

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GERARD BASTIEN,

Plaintiff,

v.

U.S. CONVERGION, INC.,

Defendant.

ORDER

03-C-0111-C

This is a civil action for monetary relief in which plaintiff Gerard Bastien alleges that defendant U.S. Convergion, Inc. breached the covenant of good faith and fair dealing and engaged in fraudulent misrepresentations regarding an employment agreement. Diversity jurisdiction is present. 28 U.S.C. § 1332.

Presently before the court is plaintiff's motion for leave to file an amended complaint in which plaintiff wishes to add (1) Market Central, Inc. as a defendant and (2) causes of action grounded in promissory estoppel, negligent misrepresentation, strict responsibility misrepresentation, false representations and fraudulent advertising. The proposed causes of action arise out of the same operative facts alleged in the original complaint. Defendant would stipulate to the new causes of action provided that this court extends the dispositive

motion deadline by two months.

Plaintiff filed this lawsuit on March 10, 2003. The deadline set for amending the pleadings was June 13, 2003. (The deadline for dispositive motions is July 31, 2003. Trial is scheduled for December 1, 2003.) Plaintiff filed his motion for leave to amend on the day it was due. Absent unusual circumstance, if a party seeks to amend the complaint before the deadline provided in the pretrial conference order, it will be granted without extending either the dispositive motion deadline or trial date. Because of an oversight, the court did not address plaintiff's present motion until today, which is also the day dispositive motions are due. Nevertheless, plaintiff's motion for leave to amend the complaint to add his new causes of action will be granted and the deadline for dispositive motions will be extended to August 18, 2003. However, plaintiff's motion for leave to amend the complaint to add Market Central as a defendant will be denied.

Although a district court shall freely grant leave to amend "when justice so requires," the rule does not command leave be granted every time. Fed. R. Civ. P. 15(a); Thompson v. Illinois Dept. of Professional Regulation, 300 F.3d 750, 759 (7th Cir. 2002). A court may deny leave to amend when there is (1) undue delay; (2) a dilatory motive on the movant's part; (3) the movant has failed repeatedly to cure previous deficiencies; and (4) when doing so would be futile. See Cognitest Corp. v. Venture Stores, Inc., 56 F.3d 771, 772 (7th Cir. 1995); Moore v. State of Indiana, 999 F.2d 1125, 1128 (7th Cir. 1993) (well settled that

leave to amend complaint should not be granted in situations in which amendment would be futile).

Plaintiff filed this lawsuit on March 10, 2003. On April 7, 2003, Market Central acquired 100% of defendant's stock. Plaintiff argues that this acquisition resulted in a de facto merger and, thus, Market Central is a necessary defendant. See International Private Satellite Partners, L.P. v. Lucky Cat, 975 F. Supp. 483, 487 (W.D.N.Y. 1997); Sedbrook v. Zimmerman Design Group, Ltd., 190 Wis. 2d 14, 20-21, 526 N.W.2d 758, 760 (Ct. App. 1994) ("Four factors are generally considered determinative of whether a transaction may be considered a de facto merger: (1) the assets of the seller corporation are acquired with shares of the stock in the buyer corporation, resulting in a continuity of shareholders; (2) the seller ceases operations and dissolves soon after the sale; (3) the buyer continues the enterprise of the seller corporation so that there is a continuity of management, employees, business location, assets and general business operations; and (4) the buyer assumes those liabilities of the seller necessary for the uninterrupted continuation of normal business operations.") Although plaintiff concedes that Market Central has no contacts with Wisconsin, he maintains that personal jurisdiction is appropriate because of the contacts of its subsidiary, defendant Convergion, coupled with the fact that there was a de facto merger. Defendant disagrees.

Setting aside the parties' main argument for a moment, it is unclear why plaintiff

waited over one month to file his leave to amend to add Market Central as a defendant when he knew that this acquisition was likely to take place before he even commenced the lawsuit. See Plt.'s Reply, dkt. #13, at 9 (On February 27, 2003, "Market Central announces that its board of directors had formally approved the acquisition of Converjion"). Moreover, the acquisition had taken place at the time plaintiff agreed to the parties' joint pretrial conference report. Plaintiff offers no explanation for his one-month delay, which in and of itself constitutes an undue delay given this court's well-known docket speed. In any event, I turn to the parties' dispute concerning futility and personal jurisdiction.

"By itself, the existence of a parent-subsiidiary relationship is insufficient to support personal jurisdiction over a nonresident parent whose subsidiary has insufficient contacts with the forum state." Insolia v. Philip Morris, Inc., 31 F. Supp. 2d 660, 669 (W.D. Wis. 1998); see also Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 336 (1925). Courts begin with the presumption of corporate separateness. Insolia, 31 F. Supp. 2d at 669. This presumption can be rebutted only if "there is a basis for piercing the corporate veil and thus attributing the subsidiaries' torts to the parent." IDS Life Insurance Co. v. SunAmerica Life Insurance Co., 136 F.3d 537, 540 (7th Cir.1998). Disregard of corporate formalities is a factor considered by Wisconsin courts when determining whether to pierce a corporation's "veil" of limited liability. See Consumer's Co-op of Walworth County v. Olsen, 142 Wis.2d 465, 483, 419 N.W.2d 211, 217 (1988). Other courts confronted with this issue in the

context of personal jurisdiction have focused on an additional factor: whether the parent managed the subsidiary with a degree of control “greater than that normally associated with common ownership and directorship.” Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1160 (5th Cir. 1983); see also Donatelli v. National Hockey League, 893 F.2d 459, 466 (1st Cir. 1990). This factor is borrowed from the so-called “alter ego” doctrine, applicable to shareholders who exert “not mere majority or complete stock control, but complete domination . . . so that the corporate entity [has] . . . no . . . separate existence of its own.” Consumer’s Co-op, 142 Wis.2d at 484, 419 N.W.2d at 217. In such cases, the corporate form is cast aside and the shareholders become liable for acts and debts attributable to the corporation.

Defendant avers that after Market Central acquired Convergion, Convergion has been maintained as a separate and independent subsidiary; has retained its own name, corporate identity and title to its assets; and has continued its operations in the same manner as before the acquisition. Other than a reduction-in-force layoff for economic reasons, defendant avers, Convergion has maintained substantially the same workforce and management. Plaintiff does not dispute defendant’s averments with any evidence or averments to the contrary. Instead, plaintiff asserts that because Market Central purchased 100% of Convergion’s stock with its own stock and Convergion’s corporate headquarters changed to that of Market Central’s after the acquisition, a de facto merger has taken place. These

allegations, even if true, would not necessitate piercing of the corporate veil and they do not meet the four-part de facto merger test articulated in Sedbrook, 190 Wis. 2d at 20-21, 526 N.W.2d at 760. Plaintiff must convince the court that “justice so requires” adding Market Central to this lawsuit and that doing so would not be futile in light of defendant’s personal jurisdiction argument to the contrary. Plaintiff has failed to do so. Accordingly, plaintiff’s motion for leave to amend to name Market Central as a defendant will be denied.

ORDER

IT IS ORDERED that plaintiff Gerard Bastien’s motion for leave to file an amended complaint is DENIED in part and GRANTED in part; plaintiff’s motion to amend the complaint to add his additional causes of action is GRANTED and the parties may have until August 18, 2003, to file dispositive motions; plaintiff’s motion to amend the complaint to name Market Central, Inc. as a defendant is DENIED.

Entered this 31st day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge