IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

SPRINGS WINDOW FASHIONS, LLC,

Plaintiff,

v.

D & S, INC., CHARLES F. DUFFLEY
and BENJAMIN D. MORRIS,

Defendants.

OPINION AND ORDER

11-cv-226-bbc

- -

Plaintiff Springs Window Fashions, LLC, has moved for partial summary judgment on its claim in count 3 of its complaint that defendants Charles F. Duffley and Benjamin D. Morris breached their personal guaranties in favor of plaintiff on behalf of defendant Dalphis, LLC. (Before going any further, it is necessary to discuss the names of the parties, which are nothing if not confusing. Dalphis, LLC is a distributor of plaintiff's products; until July 26, 2010, it was known as Dalphis Holding, LLC. It was named as a defendant originally, but it is now in bankruptcy. Defendant D&S is a corporation that until July 1, 2010 was known as Dalphis, Inc. It is a former distributor of plaintiff's products and is wholly owned by Dalphis, LLC, f/k/a Dalphis Holding, LLC. It was sued as a defendant but

filed for protection under the Bankruptcy Code in May 2011 and is no longer a defendant in this case.)

After reviewing the parties' briefs and their proposed findings of fact, I conclude that defendants are obligated to pay plaintiff whatever money Dalphis, LLC, f/k/a Dalphis Holding, LLC, owed on its line of credit before it declared bankruptcy and will grant plaintiff's motion to that extent. I cannot determine what that amount is; defendants contend that the amount must be reduced to reflect overcharges by plaintiff for product the company purchased against the line of credit, but they have adduced no evidence of what this amount might be and plaintiff has not replied to defendants' contention. I can find no basis for what I understand to be plaintiff's assertion that defendants are obligated to pay the remainder of what Dalphis, LLC, f/k/a Dalphis Holding, LLC, owes for its assumption of the debts of Dalphis Holding, LLC, up to a cap of $250,000.

From the few facts proposed by the parties, the parties' agreements attached to the complaint and the record, I find that the following facts are both undisputed and material.

UNDISPUTED FACTS

D&S, f/k/a Dalphis, Inc., was a distributor and licensee of plaintiff's products for more than 20 years. Sometime around June 2010, the company's principals informed plaintiff that a newly formed entity, to be known as Dalphis LLC, f/k/a Dalphis Holding,

LLC, would acquire substantially all of the holdings of Dalphis, Inc.. They asked that the new entity be allowed to continue as a distributor and licensee of plaintiff's products. Plaintiff agreed on the condition that Dalphis, LLC, f/k/a Dalphis Holding, LLC, would assume the Dalphis, Inc. accounts payable going forward. On June 28, 2010, defendant Morris executed an Assumption Agreement and a Distribution and License Agreement with plaintiff on behalf of what was then Dalphis Holding, LLC. (Defendant Morris is the chief executive officer of this entity; defendant Duffley is the president.) In the Assumption Agreement signed by Dalphis Holding, LLC, the company acknowledged the amount it owed plaintiff (approximately $706,000), and agreed to pay off this amount in nine equal installments of $78,498.31. Exh. 1 to Comerford Decl., Dkt. #36-1. The Assumption Agreement includes the following provision: "The parties agree that the Account Payable is not secured by any collateral or guaranty obligations." Id. at 1. In a Distribution and License Agreement, Exh. 2 to Comerford Decl., dkt. #36-2, executed at the same time as the Assumption Agreement, the parties agreed that "the Distributor's credit limit shall be Two Hundred and Fifty Thousand Dollars ($250,000) for the Term of this Agreement, . . . The foregoing credit limit shall be in addition to the Account Payable assumed by the Distributor in accordance with Section 5 (i)." (Section 5(i) refers to Dalphis Holding, LLC's obligation to deliver a fully executed assumption agreement to plaintiff.)

One week before the parties executed these two agreements, the company submitted

a credit application to purchase plaintiff's products on credit. This document was signed personally by both defendants on behalf of Dalphis Holding, LLC, on June 21, 2010, and provided in relevant part:

> I (We) agree to keep within your published terms of sale. I (We) also understand that should this account become delinquent and it be necessary to employ an attorney or collection agency to collect or commence suit to enforce payment, I (We) agree to pay all attorney or collections fees plus the cost of any suit. I (We) further agree to pay all monies due in lawful money of the United States. . . . I (We) further agree that I (we) may be personally responsible for any money not paid by the applicant.

Exh. 3 to Comerford Decl., dkt. #36-3.

OPINION

In this motion for partial summary judgment, plaintiff is seeking a determination by the court that defendants Benjamin D. Morris and Charles F. Duffley are liable to plaintiff in the amount of $250,000. The motion can be resolved only partially because many of the facts are either in dispute or not developed.

I can take judicial notice from this court's records that Dalphis Holding, LLC, n/k/a Dalphis, LLC, is in default on the payments it agreed to make toward what were then Dalphis, Inc.'s accounts payable arrears, by virtue of Dalphis, LLC's having declared itself bankrupt. It is undisputed that defendants Morris and Duffley agreed to be personally responsible for any future purchases made by Dalphis Holding, LLC after June 21, 2010.

Defendants deny that they made this agreement, saying that they had an understanding with plaintiff that they would *not* personally guarantee the obligations of Dalphis Holding, LLC, but instead would leave open the possibility that plaintiff might require personal guarantees from them in the event plaintiff increased the company's credit line above $250,000.

Defendants' allegations are not sufficient to put into dispute the fact of defendants' June 21, 2010 guaranty or to show that plaintiff's claim is barred by the statute of frauds. First, the fact of the guaranty is not in dispute. Defendants contend that the guaranty does not make them liable for Dalphis Holding, LLC's purchases because the guaranty says only that these defendants *may* be personally liable, not that they *shall* be liable. Moreover, defendants say, they have extrinsic evidence of conversations in which plaintiff's representatives agreed that defendants would have no liability under the guaranty unless plaintiff increased the credit limit.

The flaw in this second argument is that parol evidence, that is, evidence of statements made contemporaneously with the signing of a contract, is not admissible to vary the terms of a written contract unless the contract is ambiguous on its face. Town Bank v. City Real Estate Development, LLC, 2010 WI 134, ¶ 33, 330 Wis. 2d 340, 356, 793 N.W.2d 476, 484 (2010) ("'If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.'") (quoting Huml v. Vlazny, 2006 WI 87, ¶ 52, 293 Wis. 2d 169, 716 N.W.2d

807)). Defendants have not shown that the terms of the guaranty are ambiguous. They signed the credit application, agreeing that they may be personally responsible for any money not paid by Dalphis Holding, LLC, the applicant. The obvious reading of that provision is that the signers may be liable to pay should the applicant be unable or unwilling to pay its own obligation. It would be silly to read it as defendants say it should be, as applying only if sometime down the road, the parties were to enter into another agreement in which defendants would agree to a guarantee. Contracts are to be read with the realities of commerce in mind, Beanstalk Group, Inc. v. AM General Corp., 283 F.3d 856, 859 (7th Cir. 2002), and businesspeople do not write guaranties that are not intended to take effect. If, as defendants assert, they had an agreement in which they could wait before they agreed to guarantee Dalphis Holding, LLC's credit line, they should have insisted on drafting an agreement that would make that explicit. Merely inserting "may" for "shall" did not accomplish that purpose.

It is clear that defendants are obligated to pay plaintiff whatever Dalphis Holding, LLC, n/k/a Dalphis, LLC, owes on its own credit line. Defendants' guaranty is a contract that creates obligations flowing from defendants to plaintiff; defendants have failed to pay any money to plaintiff as they agreed to do under the contract; therefore, plaintiff is entitled to damages. Brew City Redevelopment Group, LLC v. The Ferchill Group, 2006 WI App 39, ¶ 11, 289 Wis. 2d 795, 807, 714 N.W.2d 582.

However, it is not clear what defendants owe plaintiff. Defendants deny that Dalphis Holdings, LLC, n/k/a Dalphis, LLC, owes as much as $250,000. They insist that the amount must be reduced to reflect the prices that the company should have been charged under the parties' actual pricing agreement, which they contend plaintiff breached. They believe that they are entitled to a credit of approximately $150,000.

For its part, plaintiff has not submitted any evidence to support its claim for $255,669.00 other than the declaration of John Comerford, in which Comerford merely asserts that the amount owed is $255,669.00, without explaining the basis for his assertion or citing any documentary evidence to support it. Plaintiff does not say whether the $255,669.00 is limited to the value of product sold on credit since June 21, 2010, or whether it also represents money due under the Assumption Agreement. If it is the latter, plaintiff has not shown that defendants Morris and Duffley have any obligation to cover those payments. The parties to the Assumption Agreement (plaintiff, Dalphis, Inc. and Dalphis Holding, LLC) agreed that the "Account Payable" was "not secured by any collateral or guaranty obligations." Assump. Agmt., Exh. 1 to Comerford Decl., dkt. #36-1. Plaintiff says that the only amount it is seeking is $250,000, because "the guaranty capped liabilities to $250,000." I have been unable to locate any evidence in the record of the existence of such a cap for the guaranty. A provision in the Distribution and License Agreement says that the distributor's *credit limit* shall be $250,000, but also says that "this limit shall be in addition to the Account Payable assumed by the distributor." Dkt. #36-2. In

summary, I find that defendants Duffley and Morris are liable to plaintiff for outstanding amounts owed to plaintiff by Dalphis Holding, LLC, n/k/a Dalphis, LLC, for purchases of product from plaintiff made after June 21, 2010, in an amount to be determined.

ORDER

IT IS ORDERED that the motion for partial summary judgment as to count 3 of its complaint filed by plaintiff Springs Window Fashions, LLC, dkt. #33, is GRANTED in part: defendants Duffley and Morris are liable to plaintiff for outstanding amounts owed to plaintiff by Dalphis Holding, LLC, n/k/a Dalphis, LLC, for purchases made after June 21, 2010, in an amount to be determined.

Entered this 9th day of May, 2012.

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