

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

HENAN MACHINERY & ELECTRIC
IMPORT AND EXPORT COMPANY, LTD.,

ORDER

Plaintiff,

06-C-715-C

v.

WDF INTERNATIONAL TRADING
CO., LLC,

Defendant.

In this civil action, plaintiff Henan Machinery & Electric Import and Export Company, Ltd. contends that defendant WDF International Trading Company, LLC, has failed to pay for goods that plaintiff shipped to defendant from China. Currently before the court is defendant's motion to strike plaintiff's amended complaint, which was filed on the last day amendments were allowed without leave of court. Jurisdiction is present because the parties are of diverse citizenship and the amount in controversy is more than \$75,000. 28 U.S.C. § 1332.

This case has gotten off to a rocky start. Before considering the merits of defendant's motion, it may be helpful to briefly review the case's already tortuous history. The action

began on October 17, 2006 when plaintiff filed a complaint in the Circuit Court for Marathon County. That complaint set forth with sparse detail a claim for action on an account. On December 7, 2006, defendant removed the action to federal court. Shortly thereafter, on December 14, 2006, defendant filed a motion to dismiss, transfer or alternatively to stay the action, dkt. #4, contending that there is a similar action pending in the District Court for the Middle District of Florida. Pursuant to the court's briefing schedule, plaintiff had until January 4, 2007, to respond.

A telephonic hearing was held on January 3, 2007 before United States Magistrate Judge Stephen Crocker. The following day, the magistrate judge issued a preliminary pretrial conference order. Two sections of that order are relevant to this discussion. First, section 3 of the pretrial conference order states:

All responses to any dispositive motion must be filed and served within 21 calendar days of service of the motion, which the court presumes is the date the motion is filed with the court. Any reply by the movant must be filed and served within 10 calendar days of service of the response, which the court presumes to be the date the response is filed with the court. A party is not entitled to additional time under Rule 6(e) to file and serve documents related to a dispositive motion. The parties may not modify this schedule without leave of court.

January 3, 2007 Preliminary Pretrial Conference Order, Dkt. #9, at 2. Next, section 2 states:

Amendments to the Pleadings: February 20, 2007

Amendments to the pleadings pursuant to Rules 13-15 and 20-21 must be filed and served not later than the date set forth above. The court routinely accepts amendments filed within the deadline. A party may not amend its pleadings after the deadline without leave of court, which will be granted only upon a showing of good cause for the late amendment and lack of prejudice to the other parties. The longer a party waits to seek leave to amend, the less likely the court will allow amendment.

Id.

On January 16, 2007, after the deadline for plaintiff's response to defendant's motion to dismiss, transfer or alternatively to stay had come and gone without any response, defendant wrote to the court and asked that the motion be granted as unopposed. This prompted plaintiff's lawyer to submit a letter to the court, in which she explained that she had not responded to the motion because she thought that the court would hold a hearing to set a briefing schedule on the pending motion. In addition, she advised the court that she would be submitting a request to withdraw as plaintiff's counsel, as she had insufficient experience in federal court. On January 24, 2007, Magistrate Judge Crocker issued an order taking defendant's unopposed motion under advisement. Dkt. #10.

As promised, plaintiff's lawyer filed a motion for leave to withdraw, which the court granted on February 12, 2007. Dkt. #19. On February 9, 2007, plaintiff's new lawyers filed a motion for reconsideration and enlargement of time to respond to defendant's motion to dismiss, transfer or alternatively to stay. Dkt. #16. Then, on February 20, 2007, as briefing on that motion was proceeding, plaintiff filed both an amended complaint and a brief in

opposition to defendant's motion to dismiss, transfer or alternatively to stay the case. Dkt. ##21, 22. On March 1, 2007, Magistrate Judge Crocker denied plaintiff's motion for reconsideration or an enlargement of time in which to respond to defendant's motion to dismiss, stay or transfer. Dkt. #28.

I return now to the matter at hand: defendant's motion to strike plaintiff's amended complaint. Defendant contends that plaintiff's amended complaint is nothing more than a back-door attempt to remedy a missed deadline and should be stricken. Plaintiff responds that the amended complaint was made in good faith and within the time allowed for amending pleadings without leave of court. In addition, plaintiff argues that the amended complaint adds legitimate new claims for breach of contract, unjust enrichment and conversion, along with a prayer for punitive damages.

If plaintiff is allowed to proceed with its amended complaint, defendant's pending motion to dismiss, transfer or alternatively to stay with respect to the original complaint will be moot. Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999) ("When a plaintiff files an amended complaint, the new complaint supersedes all previous complaints and controls the case from that point forward."). Although defendant may file a new motion to dismiss, transfer or alternatively to stay, which the court may grant, defendant will lose the tactical advantage of having an unopposed motion if plaintiff's amended complaint is not stricken. (I presume that plaintiff would not repeat its mistake of failing to respond to defendant's

motion in a timely manner if given a second chance.)

Defendant may or may not be correct that plaintiff filed its amended complaint to avoid the effect of missing the deadline to respond to defendant's earlier motion. As I noted previously, plaintiff's original complaint, which was intended for and filed in state court, was limited in its allegations and claims. It is entirely possible that, in a new forum and with new counsel, plaintiff has decided to amend its complaint to reflect these changed circumstances. It is also possible that plaintiff has amended its complaint for the tactical reason that defendant suggests. But plaintiff's motives are beside the point.

Plaintiff filed its amended complaint within the time established in the preliminary pretrial conference order for amendment without leave of court. As Magistrate Judge Crocker pointed out, it is not out of the ordinary for a plaintiff to file an amended complaint while a motion to dismiss is pending. Contrary to defendant's assertions, allowing plaintiff to amend its complaint within the court-established time for amendment does not permit plaintiff to disregard the court's schedule. Again, if defendant believes that plaintiff's amended complaint is so similar to its original complaint that it too should be dismissed, stayed or transferred to the Middle District of Florida, defendant may submit a new (or even the same) motion to dismiss, to which plaintiff would have the opportunity to respond. If defendant has the better of this argument, it is difficult to imagine how this minor delay in resolution would amount to prejudice.

ORDER

IT IS ORDERED that

1. Defendant WDF International Trading Company, LLC's motion to strike plaintiff Henan Machinery & Electric Import and Export Company, Ltd.'s amended complaint, dkt. #21, is DENIED.

2. Defendant's motion to dismiss, transfer or alternatively to stay, dkt. #4, is DENIED as moot.

Entered this 12th day of March, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge