IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BOSSHARD BOGS, LLP,

OPINION AND ORDER

Plaintiff,

02-C-0034-C

v.

CLIFFSTAR CORPORATION,

Defendant.

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This is a civil action for monetary relief in which plaintiff Bosshard Bogs, LLP, a cranberry grower, is alleging that defendant Cliffstar Corporation breached its contract and duty of good faith by failing to pay an agreed upon price for plaintiff's cranberries. Plaintiff filed its complaint originally in the Circuit Court for Monroe County, Wisconsin. Defendant removed the action to this court pursuant to 28 U. S. C. §§ 1441 and 1446. The parties alleged that jurisdiction was present under diversity of jurisdiction. See 28 U. S. C. § 1332(a). However, they did not provide the court with information regarding the citizenship of plaintiff's partners, although the citizenship of a limited liability partnership is determined by the citizenship of its partners. Cosgrove v. Bartoletta, 150 F.3d 729, 731 (7th Cir. 1998), I directed defendant to submit proof that plaintiff's partners were not

citizens of either New York or Delaware, the two states in which defendant is domiciled. On October 1, 2002, the parties stipulated that plaintiff's partners are domiciled in Wisconsin, Utah, Hawaii, and Minnesota. Now that the parties have shown that complete diversity exists between the parties, I conclude that this court has subject matter jurisdiction pursuant to 28 U. S. C. § 1332(a). (The amount in controversy exceeds $75,000.)

Presently before the court is plaintiff's motion for summary judgment in which it contends that defendant breached their contract in both 1999 and 2000. With respect to the 1999 crop year, plaintiff contends that defendant breached the contract and its duty of good faith when it failed to pay plaintiff the price announced in a September 13, 1999 letter. With respect to the 2000 crop year, plaintiff contends that defendant breached the contract by miscalculating the contract's pricing provision.

Plaintiff's motion for summary judgment will be denied. With respect to its breach of contract claim for both the 1999 and 2000 crop years, plaintiff has failed to show that the claims can be decided as a matter of law.

UNDISPUTED FACTS

Plaintiff grows and sells cranberries. Defendant buys cranberries. From 1991-1995, defendant purchased cranberries from plaintiff pursuant to a written contract. The 1991-1995 contract required defendant to pay plaintiff the "cash price paid to growers in the State

of Wisconsin, for any given year, by as many other legitimate cash buyers as can be identified, excluding Ocean Spray and other cooperative buyers." Growers usually harvest cranberries in the fall of each year, beginning in September and ending in October. Processors of cranberries, such as defendant, pay for the cranberries over a six-month period from the December after harvest to the following May.

From 1991-1995, in September, defendant sent a letter to plaintiff announcing the price it would pay for the coming harvest. Defendant then paid the price announced in the letter over four monthly installments, on December 1, January 1, March 1 and May 1. Defendant deducted costs for cleaning the cranberries and for marketing dues from the January payment. On two occasions, defendant paid a price higher than that announced in the letter because the cash price paid to growers had increased.

On April 23, 1996, plaintiff and defendant entered into a new contract that changed the pricing provision. Under the 1996 contract, from 1996-1998, defendant agreed to purchase cranberries from the plaintiff at the fixed price of $80 per barrel, plus incentives based on the cranberries' color. The 1996 contract provided that, after 1998, the minimum price defendant would pay to plaintiff would be "$2.00/bbl over the previous year's Ocean Spray average pool price less incentives." The 1996 contract does not indicate how or when the actual price will be determined and it does not define "average pool price." Except for the change in the price term, the 1996 contract terms remained the same as the 1991-1995

contract.

The 1999 crop year was the first time that defendant was to pay plaintiff on the basis of Ocean Spray's average pool price for the previous year. In a letter dated September 13, 1999, defendant sent plaintiff a letter stating, "We are announcing our 1999 Cranberry Harvest Pricing of $33.00/bbl, plus the color incentive of $1.00/bbl for color reading of 35-39 and $2.00/bbl for color 40 and over." For the 1999 crop, plaintiff delivered 27,190.73 barrels of cranberries to defendant. After receiving the cranberries, defendant wrote plaintiff in a letter dated December 1, 1999, "final pricing will be significantly below our pre-harvest estimate of $33/bbl." Defendant made the following payments to plaintiff: $236,186.33 on December 1, 1999; $161,325.13 on January 1, 2000; $100,232.68 on March 1, 2000; $18,660.49 on May 1, 2000.

For the 2000 crop, plaintiff delivered 14,792 barrels of cranberries to defendant. Defendant made the following payments to plaintiff for the 2000 crop: $65,765.00 on December 1, 2000; $34,661.15 on January 15, 2001; $36,980.00 on March 1,2001; and $36,980.00 on May 1, 2001.

As a general rule, Ocean Spray announces its final total pool proceeds and its final proceeds available to growers for a crop year about twelve to eighteen months after the crop has been harvested. The difference between the two numbers is that the total pool proceeds includes dividends paid to investors, which growers do not receive.

On July 31, 2001, Ocean Spray announced its total pool proceeds and its proceeds available to growers for the 1998 crop and the 1999 crop. In reliance on this announcement and because it had underestimated the price per barrel, defendant paid plaintiff an additional sum of $6,797.68 for the 1999 crop on August 31, 2001. After the final payment in August 2001, defendant paid $20.25, plus incentives per barrel. Also, defendant paid an additional $32,394.48 for the 2000 crop on August 31, 2001. After the final payment for the 2000 crop, defendant paid $12.19 plus incentives per barrel. For both years, defendant calculated the average pool price using Ocean Spray's total proceeds available to growers. For both years, defendant paid plaintiff for each barrel two dollars over the amount that defendant calculated to be the average pool price.

OPINION

A. Standard of Review

To prevail on a motion for summary judgment, the moving party must show that even if all inferences are drawn in the light most favorable to the non-moving party, 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, 322 (1986). Summary judgment may be awarded against the non-moving party if the court concludes that a reasonable jury could not find for that party on the basis of the facts before it. Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

B. 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 generally Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U. S. 487, 496-97 (1941). Therefore, Wisconsin's choice-of-law principles apply. The 1996 contract contains a choice-of-law provision that states: "This agreement is to be governed by and construed according to the laws of New York." 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). The parties also agree that New York law should apply. Therefore, this court will apply New York law.

C. Breach of Contract

1. 1999 Crop Year

With respect to the 1999 crop year, the issue is whether defendant is obligated to pay the price announced in the September, 13 1999 letter. Plaintiff bases its argument on course of dealings under the 1991-1995 contract asserting that defendant set the contract price for

the 1999 crop in the September 13, 1999 letter. (Plaintiff does not argue that it would have sold its cranberries to another buyer if defendant had announced a lower price). Defendant counters by arguing that whether course of dealing exists and the meaning it gives to the contract are questions of fact. It maintains that the court may not use course of dealing to interpret the contract without usurping the jury's role in determining the facts. Alternatively, defendant argues that if the court finds course of dealing between the two parties from 1991-1995, such a course of dealing ceased to exist when they entered into the 1996 contract, which had a different price provision.

Under New York law, when interpretation of a written agreement is at issue, its interpretation is a question of law if the parties' intent can be gathered from the four corners of the written agreement. Ruttenberg v. Davidge Data Systems Corp., 626 N.Y.S.2d 174, 175-76, 215 A.D.2d 191, 192-93 (App. Div. 1995); see also Funding Partners, Inc. v. RIT Auto Leasing Group, Inc., 733 N.Y.S.2d 901, 901, 288 A.D.2d 431, 432 (App. Div. 2001). The court determines whether extrinsic evidence is necessary to show the parties' intentions. Funding Partners, Inc., 733 N.Y.S.2d at 901, 288 A.D.2d at 432. If the parties' intent cannot be gathered from the four corners of the written agreement, and extrinsic evidence is necessary to show the parties' intentions, the contract's interpretation becomes a question of fact. Ruttenberg, 626 N.Y.S.2d at 176, 215 A.D.2d at 193. Extrinsic evidence can include course of dealings. New Moon Shipping Co., Ltd. v. Man B & W Diesel AG, 121

F.3d 24, 31 (2nd Cir. 1997). Generally, the interpretation of extrinsic evidence to determine the pricing provision of an open price contract is a question of fact. Vermont Morgan Corp. v. Ringer Enter., 461 N.Y.S.2d 446, 448, 92 A.D.2d 1020, 1020 (App. Div. 1983).

With respect to the pricing provision, I conclude that I cannot determine the parties' intent from the 1996 contract. Because the parties had not settled on a price at the time they concluded the contract, the contract has an open price term. See N.Y.U.C.C. § 2-305(1). Paragraph 5 of the 1996 contract provides that: "Upon expiration of the three year fixed price contract, Cliffstar's minimum price will be $2.00/bbl over the previous year's Ocean Spray average pool price less incentives." Under this term, the parties agreed to a *minimum* price, but the agreement does not say how or when the actual price would be determined. The parties could negotiate any price above what the formula set. Because the price term formulated only a price floor, and not a specific price, the agreed upon price cannot be determined by looking at the contract alone.

Plaintiff contends that based on prior course dealings, defendant set the 1996 contract price in the September 13, 1999 letter for the 1999 crop year. Determining whether course of dealing existed between two parties and the effect it gives to a contract are questions of fact. New Moon Shipping Co., Ltd., 121 F.3d at 3; see also Ruttenberg, 626 N.Y.S.2d at 176, 215 A.D.2d at 193; Division of Triple T Service, Inc. v Mobil Oil Corp.,

304 N.Y.S.2d 191, 203 (N.Y. Sup. Ct. 1969). First, the jury would determine whether a course of dealing existed between the two parties during the 1991-1995 contract. Second, the jury would determine whether the change in the pricing provision in the 1996 contract drastically altered purchasing conditions so that the 1991-1995 course of dealings was not analogous to the 1999 conditions. A reasonable jury could find that the parties' course of dealings under the 1991-1995 contract set the price for the 1999 crop season because the change in the pricing provision was not sufficient to alter purchase conditions. Alternatively, a reasonably jury could find that no prior course of dealings exists under the 1996 contract since the 1999 crop year was the first time that the parties were operating under the new price provision. I cannot determine plaintiff's claim for the 1999 crop year as a matter of law.

Plaintiff argues that by refusing to negotiate a price and paying only the contract minimum price, defendant has breached its obligation to act in good faith pursuant to N. Y.U.C.C. § 1-203. Under New York law, a violation of N.Y.U.C.C. § 1-203 does not give rise to an independent cause of action. Grain Traders, Inc. v. Citibank, N.A., 960 F. Supp. 784, 792 (S. D. N. Y. 1997); Super Glue Corp. v. Avis Rent a Car System, Inc., 517 N.Y.S.2d 764, 766, 132 A.D.2d 604, 605-6 (App. Div. 1987). Good faith doctrine does not create a separate duty that can be independently violated. Grain Traders, 960 F. Supp. at 792. When a party acts in bad faith, the court may deny that party any provision or

concept that would improve his or her position. SuperGlue, 517 N.Y.S.2d at 766, 132 A.D.2d at 607. Thus, acting in bad faith is a disqualifying factor, not a liability imposing factor. Id. Because defendant is not attempting to obtain a benefit of a provision that would improve its position, it is unnecessary to decide whether defendant has acted in bad faith.

I cannot conclude as a matter of law that plaintiff is entitled to the price announced in the September 13, 1999 letter. The prior course of dealings could show that defendant is obligated to pay the price announced in the letter. However, it is for the jury to decide whether course of dealings exists, and if it does, the meaning it gives to written agreements. Plaintiff has failed to show that no reasonable juror could find for defendant. Therefore, I will deny plaintiff's motion for summary judgment on its claim for breach of contract for the 1999 crop season.

2. 2000

For the 2000 crop, the issue is how to calculate the Ocean Spray average pool price when Ocean Spray does not define average pool price. The price provision from the 1996 contract states: "Upon expiration of the three year fixed price contract, Cliffstar's minimum price will be $2.00/bbl over the previous year's Ocean Spray *average pool price* less incentives." (Emphasis added). Plaintiff contends that defendant calculated the average pool price

incorrectly because it did not use the total pool proceeds, but used only proceeds available to growers. Defendant argues that Ocean Spray's average pool price is based on the price that growers received, which is Ocean Spray's proceeds available to growers.

Under New York law, the court determines whether a written contract is ambiguous. Funding Partners, Inc., 733 N.Y.S.2d at 901, 288 A.D.2d at 432. If the contract is ambiguous, then its interpretation is a question of fact. Id. In this case, the term "Ocean Spray's average pool price" is ambiguous because it could be reasonably based on either Ocean Spray's total pool proceeds or proceeds available to growers.

I cannot interpret the average pool price as a matter of law because plaintiff has failed to show that no reasonable juror could find in favor of defendant. In its brief, plaintiff writes, "Based on information from Ocean Spray's director of grower relations, Jack Crooks, Ocean Spray's average 1999 pool price without incentives was $12 per barrel of cranberries." Plt.'s Br., dkt #12, p. 11. However, Crooks's affidavit states, "Ocean Spray's Total Pool Proceeds less average incentives was $12.00 per barrel." Aff. of Jack Crooks, dkt. #17 at ¶6. Crooks's affidavit refers only to the total pool proceeds; it does not explain why the average pool price should be determined using the total pool proceeds. Even without considering defendant's opposing affidavit, I cannot conclude that plaintiff's affidavit demonstrates that its interpretation of the meaning of "average pool price" is the only reasonable one. Therefore, I will deny plaintiff's motion for summary judgment on its claim that the price

defendant paid for the 2000 crop breached the 1996 contract.

ORDER

IT IS ORDERED that

1. Plaintiff Bosshard Bogs, LLP's motion for summary judgment is DENIED.

2. Trial will go forward on the issues of whether defendant breached the 1996 contract and the duty of good faith by refusing to pay $33 per barrel for the 1999 crop of cranberries, whether defendant breached the 1996 contract by calculating Ocean Spray's average pool price using Ocean Spray's proceeds available to growers and the matter of damages.

Entered this 23rd day of October, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge