IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WAUSAU HOMES INCORPORATED,

Plaintiff,

v.

EVEREST BUILDERS OF MINOCQUA, INC.,

Defendant.

OPINION AND ORDER

11-cv-529-bbc

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Plaintiff Wausau Homes Incorporated designs home plans for use by authorized builders, one of which was defendant Everest Builders of Minocqua, Inc. until May 2010. Plaintiff alleges that defendant is continuing to keep and use plaintiff's designs even though defendant no longer has plaintiff's permission to do so.

Two motions are before the court: (1) defendant Everest Builders of Minocqua, Inc.'s motion to dismiss the case, dkt. #9; and (2) plaintiff Wausau Homes Incorporated's motion for leave to amend its complaint. Dkt. #15. In its motion, defendant argues that plaintiff's claims for copyright infringement and breach of contract in plaintiff's original complaint are subject to an arbitration agreement. In its motion, plaintiff concedes that the breach of contract claim is covered by the arbitration agreement and it seeks to voluntarily dismiss that

claim without prejudice. However, plaintiff says that the copyright claim should go forward.

There is no dispute that the scope of the arbitration agreement includes plaintiff's copyright claim. The agreement applies to "[a]ny and all disputes arising between the parties . . . including statutory claims." However, plaintiff says that the provision is no longer binding as to the copyright claim because the parties terminated the contract that includes the arbitration provision in 2010. Defendant admitted the termination date in its answer, dkt. #13, ¶ 8, and it does not argue that plaintiff wrongfully terminated the agreement or points to any language in the agreement suggesting that the arbitration provision survives termination of the agreement.

Plaintiff cites Litton Financial Printing Division v. NLRB, 501 U.S. 190, 205-06 (1991), in which the court rejected a flat rule that "postexpiration grievances concerning terms and conditions of employment remain arbitrable." Instead, the Court held that "[a] postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." The court of appeals has applied this standard to arbitration agreements arising outside the labor context. Nissan North America, Inc. v. Jim M'Lady Oldsmobile, Inc., 307 F.3d 601, 604 (7th Cir. 2002) (applying Litton to breach of contract dispute

between automobile manufacturer and dealer).

Defendant does not challenge plaintiff's assertions that Litton provides the controlling standard or that none of the situations listed in Litton are present in this case with respect to the copyright claim. In other words, it seems to be undisputed that the facts underlying the copyright claim arose *after* the contract was terminated, that plaintiff's copyright does not arise out of the terminated agreement and that normal principles of contract interpretation would not require a conclusion that the arbitration provision survived expiration of the remainder of the agreement. In light of defendant's failure to develop an argument on any of these issues, I must conclude that the arbitration agreement does not apply to the copyright claim.

Defendant's primary argument is that plaintiff is trying to engage in "claim splitting" by seeking to try the copyright claim in one forum and the breach of contract claim in another forum when the two claims arise out of the same facts. The Court of Appeals for the Seventh Circuit defines "claim splitting" as "maintain[ing] a suit, arising from the same transaction or events underlying a previous suit, simply by a change of legal theory." Carr v. Tillery, 591 F.3d 909, 913-14 (7th Cir. 2010). In other words, it is "one component of res judicata." Alvear-Velez v. Mukasey, 540 F.3d 672, 678 (7th Cir. 2008). However, defendant does not cite any cases in which a court applied the doctrine in the context of deciding whether a particular issue is subject to arbitration. More generally, defendant does

not cite any authority for requiring a party to arbitrate a claim that is no longer subject to an arbitration agreement. Even in cases involving claims that are intertwined, courts have refused to expand *or* limit the scope of an arbitration agreement simply to insure that all claims are tried together. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) ("[T]he Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties filed a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."); Giles v. Blunt, Ellis & Loewi, Inc., 845 F.2d 131, 134 (7th Cir. 1988) (refusing to require arbitration of claim that fell outside scope of arbitration agreement, even though claim was related to other claims subject to arbitration).

Accordingly, I conclude that plaintiff is entitled to proceed with its copyright claim in this court. Because defendant does not raise any other objections to dismissal of the breach of contract claim, I will grant plaintiff's motion for leave to amend.

ORDER

IT IS ORDERED that

1. Plaintiff Wausau Homes Incorporated's motion for leave to amend its complaint, dkt. #15, is GRANTED. Plaintiff's breach of contract claim is DISMISSED WITHOUT PREJUDICE.

2. Defendant Everest Builders of Minocqua, Inc.'s motion to dismiss, dkt. #9, is DENIED.

Entered this 21st day of October, 2011.

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