IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 159,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-613-S

CIRCUIT ELECTRIC, L.L.C.,
TRINITY TECHNOLOGIES, L.L.C.,
PETER BUCHANAN, PATRICK McFALLS
and SCOTT BRAUN,

Defendants.

Plaintiff IBEW Local 159 commenced this action alleging breach of a collective bargaining agreement. Jurisdiction is based on 29 U.S.C. § 185 and 28 U.S.C. §§ 1331 and 1337. The matter is presently before the Court on defendant Patrick McFalls' motion to dismiss for failure to exhaust the arbitration provisions of the agreement. The following is a summary of the relevant factual allegations of the complaint.

FACTS

Plaintiff is a party to a collective bargaining agreement ("CBA") with the Madison Division of the Wisconsin Chapter of the National Electrical Contractors Association which became effective on June 1, 2002 and expired June 1, 2005. On February 8, 2001,

Circuit Electric agreed to be bound by the CBA. The CBA included a grievance procedure. Peter Buchanan, Patrick McFalls and Scott Braun were at all times principals of Circuit Electric.

By letter dated December 20, 2004 Buchanan notified plaintiff that Circuit Electric was withdrawing from the multi-employer bargaining unit. By letter dated December 27, 2004 Buchanan notified plaintiff that it intended to terminate the CBA and desired to restructure its bargaining relationship with plaintiff. Buchanan named McFalls as the Circuit Electric representative for the negotiations.

On January 6, 2005 Buchanan, McFalls and Braun registered defendant Trinity Technologies, L.L.C. with the Wisconsin Department of Financial Institutions, naming Buchanan as registered agent. Defendant Trinity began doing business from the Circuit Electric address. Trinity has bid and received electrical subcontracts and employs non-union employees to perform the work.

Plaintiff notified defendant Circuit Electric that it wished to negotiate changes to the CBA and to resolve the contract dispute without arbitration. In response McFalls and Braun sent a letter on Circuit Electric letterhead, dated April 14, 2005, which provided in part:

> ... as of Wednesday, April 12, 2005, Circuit Electric, LLC, as originally established as a sole proprietary organization, ceased continuing contracting operations with the layoff on its last two employees. On April 14, 2005, we acquired a significant majority

> interest in the assets and the rights to the Circuit Electric name. We did not acquire any outstanding liabilities or obligations. As a minority owner, Mr. Peter Buchanan has been hired as an employee and consultant.
>
> With this significant change in ownership, control, transfer of assets, rights to the organizational name, cessation of operations and termination of all employees, you are being formally notified of the abrogation of all IBEW Contracts, Letters of Assent and associated Obligations, Privileges and Liabilities with Circuit Electric, LLC.

In response to plaintiff's renewed request to bargain, defendant McFalls sent an e-mail to plaintiff which provided in part:

> Having reviewed your certified letter dated April 18, 2005, I am confused. With the cessation of Circuit Electric LLC as a sole proprietary organization remaining open only to collect accounts receivable and make account payable transactions (as part of an agreement with the IRS), just why would we want to continue the union contract and letters of assent? The last employees were laid off 4/12/05. Who would you be representing?...
>
> The purchase of a portion of the assets of Mr. Buchanan's company in no way obligates me to become a union contractor or entertain your attempts to negotiate on our behalf. Mr. Buchanan's company is not conducting business. I am not conducting business as Circuit Electric. I presently do not plan on entertaining CIR arbitration. Please cease in your attempts to bring me into your contract with Peter Buchanan, previous owner of Circuit Electric.

Thereafter plaintiff commenced this action seeking to enforce CBA obligations against the defendants alleging that they are successors, principals and alter egos of the Circuit Electric

entity that executed the original letter of assent to be bound by the CBA.

MEMORANDUM

Defendant McFalls now moves to dismiss the action asserting that plaintiff failed to invoke the grievance procedure of the CBA for the alleged breach. Plaintiff concedes that it did not pursue arbitration as provided in the CBA, but argues that it would have been futile to do so because defendant McFalls had repudiated the CBA.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

When a party to an agreement "proclaims that it no longer considers the obligation to arbitrate binding, then a request to arbitrate is futile" and the other side may proceed directly to court. Bailey v. Bicknell Minerals, Inc., 819 F.2d 690, 692 (7th Cir. 1987). The issue is whether the facts alleged permit a

finding that McFalls had repudiated the agreement so that requesting arbitration would have been futile.

Not only do the alleged facts permit such a finding, they compel it. It is difficult to imagine a clearer case of repudiation than that conveyed by the letter and e-mail written by defendant McFalls. In the letter defendant McFalls "formally notified" plaintiff that he was abrogating "all IBEW Contracts, Letters of Assent and associated Obligations, Privileges and Liabilities." Surely "associated obligations" include the obligation to arbitrate. Any possible doubt was removed by his disavowal of the contract in the e-mail and his plea to "cease in your attempts to bring me into your contract with Peter Buchanan, previous owner of Circuit Electric." Not only did McFalls unequivocally state his belief that Circuit Electric, LLC was not bound by the agreement, he emphatically denied that it was ever a party to the agreement.

Furthermore, the allegations of the complaint suggest that the entire business transaction involving the defendants was a sham designed to avoid CBA obligations. These transactional allegations alone are sufficient to support an inference of repudiation. Garcia v. Eidal International Corp., 808 F.2d 717, 721-22 (10th Cir. 1987).

Defendant McFalls contends that repudiation could not occur until plaintiff had expressly sought arbitration and he had denied it. Given the force of his prior responses, it is certain that a

suggestion by plaintiff that he and Circuit Electric, LLC were bound by the CBA to arbitrate would have been greeted with derision. The policy favoring arbitration of labor disputes is not so strong that it requires plaintiff or the Court to abandon all common sense.

ORDER

IT IS ORDERED that defendant Patrick McFalls' motion to dismiss is DENIED.

Entered this 9th day of December, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge