IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BOWEN MEDICAL COMPANY, LTD.
a/k/a MASSACHUSETTS MEDICAL
COMPANY, LTD.,

OPINION AND ORDER

Plaintiff,

02-C-0170-C

v.

NICOLET BIOMEDICAL INC.,
BENJAMIN S.C. SO,
WILSON CHAN d/b/a SYNAPSE
INSTRUMENT CO., and
DOES 1 TO 10 inclusive,

Defendants.

- -

This is a civil action for monetary relief in which plaintiff Bowen Medical Company, Ltd. alleges breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation, intentional interference with prospective business advantage and intentional interference with an existing contract. Defendant Nicolet Biomedical Inc. has filed a counterclaim for $266,756.87 for products and services rendered. Diversity jurisdiction is present. See 28 U.S.C. § 1332.

Originally, plaintiff filed its complaint in the District Court for the Central District of California on November 1, 2001. On March 11, 2002, that court transferred the case to this district pursuant to 28 U.S.C. §§ 1404(a) and 1406(a) because the contract contained a forum selection clause.

Presently before the court is defendant Nicolet's (1) motion for summary judgment as to plaintiff's claims and its counterclaim and (2) motion to strike plaintiff's expert witness and surreply brief. For the reasons stated below, defendant Nicolet's motion for summary judgment will be granted as to both plaintiff's claims and its counterclaim. Because I am granting summary judgment in its favor, defendant Nicolet's motion to strike will be denied as moot.

One important preliminary matter needs to be addressed. Because defendant Nicolet and plaintiff failed to allege sufficient facts in their proposed findings to establish complete diversity, I asked defendant Nicolet to provide information regarding the citizenship of defendants So, Chan and Synapse on November 6, 2002. On November 12, 2002, defendant Nicolet responded by stating that defendant So is a citizen of Hong Kong, defendant Chan is a citizen of both Hong Kong and Australia and defendant Synapse is incorporated in and has its principal place of business in Hong Kong. Although plaintiff is a California corporation with its principal place of business in Hong Kong, for diversity purposes it is a citizen of California only. See Torres v. Southern Peru Copper Corp., 113 F.3d 540, 543-44 (5th Cir. 1997) ("Absent congressional amendment to section 1332(c)(1) to the contrary, we must conclude that for diversity purposes a corporation incorporated in the United States with its principal place of business abroad is solely a citizen of its 'State' of incorporation."); Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1559 (11th Cir. 1989) ("[A] corporation's principal place of business outside the United States, the District of Columbia and Puerto Rico will not defeat diversity of citizenship when an alien is part of the opposing side."); Willems v. Barclays Bank D.C.O., 263 F. Supp. 774 (S.D.N.Y. 1966) (holding section 1332(c) does not give dual citizenship to domestic corporation with its principal

place of business in foreign country). In addition, defendant Nicolet stated that its counsel (Foley & Lardner) does not represent defendants So, Chan and Synapse and, moreover, to its knowledge these defendants have never been served. Although it is unclear whether plaintiff ever served defendants So, Chan and Synapse or obtained a waiver of service as to them, it is clear from the record that (1) the court never received proof of either service or waiver of service, Fed. R. Civ. P. 4; (2) these defendants never answered plaintiff's complaint, Fed. R. Civ. P. 12(a); and (3) plaintiff never moved for entry of default against them for failing to answer its complaint, Fed. R. Civ. P. 55(a). Accordingly, because plaintiff has failed to prosecute this case against defendants So, Chan and Synapse, the complaint will be dismissed as to these defendants. See Chambers v. NASCO, Inc., 501 U.S. 34, 44 (1991) (federal court may act sua sponte to dismiss suit for failure to prosecute).

Because only defendant Nicolet remains in this lawsuit, all further references to "defendant" will be to Nicolet. From the proposed findings of fact and the record, I find the following material facts to be undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Bowen Medical Company, Ltd. a/k/a Massachusetts Medical Company, Ltd. is a California company with its principal place of business in Hong Kong. As of December 2000, defendant Nicolet Biomedical Inc. merged with Viasys Healthcare, Inc., which is a Delaware corporation with its principal place of business in Pennsylvania. (Before December 2000, defendant Nicolet was a California

corporation with its principal place of business in Wisconsin.) Defendant now operates as a division of Viasys Healthcare.

B. The Agreement

From 1996 to November 17, 2000, plaintiff was defendant's exclusive distributor in Hong Kong and southern China. Over the course of their relationship, plaintiff and defendant entered into successive contracts, the most recent of which was entered in January 1999. Under this agreement, plaintiff was obligated to promote defendant's products. According to its terms, the 1999 agreement commenced on January 19, 1999, and expired on December 31, 2000. The agreement included the following provisions: (1)"[defendant] shall have the right to terminate this Agreement for cause with ten (10) days written notice [if] . . . [plaintiff], in [defendant's] sole discretion, is ineffectively staffed to perform its obligations under this Agreement"; (2) "[plaintiff] is in no way the legal representative or agent of [defendant]"; (3) "[t]his agreement constitutes the entire contract between the parties. Amendments, if any, shall be in writing and valid only when signed by both parties"; and (4) "[t]his Agreement supersedes any prior agreement, discussion or negotiations between the parties whether written or oral and any such prior agreement is cancelled as at the commencement of this agreement but without prejudice to any rights which may already have accrued to the parties." In addition, the agreement contains a choice-of-law provision, which states that the agreement "shall be governed in all respects by the internal laws (and not the laws of conflicts or chapter 133) of the State of Wisconsin except for those laws expressly limited to persons situated in Wisconsin."

Defendant never signed a written amendment to the 1999 agreement. To facilitate plaintiff's ability to purchase defendant's equipment, defendant extended a $250,000 line of credit to plaintiff. Absent special circumstances, plaintiff was required to pay all outstanding credit balances within 30 days of purchase. The agreement states, "If [plaintiff] shall default in any payment due [defendant] . . . [defendant] shall have the sole right to cancel any orders and delay any shipments to [plaintiff] until payment is made or assurances required by [defendant] are received." Defendant allowed plaintiff to delay payment on items purchased in 1998 and 1999 until performance difficulties with those items were resolved. After the problems were resolved, plaintiff failed to pay the outstanding balance. On October 11, 1999, defendant informed plaintiff that its credit was on hold because the October 4, 1999 invoice indicated an outstanding balance of $255,399. Because plaintiff made sufficient payments, defendant lifted the credit hold in November 1999. As of July 5, 2000, plaintiff owed defendant more than $115,000 for machines that had problems when they were delivered. Two customers refused to pay plaintiff because they had failed to receive certain documentation, software upgrades and training. Under the contract, plaintiff had the sole responsibility to provide these items to customers.

In September 2000, defendant placed another credit hold on plaintiff's account and refused to ship any further equipment until plaintiff's past due debt was paid. As of September 13, 2000, plaintiff owed defendant $255,653.50, of which $123,983.50 was past due. The credit hold had been instituted pursuant to paragraph (3)(D)(iii), which states that "if [plaintiff's] financial condition shall at any time seem to [defendant] inadequate to warrant further shipments, [defendant] shall have the right to cancel any orders and delay any shipments . . . until payment is made or assurances . . . received." Defendant

consistently provided equipment and services to plaintiff except when plaintiff's credit was on hold.

Sometime in September 2000, Wilson Chan and Eric Lo (both of whom made up plaintiff's entire sales and service staff) resigned from plaintiff. Chan's resignation was effective October 14, 2000. Because proper servicing is critical to protect the health and safety of patients who rely on Nicolet equipment for diagnosis and treatment, defendant was concerned by the departure of plaintiff's sales and service staff. In September 2000, plaintiff hired new employees to replace departed and departing staff. The replacement employees were not experienced or trained with respect to Nicolet products. Defendant refused to provide training because the requests were made after the parties' contract had been terminated.

Also during September 2000, Benjamin So, acting without instruction from defendant, notified plaintiff that defendant was terminating the contract. Defendant told So he had no authority to terminate the agreement with plaintiff. On October 4, 2000, plaintiff's president, Monita Cheung, faxed a letter to defendant inquiring as to So's termination notice. In the fax, Cheung expressed her assumption that the 1999 agreement would renew automatically. On October 20, 2000, defendant responded to plaintiff's inquiry, stating that So had no authority to take such action and that there had been no termination. In that same letter, defendant informed plaintiff that "the distribution agreement does not renew automatically" and cautioned that "neither party should take any actions based on assumptions about the future."

Chan learned that when plaintiff's customers called for him, plaintiff failed to inform them that he no longer worked there. As a result, on November 1, 2000, Chan sent identical letters to plaintiff's

customers in which he stated that he was no longer employed by plaintiff. He did not comment in the letters on plaintiff's performance and he did not tell the recipients how to contact him.

As of November 2000, plaintiff had not replenished its sales and service staff with adequately trained employees and had not notified defendant of a realistic plan to do so. Seeing no improvement in plaintiff's staffing, defendant decided to terminate the agreement. On November 7, 2000, defendant notified plaintiff that effective November 17, 2000:

> [Defendant] is terminating the agreement in accordance with section 2.B.iii of the agreement, which allows termination if [plaintiff] becomes ineffectively staffed to perform its obligations. [Defendant] considers [plaintiff] ineffectively staffed to perform its obligations, because [plaintiff] has lost its entire sales and service staff, and has no one [defendant] considers competently trained to perform those duties.

When defendant decided to change distributors in Hong Kong and southern China, it approached Chan about filling that role through his company, Synapse Instrument. Chan had formed Synapse on August 30, 2000, as an internet business specializing in medical information. In selecting "trading in medical equipment" as the description of his business for registration purposes, Chan had to select from a limited number of approved descriptions. Chan resigned from plaintiff in order to develop an internet business.

On November 18, 2000, Chan accepted defendant's offer to be its exclusive distributor in Hong Kong and southern China. Because of the decline of the dot-com industry, Chan realized that it would be difficult to build an internet business. Chan has never worked directly for defendant but has always been employed by a Nicolet distributor.

As of November 2000, plaintiff owed defendant $266,756.87 plus interest for services actually

rendered and equipment actually delivered. Despite defendant's demand for payment, plaintiff has not made a payment since July 12, 2000.

OPINION

A. Choice of Law

In a federal lawsuit based on diversity of citizenship, the court will apply the choice-of-law principles of the jurisdiction in which it sits to determine the substantive law that will apply. See Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U. S. 487, 496- 97 (1941). Therefore, Wisconsin's choice-of-law principles apply. The 1999 contract contains a choice-of-law provision that states the agreement "shall be governed in all respects by the internal laws . . . of the State of Wisconsin." As there are no public policy reasons to disregard the provision, Wisconsin law recognizes the parties' choice-of-law provision in the contract. See Bush v. National School Studios, Inc., 139 Wis. 2d 635, 642, 407 N.W.2d 883 (1987). Defendant argues that Wisconsin law applies to this lawsuit and plaintiff does not dispute this contention. Therefore, this court will apply Wisconsin law.

B. Breach of Contract

Defendant argues that pursuant to the plain language of the 1999 agreement (1) it could terminate the agreement because of inadequate staffing and (2) the agreement did not renew automatically. Plaintiff fails to address either of these breach of contract arguments in its brief in opposition. As a consequence, plaintiff has waived these arguments. See Central States, Southeast and

Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived."); Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Bd., 957 F.2d 302, 305 (7th Cir. 1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief"). Instead, plaintiff contends that its breach of contract claim is grounded in the Wisconsin Fair Dealership Act. Defendant argues that (1) because plaintiff failed to plead a Wisconsin Fair Dealership Act claim, it is barred from doing so; and (2) even if the claim had been pleaded properly, it is frivolous because the Act applies only to "dealers" that are "situated in" Wisconsin.

Although it is not entirely clear whether plaintiff was required to plead the Wisconsin Fair Dealership Act under Fed. R. Civ. P. 8, it is unnecessary to determine that issue because even if plaintiff had pleaded the Act, plaintiff is not "situated in" Wisconsin, as required under the Act. See Wis. Stat. § 135.02(2) ("dealer" means "a person who is a grantee of a dealership situated in this state"). Plaintiff argues that because defendant transferred this case to this court (from the Central District of California) on the basis of the forum selection clause, plaintiff is now protected under the Wisconsin Fair Dealership Act notwithstanding the Act's requirement that it be situated in Wisconsin. It takes more than the transfer of a case for improper venue to make inapplicable laws applicable. See Baldewein Co. v. Tri-Clover, Inc., 233 Wis. 2d 57, 606 N.W.2d 145 (2000) (Wisconsin choice-of-law provision in dealership agreement will not make dealership "situated in" Wisconsin). In fact, even though the agreement in this case provides that the laws of Wisconsin apply "except for those laws expressly limited to persons situated in Wisconsin," this disclaimer in all likelihood would not have prevented the Wisconsin Fair

Dealership Act from applying had plaintiff actually been situated in Wisconsin. See Generac Corporation v. Caterpillar, Inc., 172 F.3d 971, 974-75 (7th Cir. 1999) (whether Act is applicable is governed by statutory definitions of "dealer" and "dealership" and not choice-of-law provision); Bush, 139 Wis. 2d at 643, 407 N.W.2d at 887 (Minnesota choice-of-law provision does not prevent Act from applying).

Plaintiff contends alternatively that even if the Wisconsin Fair Dealership Act is not applicable to the agreement, plaintiff is entitled to prevail under a breach of contract theory. However, plaintiff does not support its contention with any argument. In fact, it is not even clear from plaintiff's brief in opposition how the contract might have been breached. As stated above, arguments not developed in any meaningful way are waived. Central States, 181 F.3d at 808. Accordingly, I will grant defendant's motion for summary judgment as to plaintiff's breach of contract claim.

C. Breach of Fiduciary Duty

Plaintiff argues in a conclusory fashion that defendant terminated their "agreement without good cause and breached an asserted fiduciary relationship." Plt.'s Br. in Resp., dkt. #28, at 11. Defendant argues that it did not owe a fiduciary duty to plaintiff because (1) the contract states expressly that "[plaintiff] is in no way the legal representative or agent of [defendant]" and (2) the parties' supplier-dealer relationship does not give rise to a fiduciary duty under Wisconsin law.

As defendant notes, it is well established that supplier-dealer relationships do not give rise to a fiduciary duty. See Bushendorf v. Freightliner Corp., 13 F.3d 1024, 1026 (7th Cir. 1993) ("an

automobile dealer or other similar type of dealer, who . . . merely buys goods from manufacturers or other suppliers for resale to the consuming public, is not his supplier's agent") (collecting cases); Badger Pharmacal, Inc. v. Colgate-Palmolive Co., 1 F.3d 621, 627 (7th Cir. 1993) (no duty to disclose information in commercial relationship in which buyer given exclusive right to market seller's product). Although plaintiff acknowledges that it must prove that defendant Nicolet owed it a fiduciary duty, see Modern Materials, Inc. v. Advanced Tooling Specialists, Inc., 206 Wis. 2d 435, 443, 557 N.W.2d 835, 838 (Ct. App. 1996), it fails to explain to the court how such a duty arose. Plaintiff cannot simply proclaim that a duty exists. Instead, it must tether its proclamations to the law. See Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir.1999) (summary judgment "is the 'put up or shut up' moment in a lawsuit"). Moreover, to the extent that plaintiff is arguing that defendant had a fiduciary duty to act with "good cause" under the Wisconsin Fair Dealership Act, as discussed earlier, the Act does not apply to plaintiff. Accordingly, I will grant defendant's motion for summary judgment as to plaintiff's breach of fiduciary duty claim.

D. Economic Loss Doctrine

"Under the economic loss doctrine, Wisconsin law bars tort claims which seek only 'economic losses' related to the commercial transaction." Home Valu, Inc. v. Pep Boys, 213 F.3d 960, 963 (7th Cir. 2000) (citing Wausau Tile, Inc. v. County Concrete Corp., 226 Wis. 2d 235, 593 N.W.2d 445 (1999)). The doctrine is based on an understanding that contract law is better suited than tort law for dealing with purely economic loss in the commercial arena. See Daanen & Janssen, Inc. v. Cedarapids,

Inc., 216 Wis. 2d 395, 400, 573 N.W.2d 842, 844 (1998); see also Miller v. U.S. Steel Corp., 902 F.2d 573, 574 (7th Cir. 1990) (holding that "tort law is a superfluous and inapt tool for resolving purely commercial disputes"). Wisconsin law requires transacting parties to pursue only their contract remedies when asserting an economic loss, thus preserving the distinction between contract and tort law. See Daanen & Janssen, 216 Wis. 2d at 400, 573 N.W.2d at 844. Economic losses encompass all losses other than injuries to a plaintiff's person or property. See Cooper Power System, Inc. v. Union Carbide & Plastics Co., 123 F.3d 675, 681 (7th Cir. 1997).

Defendant contends that plaintiff's tort claims of fraud, negligent misrepresentation and interference with a contract are barred by the economic loss doctrine. Plaintiff argues that the economic loss doctrine applies only to purchases of consumer products and, thus, is inapplicable in this case. Once again, plaintiff glosses over defendant's argument and comes to a conclusion without citing any supporting law. Without doubt, the economic loss doctrine is a threshold issue that must be determined before delving into the elements of each tort. As defendant points out, the economic loss doctrine is well-established and has been applied to commercial transactions outside the realm of consumer product purchases. See, e.g., Home Valu, 213 F.3d at 963 (applying economic loss doctrine to real estate contract between commercial parties); Daanen & Janssen, 216 Wis. 2d at 400, 573 N.W.2d at 844 (economic loss doctrine bars remote commercial purchaser from recovering economic losses from manufacturer under tort theories of strict liability and negligence); Stoughton Trailers, Inc. v. Henkel Corp., 965 F. Supp. 1227, 1230 (W.D. Wis. 1997) ("Permitting parties to sue in tort when the deal goes awry rewrites the agreement by allowing a party to recoup a benefit that was not part of the bargain.")

(citing East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 871-75 (1986). Accordingly, I conclude that the economic loss doctrine bars plaintiff's tort claims and will grant defendant's motion for summary judgment as to those claims.

E. Defendant's Counterclaim

Defendant alleges that plaintiff owes it $266,756.87 plus interest for services rendered and equipment delivered under their agreement. Plaintiff's entire argument in response is that defendant's figure "was incorrectly calculated" and that, in any event, the unpaid balance will be offset by damages it will receive in this lawsuit. As should be evident by this point, plaintiff will not be receiving any damages to offset defendant's counterclaim. As to plaintiff's contention that defendant's figure is incorrect, plaintiff fails to explain what is incorrect about the figure or what the correct figure should be. Plaintiff never proposed facts in support of the allegedly correct figure or for that matter any facts at all. Although defendant alleges in its reply brief that presumably plaintiff contests only two charges (which supposedly total $81,180.50), this appears to be mere speculation on the basis of various documents in the record. Notwithstanding defendant's gracious speculation in plaintiff's favor, if plaintiff believed that defendant's figure had been calculated incorrectly, it had an obligation to explain to the court why it was wrong and how the correct figure should have been calculated. Plaintiff failed to do so. For the third time in this opinion, I will remind plaintiff that "[a]rguments not developed in any meaningful way are waived." See Central States, 181 F.3d at 808. Accordingly, defendant's motion for summary judgment on its counterclaim will be granted in the amount of $266,756.87. Because defendant has not

told the court how interest is to be calculated, it may have until November 22, 2002, to do so. Plaintiff may have until November 29, 2002, to respond. There will be no reply brief.

ORDER

IT IS ORDERED that

1. Defendants Benjamin S.C. So and Wilson Chan d/b/a Synapse Instrument Co. are DISMISSED for failure to prosecute;

2. Defendant Nicolet Biomedical Inc.'s motion for summary judgment as to plaintiff's claims is GRANTED;

3. Defendant Nicolet's motion for summary judgment as to its counterclaim is GRANTED in the amount of $266,756.87;

4. Because defendant has not told the court how interest is to be calculated, it may have until November 22, 2002, to do so. Plaintiff may have until November 29, 2002, to respond to defendant's interest calculation. There will be no reply brief; and

5. Defendant Nicolet's motions to strike plaintiff's expert witness and surreply brief are DENIED as moot.

Entered this 14th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge