. That's also on page two.

THE COURT: Sure.

(Pause)

MR. PETITJEAN: It says, can be written by -- only amended by written agreement, Your Honor.

THE COURT: I -- I knew that. My question is, that seems to tell me that when I interpret this agreement, that I'm supposed to look at whether or not there is a written instrument designated as an amendment to this agreement and executed by the parties to the agreement, and --

MR. PETITJEAN: Doesn't that --

THE COURT: -- that would suggest to me that one of these e-mails perhaps should have had an attachment to it that says, Please sign this document labeled Amendment to Agreement; there is a signature line for you; and my client will sign it and that sort of thing.

MR. PETITJEAN: And, Your Honor, because I am of the age I am and not of the electronic age, I wouldn't know if we have described e-mail communications as written communications. Certainly they are when they're printed off. And -- I -- those **are** things that I would like an opportunity to at least brief to the Court. I don't want to say I even know the answer to that.

But it's certainly much different than an oral communication where we have a he-said-she-said or in this case a he-said-he-said discussion.

THE COURT: Do you have a response or anything further you want to say?

MR. CURTIS: I do, Your Honor, a few points I want to make. If I could just maybe shed some light on the e-mail included in the affidavit, they're certainly an accurate reflection of the communication that took place with Mr. Voiland.

However, it omits the next day's e-mails, and again the intent here is not to get kind of stuck in the weeds, but Mr. Voiland -- I'm providing a copy to counsel, and I'll provide one to the Court as well -- I have marked it as Exhibit B. Mr. Voiland -- Attorney Voiland made it very clear in response the following day that that represented the second -- the \$50,000

1 would represent the second payment and that there was
2 an additional third or, in total, there were three
3 payments to make.

4 And also I'll provide Exhibit A, which is a
5 voice -- a transcription of a voice message received
6 from Attorney Petitjean once again indicating that
7 there is an effort to really revise the Settlement
8 Agreement.

9 So again this voice message was received on the
10 26th at 10:37, and that's Exhibit A, the transcription.
11 And Exhibit B is an e-mail at 10:49. So clearly this
12 simply establishes that the plaintiff in this case was
13 in no way waiving any of its rights under the
14 Settlement Agreement.

15 The Settlement Agreement is very clear as to what
16 happens under or in the event of default, and it made
17 efforts to obtain the payments in a timely manner.

18 I would note just for clarification that this
19 motion -- I have the file stamped copy -- was filed
20 September 19th, 2012. The second payment, the wired
21 transfer, was not made until September 26th, at
22 sometime before three o'clock in the afternoon. So
23 that is the time line of when the second payment was
24 made.

25 And once again there was no waiver of plaintiff's

rights under the Settlement Agreement. There's really, frankly, no ability to go back and revise it, and in the event that defendant wanted to attempt that, there would have had to have been a motion again giving plaintiff the opportunity to respond. That hasn't taken place. And I won't repeat my earlier summary, but as I've already noted, 806.07 is very clear. When a judgment -- and frankly, a stipulated order for dismissal would be considered a final judgment under this Settlement Agreement. That simply really can't be viewed any other way.

And so for purposes of 806.07 and 806.07 analysis, it's very clear what acts would have to take place in order to reopen that stipulated order for dismissal. And those acts weren't taken as far as filing a motion. And this Court, obviously, hasn't had the opportunity to go through the analysis; and even if it did, if we'd get to that point, there is clear case law again indicating that the -- the ability to reopen for any reason is -- clearly, this doesn't fit within -- this would not fit within any of the previous A through F subparts of 806.07, so we would be looking at subpart H. That should be used sparingly by this Court.

But again that's an analysis we can't even get to because no motion ~~has~~ been filed.

So plaintiff's not waiving its right to the Settlement Agreement, and it urges this Court to look at the Settlement Agreement and enter full judgment.

THE COURT: I guess I'm wondering about the need to even arrive at 806.07 even if such a motion was filed because the only order in this case is one for dismissal. I don't know why the -- why there would be any desire on the part of the defendant to reopen a dismissal -- well, in any case, that kind of a motion hasn't been filed.

Mr. PetiJean, did you have anything else you wanted to say?

MR. PETITJEAN: Yes. The e-mail that was just provided to you by Mr. -- from Mr. Voiland to me after the second payment says, John, this will be your client's second payment. He has three payments to make. The stipulation called for three payments, fifty thousand, fifty thousand, fifty thousand. My e-mail said if we pay the second one, will you withdraw the motion? The response was providing me with the routing information and the bank information.

Then we have this, John, he's still got one more payment to make. We got the payment. They -- and now they want a judgment for \$800,000.

THE COURT: Mr. PetiJean, if the last payment

was due on June 1, 2012 -- and I think you're saying to me, the agreement was modified or was amended.

MR. PETITJEAN: It was modified or novation.

THE COURT: When is the last payment due? To your understanding, when is that last payment due? It hasn't been paid, has it?

MR. PETITJEAN: No. We have offered to wire it, and the e-mails --

THE COURT: But this agreement just simply doesn't have anymore deadlines in it?

MR. PETITJEAN: Well, I wouldn't say it has anymore deadlines in it because it could be done today and the matter would be over.

THE COURT: But it hasn't been done.

MR. PETITJEAN: Well --

THE COURT: Because my understanding is, whether I reopen the dismissal and grant judgment for eight hundred thousand, or whether it's a hundred and fifty thousand, the payment is still due; and if it were paid yesterday, it would have been credited towards the eight hundred or the one fifty. It just hasn't been paid. Right?

MR. PETITJEAN: The third -- the third payment has not been paid. That's correct. But given what's -- if you look at the history, that's what's

1 gone on here, one could understand a reluctance of
2 wiring the \$50,000.

3 Also, and not -- the -- when one's borrowing
4 money, it's contingent upon certain terms and
conditions, and one would be -- and that's not in this
affidavit, but the funds are available upon being able
to resolve this in total. I'm talking about Mr.

VanDenHeuvel being and his company as being able to --

9 THE COURT: Mr. Petitjean, do you think there's
10 anymore documentation or anything else you want to
11 submit to the Court before a decision is rendered?

12 MR. PETITJEAN: Yes, Your Honor. I would like
13 to be able to submit additional e-mails to the Court
14 that show that there was an agreement as to the
15 modification as to the date when the first payment was
16 due and that the first -- and that that payment
17 ultimately was accepted by the plaintiffs. And there's
18 probably -- if I were to search, there's probably
19 additional e-mails and inquiries as to when the second
20 payment could be made, and I could submit those also to
21 the Court. And, obviously, the plaintiff should have
22 time to respond.

23 THE COURT: How soon can you get me those
24 e-mails?

25 MR. PETITJEAN: Oh, I would think within sever.

days, Your Honor.

THE COURT: I'll give you seven days to submit any additional documentation that you want to submit and any argument that you want, and I'll give -- I'll give the plaintiff then ten days to reply, to put together any brief they want to put together, and then I'll render a written decision.

MR. PETITJEAN: Thank you.

THE COURT: Anything further for this record?

MR. CURTIS: No, Your Honor.

THE COURT: Very good. Then I'll expect your information from the defense within seven days and a reply within ten, if you want to submit anything. You don't have to submit anything in reply to what's being submitted by the defendant, but if you do, you can, and you have ten days after receipt to do so. And then I'll render a decision. All right?

MR. PETITJEAN: Today is -- I should know this. My wedding anniversary is Thursday, so this must be the 16th.

THE COURT: It's the 16th. So that means you'll have until the 23rd, close of business on the 23rd, and ten days from then is a Saturday. Let me give you until close of business on November 1st.

MR. CURTIS: Thank you, Your Honor.

THE COURT: All right. Very good. Then we're
in recess.

MR. PETITJEAN: Thank you.

(Proceedings concluded at 2:24 p.m.)

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STATE OF WISCONSIN

BROWN COUNTY

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I, Jeanne L. Spoehr, certify that I am the official court reporter for Branch II of the Circuit Court of Brown County; and as such court reporter, I made full and accurate stenographic notes of the foregoing proceedings; that the same was later reduced to typewritten form; and that the foregoing is a full and accurate transcript of my stenographic notes so taken.

Dated and signed in the City of Green Bay on the 17th day of October, 2012.


Jeanne L. Spoehr
Registered Merit Reporter
Certified Realtime Reporter
Brown County Courthouse

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OCT 23 2012

CLERK OF COURTS
BROWN COUNTY, WI