IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FLEMING COMPANIES, INC.,

Plaintiff,

v.

KRIST OIL CO.,

Defendant.

OPINION and ORDER

03-C-221-C

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This is civil action in which plaintiff Fleming Companies, Inc. sought monetary damages, alleging that defendant Krist Oil Co. breached the parties' contract by failing to pay for certain merchandise that it ordered from plaintiff. In response, defendant brought five counterclaims: (1) breach of contract; (2) breach of warranty of fitness for a particular purpose; (3) misrepresentation or fraud; (4) violation of the Wisconsin Fair Dealership Act; and (5) any other tort as the facts may justify. In an order dated June 16, 2004, I granted plaintiff's motion for summary judgment with respect to its breach of contract claim and all five of defendant's counterclaims. Because plaintiff was entitled to judgment on all claims, the case was closed. Now defendant has filed two motions: one to amend its counterclaims

under Fed. R. Civ. P. 15(a) and another to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or alternatively for relief from the judgment under Fed. R. Civ. P. 60(b). Both motions will be denied.

A. Motion to Alter or Amend

1. Plaintiff's breach of contract claim

In concluding that plaintiff was entitled to judgment in the amount of $1,028,842.70, I reasoned that defendant had conceded liability, that plaintiff had submitted invoices totaling $1,059,437.33 showing the amount due and that defendant had put only $30,584.61 of that total into dispute. In arguing that this conclusion was erroneous, defendant raises two interrelated arguments: (1) the court erroneously concluded that the invoices were conclusive on the issue of the amount owed simply because it found them to be admissible; and (2) the court improperly shifted the burden to defendant to show the amount due.

Defendants' first argument is flatly contradicted by the language in the holding. The invoices were not considered conclusive simply because they were found to be admissible; had they been, plaintiff would have been awarded the full $1,059,437.33. Instead, I concluded that plaintiff was entitled to judgment in the amount of $1,028,842.70 "[b]ecause plaintiff has submitted admissible evidence that defendant owes it at least $1,028,842.70,

and defendant has failed to adduce any evidence contradicting this amount." Op. & Order, dkt. #44, at 14. The invoice figures were reduced to the extent that defendant had submitted evidence calling them into question. (Plaintiff agreed to reduce the amount it was seeking by this amount, making trial unnecessary.)

Next defendant argues that the court shifted the burden to it to prove the amount due. Defendant was held only to the standard facing every party opposing a motion for summary judgment. As Fed. R. Civ. P. 56(e) states clearly,

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

(Emphasis added). Certainly, plaintiff bears the burden of proving its damages. To this end, plaintiff proffered invoices that defendant concedes are admissible to show the amount due. However, defendant did not adduce evidence containing specific facts showing that there is a genuine issue with respect to $1,028,842.70 of the total $1,059,437.33 amount shown on the invoices. Although the jury must resolve discrepancies where the parties submit conflicting evidence as to damages, Brogan v. Industrial Casualty Ins. Co., 132 Wis. 2d 229, 239, 392 N.W.2d 439, 444 (Ct. App. 1986), there was no conflict with respect to the sum awarded.

As I noted in the order, the three affidavits that defendant cited in support of its arguments did not create a material issue of fact with respect to the $1,028.842.70. In one of the affidavits, the affiant noted that two invoices contained certain errors that were totally unrelated to the amount due. In the others, two of defendant's store managers averred that additional credits were due but could not say how much. (In a footnote, defendant notes that one of these three affiants had stated that there were "likely errors on the invoices of stores managed by less experienced people that were never picked up." Dft.'s Br., dkt. #49, at 3 n.2. "Memorializing mere speculation in the form of an affidavit does not convert the speculation into competent evidence." Gonzalez v. Litscher, 230 F. Supp. 2d 950, 962 (W.D. Wis. 2002).)

Defendant appears to reason that a jury could infer from the existence of some errors the existence of others for which there is no evidence. Defendant's theory calls for speculation on the part of the jury. Juries are entrusted to weigh credibility and draw inferences, but they may not speculate. Featherly v. Continental Insurance Co., 73 Wis. 2d 273, 280, 243 N.W.2d 806, 812 (1976); Ianni v. Grain Dealers Mutual Insurance Co., 42 Wis. 2d 354, 364, 166 N.W.2d 148, 153 (1969). See also McCoy v. Harrison, 341 F.3d 600, 604 (7th Cir. 2003) (speculation does not create material factual dispute). The errors defendant highlighted represented only a slight fraction of the total invoiced amounts. At no point did defendant contend that there was any regularity or predictability to the errors

such that it might be reasonable to infer errors for which there is no other evidence.

Finally, defendant stresses the fact that it had indicated in its opposition brief that it could and would prove that the invoice amounts were inaccurate at trial. As I have already explained, it is not enough that defendant asserts that it will able to show that the invoices are unreliable at trial; summary judgment is the time it must show that it has admissable evidence for trial. Fed. R. Civ. P. 56(e); Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003). It is too late for defendant to submit additional evidence to bolster its position. "Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence." Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986) (emphasis added). The affidavit defendant submits merely clarifies the meaning of certain markings found on an invoice that was already submitted; there is nothing "newly discovered" about it. Defendant provides no explanation why it could not have produced the evidence earlier. In addition, defendant points to evidence it had submitted earlier but did not refer to in its proposed findings of fact. This court's procedures make clear that evidence cannot be considered unless it is made the subject of proposed findings of facts. See Procedure to Be Followed on Motions for Summary Judgment, I.B.3; I.C.1, attached to Preliminary Pretrial Conference Order, dkt. #9 ("The court will not search the record for evidence."). Neither Rule 59(e) nor 60(b) was designed to give a losing party a belated second bite at the apple.

2. Defendant's misrepresentation counterclaim

As I noted in the June 16 opinion and order, defendant failed to explain how its evidence satisfied the elements of the six theories of fraud and misrepresentation available under Michigan and Wisconsin state law. Because defendant did not identify any statements plaintiff made to it in its argument, I disregarded defendant's reference to those theories that were based on affirmative misrepresentations. Defendant contends that this was error because the undisputed facts indicate that plaintiff made certain affirmative statements that defendant now identifies as being the basis for its misrepresentation claim. "Arguments not developed in any meaningful way are waived." Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999). It is defendant's burden to explain how evidence in the record supported a particular argument or theory. Even in arguing that the court erred in not considering these statements as the basis of its claim, defendant still does not explain why or how it satisfied the other elements making out a claim of affirmative misrepresentation. Thus, defendant's argument provides no basis for altering the outcome even if I were to accept it.

Finally, defendant reargues its non-disclosure misrepresentation claim. However, defendant does not explain why it considers the June 16 order erroneous or why plaintiff had a duty to disclose additional information regarding the scope and breadth of its conversion to a new inventory system. In any event, rule 59(e) is not a mechanism for reargument of

issues that have been decided.

B. Motion to Amend

In its second motion, defendant seeks leave to amend its counterclaims. Because this case is closed, the request to amend the pleadings will be denied. "It is well-settled that after a final judgment, a plaintiff may amend a complaint under 15(a) only with leave of court after a motion under Rule 59(e) or 60(b) has been made and the judgment has been set aside or vacated." Figgie International Inc. v. Miller, 966 F.2d 1178, 1179 (C.A.7 1992). For the reasons explained above, I have already concluded that defendant is not entitled to relief under either of those rules. Accordingly, defendant's motion to amend will be denied.

ORDER

IT IS ORDERED that defendant Krist Oil Co.'s motion to alter or amend the judgment in this case pursuant to Fed. R. Civ. P. 59(e) or in the alternative for relief from the judgment under Fed. R. Civ. P. 60(b) is DENIED. In addition, defendant's motion to

amend its counterclaims under Fed. R. Civ. P. 15(a) is DENIED.

Entered this 20th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge