IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

KOLBE & KOLBE MILLWORK CO., INC.,

Plaintiff,

OPINION AND ORDER

v.

05-C-335-C

DELES INDUSTRIES LTD., DANIEL DIENA, ACORE DOOR COMPANY, INC., AND ACORE DOOR (ONTARIO), INC.,

Defendants.

- -

In this civil action for monetary relief, plaintiff Kolbe & Kolbe Millworks, Inc. is suing defendants Daniel Diena, Deles Industries Ltd., Acore Door Company, Inc. (Acore Michigan) and Acore Door (Ontario), Inc. (Acore Ontario) for breach of contract, alleging that (1) defendants Deles, Acore Michigan and Acore Ontario breached their reimbursement obligations under section 2.5 of the parties' stock repurchase agreement; (2) defendants Acore Michigan and Diena defaulted under the terms of their promissory note with plaintiff; (3) defendant Acore Michigan breached its supply agreement with plaintiff; and (4) all defendants breached their duty of good faith and fair dealing. Defendants raise two counterclaims, alleging that plaintiff breached its obligations under the parties' stock

repurchase and supply agreements. Jurisdiction is present under 28 U.S.C. § 1332(a)(1).

Before the court is plaintiff's motion for partial summary judgment, in which plaintiff requests summary judgment on its claims that defendants breached their obligations under the stock repurchase agreement and promissory note and on defendants' counterclaims for breach of the parties' stock repurchase and supply agreements. Because defendants do not contest that they failed to meet their obligations under the stock repurchase agreement and promissory note, plaintiff's motion will be granted with respect to those claims. Moreover, because defendants have proposed no facts to support their counterclaims, I will grant plaintiff's motion with respect to those claims as well.

Three preliminary matters merit attention. First, in response to plaintiff's proposed finding of fact, defendants have asserted that they are "unable to substantiate" many of plaintiff's claims because

> [a]t this point in the litigation, due to the continuing hope that the parties would complete a settlement of this matter, Defendants have not yet conducted discovery to permit them to inspect the necessary records to know exactly what was received and processed by Kolbe. Should the ongoing settlement efforts be unsuccessful by the close of the period for discovery, such a request will be made.

Def.'s Brief, dkt. # 20, at 4. The preliminary pretrial conference order specifies that "parties are to undertake discovery in a manner that allows them to make or respond to dispositive motions within the scheduled deadlines. The fact that the general discovery cutoff . . .

occurs after the deadlines for filing and briefing dispositive motions is not a ground for requesting an extension of the motion and briefing deadlines." Order dated Aug. 31, 2005, dkt. # 10, at 3. The fact that defendants "hoped" to settle is no excuse for their failure to undertake discovery. Where defendants have not supported their factual "disputes" with admissible evidence, as required by this court's Procedures to be Followed on Motions for Summary Judgment, the facts proposed by plaintiff have been treated as undisputed.

Second, both parties have referred to "facts" in their briefs that they did not propose as findings of fact. This court will not consider facts contained only in a brief. Id., I.B.4.; see also Ziliak v. AstraZeneca, LP, 324 F.3d 518 (7th Cir. 2003) (when party fails to follow summary judgment procedures, proper response is to disregard party's nonconforming submissions). Therefore, I have disregarded facts not properly proposed and supported by admissible evidence.

Finally, plaintiffs failed to propose facts regarding much of the content of the stock repurchase agreement and promissory note defendants are alleged to have breached. However, because plaintiff did submit authenticated copies of these documents and because their terms are essential to the resolution of the claims at issue in this case, I will consider them in ruling on plaintiff's motion for summary judgment.

From plaintiff's proposed findings and the terms of the stock repurchase agreement and promissory note, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Kolbe & Kolbe Millwork Co., Inc. is a business incorporated under Wisconsin law, with its principal place of business located in Wausau, Wisconsin. Plaintiff designs and manufactures windows and doors.

Defendant Deles Industries Ltd. is a business incorporated under the laws of Ontario, Canada, with its principal place of business located in Vaughan, Ontario. Defendant Deles manufactures doors.

Defendant Daniel Diena is an adult citizen of Toronto, Ontario, Canada.

Defendant Acore Door Company, Inc. (Acore Michigan) is a business incorporated under Michigan law, with its principal place of business located in Coldwater, Michigan. Defendant Acore Michigan manufactures doors and door slabs.

Defendant Acore Door (Ontario), Inc. (Acore Ontario) is a business incorporated under the laws of Ontario, Canada, with its principal place of business located in Vaughan, Ontario. Defendant Acore Ontario is a holding company.

B. Stock Repurchase Agreement and Promissory Note

Prior to May 18, 2004, plaintiff owned all outstanding stock in defendant Acore Michigan. On May 18, 2004, plaintiff and defendants Deles and Acore Michigan executed

a stock purchase agreement under which Deles agreed to purchase all of Acore Michigan's stock from plaintiff.

Section 2.5 of the agreement states:

> Satisfaction of Intercompany Debt. As satisfaction of the intercompany debt owed by Company to Stockholder, Buyer will cause Company to pay to Stockholder (I) $1,050,000, payable in cash at Closing, (ii) amounts due under the Intercompany Promissory Note (as defined in Section 2.6), (iii) the Inventory Payments (as defined in Section 2.7), and (iv) the Receivables Payment (as defined in Section 2.8 below) (collectively, the "Intercompany Debt Payments).

Section 2.6 of the agreement states:

> Intercompany Promissory Note. Buyer will cause Company to execute and deliver to Stockholder a promissory note, in the form attached as Exhibit 2.6 (the "Intercompany Promissory Note"), in the initial principal amount of $336,278.61. Daniel Diena will personally guarantee the payment of amounts due under the Intercompany Promissory Note.

Anderson Aff., dkt. #18, exh. C, att. A, at 4. Pursuant to Section 2.6, defendant Deles arranged for defendant Acore Michigan to execute and deliver to plaintiff an intercompany promissory note in the amount of $336,278.61. Defendant Diena signed the note personally.

The promissory note, dated May 18, 2004, provided:

> The undersigned ("Obligor") promises to pay to the order of Kolbe & Kolbe Millwork Co., Inc. ("Obligee") . . . the principal sum of $336,278.61, together with interest from the date hereof upon the unpaid principal at the rate of six percent (6%) per annum until fully paid, and upon the occurrence of an Event of Default (as defined below), interest upon the unpaid balance at the rate of

> 8% per annum from the date of such occurrence until such Event of Default is cured.
>
> Payments of principal and interest under this Note will be made annually, on the last day of April, from April 30, 2005 through April 20, 2008, as follows:
>
> April 30, 2005, principal of $36,460.54, plus accrued and unpaid interest
> ***

Anderson Aff., dkt. #18, exh. C, att. B, at 1. In addition, the promissory note provided that the failure "to pay when due any amount under this Note, which failure is not cured within 10 days after Obligor's receipt of written notice thereof from Obligee" would be deemed an "event of default," entitling plaintiff to accelerate the maturity of the debt. Id. at 1-2. The promissory note also required defendants Diena and Acore Michigan to "pay all costs of collection and enforcement of th[e] Note, including attorneys' fees and court costs."

Section 2.8 of the stock repurchase agreement describes in greater detail the inventory payments defendants were required to make under section 2.5 and provided that all inventory payments were to be made "no later than six months after the closing date, in the case of standard inventory payments" and no later than "June 30, 2005, in the case of the Fiberglass Inventory Payments and the Prehung Inventory Payments." Anderson Aff., dkt. #18, exh. C, att. A, at 5.

Section 2.9 of the stock repurchase agreement describes in greater detail the receivables payments defendants were required to make under section 2.5:

> Buyer will cause Company to pay to Stockholder an amount equal to the net book value of Company's accounts receivable less Company's trade and employee payables, each as reflected on the Closing Balance Sheet (the "Receivables Payment"). The Receivables Payment will be made on the 30th day following the Closing Date. In the event that any of Company's accounts receivable reflected on the Closing Balance Sheet remains unpaid on the 180th day following the Closing Date, despite Company's reasonable efforts to collect such receivable(s), Stockholder will repurchase such unpaid receivable(s) from Company within 30 days after Stockholder's receipt of written notification from Company of the repurchase obligation . . .

Id.

On May 18, 2004, defendant Deles assigned all of its rights and obligations under the stock purchase agreement to defendant Acore Ontario. Defendants Deles, Acore Michigan and Acore Ontario have not made the payments described in section 2.5 of the stock purchase agreement. As a result of defendants' failure to pay, plaintiff has sustained damages in the amount of $712,029.19. (Of this amount, $374,740.17 is attributable to defendants Diena's and Acore Michigan's failure to make payments due on the promissory note.) As of January 11, 2006, plaintiff's costs for collecting and enforcing the promissory note are $25,374.00.

OPINION

A. Breach of the Stock Repurchase Agreement and Promissory Note

Plaintiff has moved for summary judgment with respect to its claim that defendants

breached their obligations under the stock repurchase agreement and promissory note by failing to make required payments. Defendants admit that the payments were not made, but contend that "there is a dispute, or at the least, uncertainty" regarding the amount they owe. Although a motion for summary judgment does not invite the court to weigh the evidence or determine the truth of the matters in dispute, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), it is the moment in a lawsuit when a party must show what evidence it has to convince a trier of fact to accept its version of events. Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999). To avoid summary judgment, the nonmoving party must "produce more than a scintilla of evidence to support his position." Pugh v. City of Attica, Indiana, 259 F.3d 619, 625 (7th Cir. 2001). In this case, defendants have produced no evidence at all. Vague allegations, unsupported by admissible evidence, cannot defeat summary judgment.

Under the plain language of the stock repurchase agreement, defendants were obligated to make inventory payments to plaintiff no later than June 30, 2005, and receivables payments no later than thirty days after closing (that is, June 18, 2004). Under the terms of the promissory note, defendants were obligated to make a payment of $36,460.54, plus accrued and unpaid interest by April 30, 2005. Defendants have not alleged that the contract was invalid or that there is any reason why they should not be held to the terms of their bargain.

It is undisputed that none of the defendants have made the inventory and receivables payments described in section 2.5 of the stock purchase agreement or made the April 30, 2005 payment required by the promissory note. Because defendants were obligated to make these payments and did not do so, plaintiff is entitled to summary judgment with respect to its claims that defendants breached its obligations under the stock repurchase agreement and promissory note.

B. Defendants' Counterclaims

Next, plaintiff requests summary judgment on defendants' counterclaims for breach of the stock repurchase agreement and the supply agreement. Because neither party has proposed facts relating to the substance of the supply agreement, it is impossible to know what obligations were imposed upon plaintiff by that agreement and whether plaintiff failed to carry out any of those obligations. Similarly, with respect to defendants' counterclaim for breach of the stock repurchase agreement, defendants have proposed no facts indicating how plaintiff failed to carry out its obligations under the agreement. Where the nonmoving party fails to make a showing sufficient to establish the existence of an essential element on which he would bear the burden of proof at trial, summary judgment should be entered against him. Fitzpatrick v. Catholic Bishop of Chicago, 916 F.2d 1254, 1256 (7th Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). Because defendants have not

alleged facts from which it could be inferred that plaintiff breached its obligations under the stock repurchase or supply agreements, plaintiff's motion will be granted with respect to both counterclaims.

C. Damages

With respect to damages, it is undisputed that as a result of defendants' failure to pay the amounts due under the stock purchase agreement, plaintiff sustained damages in the amount of $712,029.19 and that $374,740.17 of that amount is attributable to defendants Diena's and Acore Michigan's failure to make payments due on the promissory note. In addition, it is undisputed that as of January 11, 2006, plaintiff incurred $25,374.00 in costs related to the collection and enforcement of the promissory note. It is not clear whether plaintiff's costs have continued to accumulate, though it is reasonable to assume that they have.

Because several claims remain unresolved in this case, including plaintiff's claim that defendant Acore Michigan breached its obligations under the supply agreement and that all defendants breached their duty of good faith and fair dealing with respect to the agreements between the parties, I will not enter judgment at this point in the litigation. However, both parties should be aware that at trial they will not be free to dispute damage figures they have conceded on summary judgment.

ORDER

IT IS ORDERED that plaintiff's motion for partial summary judgment is GRANTED in its entirety.

Entered this 2nd day of March, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge