

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

GLOBAL DAIRY SOLUTIONS PTY. LTD.

Plaintiff,

v.

BOUMATIC, LLC.,

Defendant.

OPINION AND ORDER

10-cv-237-slc

In this civil action, plaintiff Global Dairy Solutions Pty LTD (GDS) claimed that defendant BouMatic, LLC, acting in bad faith, terminated the parties' agreements relating to GDS's distribution of commercial dairy equipment without good cause and failed to give GDS an opportunity to cure any alleged material breaches. BouMatic counterclaimed for several unpaid invoices, attorney fees and costs. On April 19, 2011, I granted summary judgment in favor of BouMatic on the breach of contract claim and the counterclaims with respect to all but three of the unpaid invoices. Dkt. 49. BouMatic then dismissed the remaining counterclaims arising out of those invoices. Now before the court is GDS's Rule 59(e) motion for reconsideration of the summary judgment order. Dkt. 62. Also, as the prevailing party, BouMatic has requested attorney's fees and costs in the amount of \$209,023.95 pursuant to the indemnification provision of the parties' distribution agreements.¹ Dkt. 53.

I am denying the motion for reconsideration because GDS has not established that it was a mistake of law or fact for the court to conclude that BouMatic had good cause to terminate the distribution agreements. I also find that the attorney's fees and costs requested by BouMatic are both compensable and reasonable, I will grant its petition for an award of fees

¹ Although BouMatic states that certain of its costs are taxable, it is not submitting a separate bill of taxable costs.

in the amount of \$176,940.25 and costs in the amount of \$32,083.70, for a total of \$209,023.95.

DISCUSSION

I. Motion for Reconsideration

The purpose of a motion under Fed. R. Civ. P. 59(e) is to bring to the court's attention newly discovered evidence or a manifest error of law or fact. *Bordelon v. Chicago School Reform Board of Trustees*, 233 F.3d 524, 529 (7th Cir. 2000). It is not intended as an opportunity to reargue the merits of a case. *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 368 (7th Cir. 2003). Nor is a Rule 59 motion intended as an opportunity for a party to submit evidence that it could have presented earlier. *Dal Pozzo v. Basic Machinery Co., Inc.*, 463 F.3d 609, 615 (7th Cir. 2006) (citing *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995)). The movant must clearly establish the ground for relief. *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006) (citations omitted).

On summary judgment, BouMatic asserted that it had good cause to terminate GDS's distribution agreements because GDS had failed to achieve the required minimum percentage of its sales forecast. The court agreed with that assertion; GDS now contends that the court erred as a matter of law in awarding summary judgment to BouMatic because the court based its decision on an argument that BouMatic made for the first time in its summary judgment reply brief: that Jorge Prieto used certain pre-contract figures provided by GDS to set GDS's sales forecast under the distribution agreements. GDS asserts that Prieto never testified that he used the June 2008 figures provided by GDS to set the sales forecasts, and even if he had, there is ample evidence for a reasonable jury to disbelieve Prieto. GDS also asserts that there is no

evidence that Prieto ever “imposed” the sales figures on GDS by telling GDS that he had set sales forecasts using the June 2008 figures or any other figures. I address each of GDS’s arguments in turn:

A. BouMatic Presented New Arguments in its Reply Brief

In its opening brief in support of summary judgment, BouMatic showed through a series of e-mails written in the weeks before the distribution agreements were signed in 2008 that GDS provided “sales projections” to Jorge Prieto, BouMatic’s regional sales manager for Australia and New Zealand, who advised GDS that he wanted everyone to “have a clear understanding on where we stand concerning the distribution agreement process.” Dkt. 19 at 3-4. With its brief, BouMatic also submitted a declaration from Prieto, who averred that the e-mails contained “sales forecasts” for GDS. Dkt. 21.

In its response brief, GDS contended that at no point had Prieto or anyone from GDS referred to the 2008 figures as “sales forecasts” and that Chris Nisbet and Mike Pawlak (both signatories on the agreements) had not intended the projections to be forecasts. Dkt. 31 at 20-21. BouMatic then submitted a reply brief in which it argued that there was no significant difference between “projections” and “forecasts” and that the intentions of the signatories to the agreement were irrelevant because the agreement gave BouMatic the final say as to what the forecasts would be. Dkt. 40 at 2.

GDS now asserts that the arguments that BouMatic made in its reply were “new.” It is true that arguments raised for the first time in a reply brief are considered waived, *Hernandez v. Cook County Sheriff's Office*, 634 F.3d 906, 913 (7th Cir. 2011), but BouMatic did not raise new

arguments in its reply brief. Instead, BouMatic was refuting GDS's assertions about Nisbet's and Pawlak's intentions and the difference between "projections" and "forecasts." Although BouMatic may have made a stronger argument on reply and proffered additional supporting evidence, this is not "new" argument that would constitute waiver. *See id.* (no waiver where defendants followed cursory treatment of issue in opening brief with 4-page discussion on reply); *Gamesa Eolica, S.A. v. General Elec. Co.*, 2005 WL 318854, *2 (W.D. Wis. 2005) (moving party could add new support for existing argument in reply brief). BouMatic's arguments in its opening brief supplied GDS with adequate notice of BouMatic's theory of the case and obviates GDS's claim of prejudice from BouMatic's reply. *Hernandez*, 634 F.3d at 913 (noting concern underlying waiver rule is opposing party suffering prejudice as result of being denied sufficient notice of an argument). There was no waiver here.

B. There Is No Evidence To Support a Material Assertion by BouMatic

GDS next takes issue with the court's statement that "[i]t is undisputed that at the time, Prieto had the authority to set GDS's sales forecasts, and Prieto has testified that he used the June 2008 figures provided by Larsen to do so." GDS asserts that the court mistakenly concluded that Prieto testified that he "used" the 2008 projections provided by GDS to "set" GDS's sales forecasts when there was no evidence supporting that fact. In support of its assertion, GDS points out that in his first declaration, dkt. 21, Prieto only *refers* to the 2008 figures as forecasts and does not state that he actually *determined* that the projections would be GDS's sales forecasts. This purported distinction merely picks at nits.

In his first declaration, Prieto averred that on June 3, 2008, he contacted Tim Larsen, a GDS owner at the time, via e-mail “to get a clear understanding regarding GDS’ sales forecasts for the sale of BouMatic goods for the years 2008, 2009 and 2010.” Dkt. 21, ¶ 5. Prieto averred that Larson sent him an e-mail “regarding GDS’ sales forecasts” and attached “GDS’ forecast figures for the sale of BouMatic goods for New Zealand and Australia for the years 2008, 2009, and 2010.” *Id.* at ¶¶ 7-8. Prieto concluded his declaration by averring that those attachments “forecast GDS’ sales of BouMatic goods in Australia and New Zealand for the years 2008-2010” and “GDS’ purchase of BouMatic products for 2008 to 2010.” *Id.* at ¶¶ 11 and 13. Moreover, paragraph 12 of the distribution agreements provide that BouMatic determines the final forecast for GDS and that GDS must agree with BouMatic’s reasonable forecast. After GDS challenged Prieto’s statements in its response brief, Prieto submitted a second declaration in which he averred specifically that “[a]t all times relevant to GDS’ distributorship, the document entitled ‘2008-2010 Projections’ (attached to my January 21, 2011 Declaration) was the sales forecast for GDS. I did not create any additional forecasts for GDS because we had a three-year forecast for GDS.” Dkt. 44, ¶¶ 3-4. From these facts, a reasonable jury would conclude that Prieto “used” the figures provided by Larson as GDS’s sales forecasts.

C. There Is a Genuine Factual Dispute Requiring a Trial

In an alternative argument, GDS contends that even if the court did not err in concluding that Prieto testified that he used the projections as GDS’s sales forecasts, a reasonable jury could disbelieve him. It relies on *Boyd v. Wexler*, 275 F.3d 642, 645-47 (7th Cir. 2001), which held that circumstantial evidence can create a genuine issue of fact as to the credibility of a witness’s sworn

affidavit. In *Boyd*, an attorney who worked for the law firm defendant averred that he personally reviewed a collection letter before it was sent out. However, the court found that this “testimony was made incredible, or at least highly implausible,” by evidence adduced by plaintiff that the firm employed only three lawyers and sent out an average of 51,718 collection letters a month.

Analogizing this case to *Boyd*, GDS asserts that the following “circumstantial evidence” calls Prieto’s affidavit into doubts: BouMatic did not mention the alleged sales forecasts in its internal communications leading up to the contract termination or in the termination letters sent to GDS; the agreements provide that BouMatic will set the forecasts on an annual basis; setting a three-year forecast does not make good business sense; Prieto did not refer to the June 2008 figures as “forecasts” until the declaration he filed in this court; and Prieto never told Nisbet that the figures were the forecasts. However, as BouMatic rejoins, most of these proffered circumstances are speculative and none render Prieto’s statements incredible or highly implausible. In *Boyd*, the circumstantial evidence so directly and overwhelming impeached the affiant’s core assertion as to border on direct contradiction. The circumstantial evidence offered here by GDS does not approach this threshold, so that GDS is not entitled to a trial simply to attempt to impeach Prieto on this point.

As it did on summary judgment, GDS relies heavily on the fact that Prieto never referred to the sales projections or budget figures supplied by GDS as “sales forecasts” in his communications with GDS or in the termination letters. However, as I discussed in the summary judgment order, what Prieto, Larsen or any other employee initially intended when developing the 2008 figures or what they called them does not matter because under the

distribution agreements, BouMatic had the sole and final say on the final sales forecasts. Further, the agreements did not set forth any procedure to be followed in setting the forecasts or even require BouMatic to inform GDS of the forecasts. GDS only got to participate if BouMatic asked it to participate. The fact that Prieto did not use the term “forecasts” in referring to the figures does not render implausible his statement that he used the figures as the measure of GDS’s performance. Further, nothing in the brief e-mail communications between Prieto and Larsen that were submitted to the court implies that Prieto was not using or would not use the 2008 figures as GDS’s sales forecasts. In fact, apart from those few e-mails between Prieto and Larsen, there is no evidence of BouMatic’s internal communications about GDS’s performance.

Similarly, GDS offers no evidentiary support for its blanket statement that setting a three-year forecast is a poor business practice. On summary judgment, GDS proposed facts based on Prieto’s deposition testimony that BouMatic’s usual process was to review a distributor’s sales totals for the prior year and put together a sales forecast for the upcoming year. The distribution agreements also state that the final GDS forecast must be developed on at least an annual basis. However, Prieto clarified that he did not need to use that process with GDS because the sales forecasts already had been set in advance based on the figures sent by Larsen. GDS has failed to show that this explanation can not be true. For example, apart from Prieto’s vague references to “usual processes,” there is no evidence of how BouMatic set forecasts for other distributors, whether it deviated from that process if the need arose or why it would never consider sales forecasts three years in advance.

Finally, GDS finds it suspicious that BouMatic did not cite its alleged failure to meet the sales forecasts in either termination letter. I agree that the termination letters are vague, but they are not very probative of Prieto's credibility because the parties' agreements did not require BouMatic to provide any particular notice apart from the right to cure an alleged material breach. Under the agreements, BouMatic had the power to terminate the agreements with "good cause," which expressly included the failure to meet certain percentages of the sales forecasts. In a separate provision, the agreements also defined good cause as GDS's failure to comply with essential and reasonable requirements *or* a "material breach" that cannot be cured or remains uncured for 30 days after written notice. The only written notice requirement related to material breaches that BouMatic wished to rely on as "good cause" for termination. The failure to meet sales forecasts within a certain period constituted good cause as a matter of course. BouMatic did not have to list GDS's failure to meet the sales forecasts in the termination letters as a material breach because it was not a situation curable with 30 days notice.

Certainly a factfinder *could* conclude from all this that BouMatic only realized that it had an additional good cause ground for termination after sending the letters (else the letters would have referred to the sales forecasts). But even if this is true, it would do nothing to establish that Prieto had not used the 2008 figures as sales forecasts for GDS. In short, the fact that BouMatic had several proposed bases for terminating the agreements or may have discovered an additional ground for good cause late in the game is irrelevant. What matters is whether BouMatic had good cause to terminate the agreements. The evidence, which is not subject to genuine dispute, shows that it did.

D. BouMatic Never “Imposed” a Sales Forecast on GDS

In a final, brief argument, GDS asserts that because failure to meet a sales forecast is a type of “good cause” under the agreements, and the agreements define good cause as a failure to comply with a requirement “imposed upon” GDS, BouMatic must prove that it told GDS what the sales forecast was. I agree with BouMatic that GDS is misreading the agreements.

Paragraph 14 of the agreements provide that:

BouMatic may terminate this Agreement for good cause. The term “good cause” means Distributor’s failure to comply substantially with essential and reasonable requirements imposed upon Distributor by BouMatic, or Distributor’s material breach of this Agreement, which breach cannot be cured or remains uncured for 30 days after written notice to Distributor by BouMatic. Good cause shall expressly include, but not be limited to, a failure to achieve a minimum of 35% of sales forecast by the end of six months of a sales period, or 70% of the sales forecast by the end of a twelve month sales period.

Although unspecified “essential and reasonable requirements” must be “imposed” on GDS, sales forecasts do not, because the failure to reach them is good cause *per se*. Accordingly, in order to prevail, BouMatic did not have to show that it “imposed” the forecasts on GDS.

Because GDS has not established that it was a mistake of law or fact for the court to find as a matter of law that BouMatic had good cause to terminate the distribution agreements, its motion for reconsideration will be denied.

II. Motion for Attorney’s Fees and Costs

Paragraph 20 of the parties’ distribution agreements states that in the event of a lawsuit concerning the agreements, the prevailing party shall be reimbursed for all reasonable costs, expenses and attorneys’ fees. When a party is entitled to attorneys’ fees and costs pursuant to

a fee-shifting clause in a contract, the court must determine if the claimed expenses were commercially reasonable. *Matthews v. Wisconsin Energy Corp., Inc.*, 642 F.3d 565, 572 (7th Cir. 2011) (citing *Medcom Holding Co. v. Baxter Travenol Lab., Inc.*, 200 F.3d 518, 520 (7th Cir. 1999)). Therefore, courts do not have to engage in “detailed, hour-by-hour review” of a prevailing party’s billing records and need only “look to the aggregate costs in light of the stakes of the case and opposing party’s litigation strategy.” *Id.* “A willingness to pay is an indication of commercial reasonableness.” *Id.*

GDS points out that at the time the court issued its summary judgment decision, BouMatic had paid only \$54,233.76 in fees and costs. Relying on a convoluted interpretation of *Medcom*, GDS contends that BouMatic only can rely on bills that it actually paid in the ordinary course of business to prove that its fees are commercially reasonable. According to billing records, the last invoice that BouMatic paid before the court issued its April 19 summary judgment order was dated November 10, 2010. GDS suggests that BouMatic may have been holding out on paying its legal fees until it learned that it prevailed on summary judgment. However, this is mere speculation on the part of GDS. As GDS itself notes in its response brief, payment of one’s bills at a time when ultimate recovery is uncertain is just one indicator of reasonableness. *Medcom*, 200 F.3d at 521. It is not the only indicator.

As discussed above, the Court of Appeals for the Seventh Circuit has instructed district courts not to conduct a painstaking review of fee claims because there is a market constraint on running up excessive expenses. *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 774 (7th Cir. 2010); *Anderson v. Griffin*, 397 F.3d 515, 522 (7th Cir.2005) (citing *Taco Bell v. Continental Casualty Co.*, 388 F.3d 1069, 1075 (7th Cir. 2004)). The court in *Metavante* reasoned that when

a party is preparing for summary judgment or trial, it does not know that it is going to prevail in the case, and therefore, has no incentive to incur excessive fees and costs. *Id.* In this case, even though BouMatic had not yet paid all of its legal bills, it still had an incentive to not incur excessive fees and costs because it could not know whether it would prevail on summary judgment and be able to shift costs to GDS. *Id.*

Generally, once it is established that fees and costs were incurred for issues related to the case at hand, they should be accepted. *See Z-Trim Holdings, Inc. v. Fiberstar, Inc.*, 2008 WL 3843507, *2 (W.D. Wis. Aug. 12, 2008) (discussing costs). BouMatic has submitted detailed billing records and affidavits from its attorneys showing the type of work performed on the case. GDS takes issue with some of these records because BouMatic partially redacted as “privileged” the descriptions for time entries for 147.5 hours of work, including the topics of some legal research and the identities of certain individuals contacted during the discovery process. In support of its argument, GDS cites *Oldenburg Group Inc. v. Frontier-Kemper Constructors, Inc.*, 597 F. Supp. 2d 842, 844 (E.D. Wis. 2009), in which the Eastern District found that plaintiff waived the attorney-client privilege that it claimed with respect to its legal bills because it had placed bills at issue in seeking attorneys’ fees. The court in *Oldenburg* relied on a case from the Eight Circuit, *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731-32 (8th Cir. 2002). However, as BouMatic points out, in both cases, the courts appeared to be dealing with a unique set of facts that made it necessary to examine the redacted entries in detail before awarding fees. In *Oldenburg*, the plaintiff had asked for expenses it incurred both while defending itself in Illinois and in establishing its right to indemnification but only the expenses in the Illinois action were recoverable. 597 F. Supp. 2d at 845. *Pamida* also was an indemnification action “in which the

information allegedly protected [was] crucial and unavailable by other means.” 281 F.3d at 732.

In this case, however, there is no reason to perform a line-by-line analysis of the billing records. *See Metavante*, 619 F.3d at 775 (finding no abuse of discretion where district court accepted redacted bills because there was no reason to doubt market constraints on fees). BouMatic prevailed in full, so there is no need to match billing entries to particular issues in the case. Further, a review of the partially redacted entries (*see* dkt. 58, Exhs. 1 & 2) shows that there is sufficient information from which GDS can determine that the work was of the type and in an amount reasonable and proportionate to a lawsuit of this nature and scope.

GDS next contends that BouMatic could have filed its summary judgment motion almost six months earlier than it did and avoided unnecessary discovery and trial preparation. According to GDS, “[i]n a fee shifting case, . . . nether party should be held to have taken the risk that the other would unnecessarily prolong the pain by keeping its dispositive motion in its back pocket.” Dkt. 60 at 5. Again, this is speculative. BouMatic filed its summary judgment well within the deadline set by the court for dispositive motions. There is no evidence that it purposely avoided filing its motion in order to run up legal fees. To the contrary, it would have been illogical and perilous for BouMatic to run up the bill for this reason since it had no assurance that it would prevail.

Finally, GDS argues that the time BouMatic spent locating and deposing disgruntled GDS customers was not reasonably calculated to lead to the discovery of admissible evidence because any alleged issues with those customers had nothing to do with why BouMatic terminated the parties’ distribution agreements. In its reply, BouMatic goes to great lengths to

explain how this information was relevant to its liability and damages defense because it allegedly shows that GDS was incompetent and dishonest and had a flawed business model.

As discussed above, the court is not required to conduct—and will not conduct—an in-depth analysis of individual time entries or BouMatic’s litigation strategy. Nevertheless, under Wisconsin law, a “prevailing party” is not required to win in all respects. As long as its claims “arise out of a common core of facts,” the losing party is not “entitled to a reduction in attorney’s fees for time spent on unsuccessful claims, if the winning party achieved substantial success and the unsuccessful claims were brought and pursued in good faith.” *Metavante Corp. v. Emigrant Savings Bank*, 2009 WL 4556121, at *3 (E.D. Wis. Nov. 27, 2009), *aff’d*, 619 F.3d 748 (7th Cir. 2010) (citing *Wis. Seafood Co. v. Fisher*, 2002 WI App 134, ¶ 21, 255 Wis. 2d 833 (Ct. App. 2002); *Radford v. J.J.B. Enters., Ltd.*, 163 Wis. 2d 534, 550 (Ct. App. 1991)). Although GDS asserts that its relations to its customers had nothing to do with BouMatic’s termination of the parties’ agreements, at least in its second termination letter to GDS, BouMatic specifically cited GDS’s failure to service and advise customers properly. Given this, I cannot say that BouMatic’s discovery with respect to GDS’s customers did not arise out of the same common core of facts.

In sum, I find the attorney’s fees and costs requested by BouMatic commercially reasonable. Therefore, I will grant its petition for an award of fees in the amount of \$176,940.25 and costs in the amount of \$32,083.70, for a total of \$209,023.95.

ORDER

IT IS ORDERED that

- (1) Plaintiff Global Dairy Solutions motion for reconsideration of the summary judgment order is DENIED; and
- (2) Defendant BouMatic LLC's motion for an award of attorneys' fees and costs is GRANTED. BouMatic is awarded fees in the amount of \$176,940.25 and costs in the amount of \$32,083.70, for a total of \$209,023.95.

Entered this 11th day of August, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge