IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MAXAM NORTH AMERICA, INC.,

Plaintiff,

v.

APPLIED ENERGIES, LLC and
KEVIN VINCENT,

Defendants.

OPINION AND ORDER

11-cv-796-bbc

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This is a contract dispute under Wisconsin state law. Plaintiff Maxam North America, Inc. contends that defendant Applied Energies, LLC and its sole member, defendant Kevin Vincent, owe it more than $241,000 for goods plaintiff sold and delivered to defendants. Jurisdiction is present under 28 U.S.C. § 1332 because plaintiff's citizenship is diverse from defendants' and more than $75,000 is in controversy. (Plaintiff is a Utah corporation with its principal place of business in Utah. Defendant Vincent is a citizen of Wisconsin, and his citizenship is imputed to defendant Applied Energies, LLC. Thomas v. Guardsmark, LLC, 487F.3d 531, 534 (7th Cir. 2007) (citizenship of limited liability company is determined by citizenship of its members)).

Now before the court is plaintiff's motion for summary judgment, dkt. #15, in which plaintiff contends that there are no material facts in dispute relevant to its contract claim. Defendants oppose the motion, contending that summary judgment would be improper because there are disputed facts concerning the amount of money they owe to plaintiff. After reviewing

the parties' briefs and the evidence, I conclude that there are no genuine facts in dispute regarding plaintiff's claim that defendants breached a contract by failing to pay plaintiff for all of the goods plaintiff delivered to them. Thus, I will grant plaintiff's motion for summary judgment on that issue. However, neither side submitted adequate evidence or argument regarding the specific amount of defendants' outstanding debt to plaintiff. Plaintiff's argument on the issue is confusing and the evidence is incomplete, while defendants' argument and evidence are vague and conclusory. Thus, I will deny plaintiff's motion as to the amount defendants owe and will order the parties to submit supplemental briefing and evidence on the issue.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed. I note any relevant, disputed facts in paratheticals.

UNDISPUTED FACTS

Plaintiff Maxam North America, Inc. is a Utah corporation that manufactures and distributes commercial explosives. Defendant Kevin Vincent is the principal and sole owner of defendant Applied Energies, LLC, a Wisconsin demolition business. Defendants and plaintiff have conducted business with each other since at least 2003, . Initially, defendants' business interactions with plaintiff consisted of defendants' purchasing explosive materials from plaintiff. Over the course of several years, the business relationship between plaintiff and defendants expanded.

In 2007, defendants entered into a verbal agreement with plaintiff to deliver plaintiff's products to Michigan. Defendants made five trips to Michigan on behalf of plaintiff. (The

parties dispute whether plaintiff ever paid defendants for the trips or credited the trips to defendants' outstanding account balance.) Also in 2007, defendants agreed to allow plaintiff to bill defendants' clients for jobs that defendants had completed. This occurred approximately 15 times. (The parties dispute whether plaintiff credited the amounts billed to defendants' outstanding debts to itself.)

Sometime in 2008, defendants and plaintiff entered into a verbal agreement under which plaintiff would pay or credit defendants $600 a month to store products in a storage magazine unit that defendants had leased. The agreement lasted approximately two years. (The parties dispute whether plaintiff deducted $600 a month from defendants' outstanding debt.)

In April 2008, defendants submitted an "Application for Credit" to plaintiff in which it requested $150,000 in credit. The application states that defendants "attest[] financial responsibility, ability and willingness to pay our invoices . . . a) 30 days from the date of delivery, unless specifically agreed otherwise as follows." Applic. p. 3, dkt. #18-1. This provision is followed by a handwritten note, "as per spoken agreement." The application goes on to state that:

> b) All past due invoices shall bear interest at the rate of 1 1/2 % (18% annual percentage rate), Computed on a daily basis, on the past due amount.
>
> * * *
>
> d) We hereby agree that if our account is referred to collection, that we will pay reasonable collection charges and reasonable attorney's fees and court costs should such be expended for collection of this account. We agree to be bound for the interest charge of 1 1/2 % (18% annual percentage rate) on the unpaid balance owing both before and after judgment.

Id.

Defendant Vincent signed the application on behalf of defendant Applied Energies, and

at the end of the application, executed a "personal guarantee," saying that "in consideration of the account accommodations extended to" Applied Energies, Vincent was "personally guarantee[ing] the payment of all amounts which may become due" under Applied Energies' account and adding that the "guarantee is continuing and irrevocable." Id.

From 2008 until 2011, defendants continued to purchase goods from plaintiff. Plaintiff invoiced defendants when it shipped goods to defendants. (The parties dispute whether plaintiff sent invoices regularly. Plaintiff contends that it sent an invoice promptly after each shipment of goods; defendants contend that plaintiff sent invoices only sporadically.) Invoices sent in 2009, 2010 and 2011 contained a provision stating that the "[c]ustomer agrees to pay 1.5% per month on any late payment and attorney's fees and costs of collection, if any."

At some point, defendants fell behind on their payments to plaintiff. On April 12, 2009, defendants wrote to plaintiff, stating:

> Our goal for this year is to reduce expenses by $150,000 to $200,000 and increase sales $200,000 to $300,000 with a projected net profit of $150,000 to $200,000.
>
> Maxam will receive 2/3rds of our net profits in the form of monthly payments of $8,000 to $12,000 beginning May 20th and continuing until January 2010[,] resuming again May 20th 2010 and continuing until finished.

Dkt. #18-3. Defendants did not follow through with the assurances made in the April 12 letter.

On March 22, 2010, defendants sent another letter to plaintiff, stating:

> Applied Energies agrees to lower its debt to Maxam by 40-50 thousand dollars over the next six months. This is to be accomplished by payments of between $6,666-$8,333 monthly, the payments will be made directly or by cost plus purchases or a combination of both.
>
> * * *
>
> All purchases will be made by bank check, paid in advance, with the hope that

> once a track record has been established this requirement may be lifted.
>
> Applied Energies also understands th[at] once this debt has been rectified, Maxam would consider reducing accumulated interest penalties.

Dkt. #18-4. Defendants did not follow through with the assurances given in the March 22 letter. In May 2010, defendants wrote to plaintiff again, this time agreeing to pay plaintiff by cashier's check, in advance, 150% of the purchase price for any goods ordered.

On August 5, 2010, plaintiff sent defendants an account statement showing an overdue amount of $241,598.66, with unpaid balances dating from 2007. Dkt. #17-3. Plaintiff sent additional account statements on December 8, 2010 (showing $241,191.47 overdue), dkt. #17-4; March 31, 2011 (showing $241,368.91 overdue), dkt. #17-5; April 30, 2011 (showing $242,568.94 overdue), dkt .#17-6; and May 2, 2011 (showing $240,501.95 overdue), dkt. #18-2. After plaintiff sent the May 2 statement, it referred defendants' account for collection. Plaintiff filed this action on November 30, 2011.

OPINION

Plaintiff has moved for summary judgment in its claim that defendants owe it more than $240,000 for goods plaintiff sold and delivered to defendants "pursuant to a written agreement between the parties." Plt.'s Cpt. ¶ II. Plaintiff also claims interest and attorneys' fees under the same written agreement. The parties assume that Wisconsin law applies to their dispute, so I have done the same. RLI Insurance Co. v. Conseco, Inc., 543F.3d 384, 390 (7th Cir. 2008) ("When neither party raises a conflict of law issue in a diversity case, the applicable law is that of the state in which the federal court sits."). Because plaintiff's claim involves a contract for the sale of goods, its claim is governed by Wisconsin's commercial code. Wis. Stat. ch. 401-402.

Under Wis. Stat. § 402.607(1), a "buyer must pay at the contract rate for any goods accepted." Further, "[w]hen the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under s. 402.710, the price . . .[o]f goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer. . ." Wis. Stat. § 402.709(1)(a).

Plaintiff contends that this is a "straightforward case" because it is undisputed that defendant Applied Energies ordered goods from plaintiff, that plaintiff delivered goods to Applied Energies and that Applied Energies received and accepted the goods. Plt.'s Br., dkt. #19, at 7. It is also undisputed that plaintiff has sent numerous account statements to Applied Energies showing unpaid balances and that Applies Energies has not paid the amounts demanded. Finally, it is undisputed that defendant Vincent signed a personal guarantee, agreeing to guarantee payment of the amounts owed by Applied Energies after April 2008.

I agree with plaintiff that this should be a relatively straightforward case, particularly given the concessions defendants make in their response brief. In their opposition materials, defendants concede that they have not paid plaintiff for all of the goods they received and that there is still an outstanding balance on its account. Dfts.' Br., dkt. #20, at 7 (conceding that defendants had been withholding payments); Aff. of Kevin Vincent, dkt. #21, ¶ 15 ("I have stopped making payments for the outstanding balance as I believe it is incorrect and does not reflect the true amounts that are due and owing."). Additionally, they have no arguments to refute plaintiff's claim that defendant Vincent can be held personally liable for the cost of the goods and they do not contend that there are material facts in dispute with respect to their liability to plaintiff under the contracts. In fact, defendants raised only one argument as to why

they should not be ordered to pay plaintiff for the goods they received. They contend that under § 2-717 of the Uniform Commercial Code, they were entitled to withhold payments because plaintiff failed to properly deduct from Applied Energies' account the value of the services Applied Energies provided to plaintiff. These services included Applied Energies' (1) five trips to Michigan on plaintiff's behalf; (2) allowing plaintiff to collect directly from Applied Energies' clients; and (3) leasing a storage unit to plaintiff for 23 months.

Defendants' argument is not persuasive for two reasons. First, the code provision on which they rely does not permit a buyer to withhold payments in response to a seller's breach of a separate contract between the parties. The Uniform Commercial Code states that "[t]he buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due *under the same contract*." U.C.C. § 2-717; Wis. Stat. § 402.717 (emphasis added). The provisions apply to situations in which the seller has breached the contract between the parties relating to the sale of goods, not some other contract. ECHO, Inc. v. Whitson Co., 52 F.3d 702, 708 (7th Cir. 1995) (holding that because distributorship and purchase orders were separate contracts, distributor could not rely on § 2-717 to set off amount it owed on purchase orders against alleged violation of distributorship agreement). In this case, defendants have made no showing why plaintiff's agreements to rent a storage unit, bill defendants' clients or accept delivery services from defendants should be considered part of the buy-sell contracts between the parties.

Moreover, even if these separate agreements could be considered part of the original purchase agreements, the code provision does not excuse a buyer from making payments. If a seller fails to meet his obligations under the buy-sell contract, the buyer may recover damages

or deduct the cost of the seller's breach from the amount the buyer owes. The buyer cannot simply refuse to make any payment on the goods it received. I conclude therefore that this provision is not a defense to plaintiff's breach of contract claim.

In sum, defendants have asserted no viable defense to plaintiff's breach of contract claim. The undisputed facts show that defendants owe money to plaintiff for goods they ordered and received from plaintiff. Thus, I will grant plaintiff's motion for summary judgment on its claim that defendants breached a contract between the parties by failing to pay for goods received from plaintiff. The only question remaining is what amount defendants must pay to plaintiff.

Unfortunately, the question of damages is not straightforward. In fact, it is impossible to determine from the parties' submissions whether there are genuine disputes of material fact regarding the amount of money defendants owe plaintiff. According to plaintiff, the amount owed as of October 1, 2010 was $241,840.99, plus prejudgment interest at 1.5% a month and attorney fees. Dkt. #24 at 11. As evidence of this amount, plaintiff relies on account statements it created and sent to defendants between August 2010 and May 2011, dkt. #17, Exhs. C-F, and an affidavit from plaintiff's treasury and credit manager stating the amount owed by defendants. Dkt. #18. In support of its claim for interest and attorney fees, plaintiff cites a handful of invoices it sent to defendants between February 2009 and April 2011 that list an interest rate, dkt. #17, Exh. G, and the April 2008 credit application signed by defendants, which states that defendants will be charged interest at a rate of "1 1/2% (18% annual percentage rate) on the unpaid balance" as well as "collection charges and reasonable attorney's fees and court costs." Dkt. #18, Exh. A.

The problem with plaintiff's submissions is that they do not explain with any clarity how

plaintiff reached the sum of $241,840.99. The account statements are nearly incomprehensible and plaintiff makes little effort to explain them. Plaintiff attached to its reply brief a supplemental affidavit from its treasury and credit manager in which it makes a little more effort to explain the sum it is demanding, dkt. #25, but that affidavit and explanation came too late for defendants to respond to it. Moreover, even this explanation is confusing and seems to suggest that the account statements submitted to the court and defendants do not include several of the transactions between the parties.

Additionally, it is not clear how plaintiff is calculating what constitutes a "past due" amount. The April 2008 credit application states that payments are due "as per spoken agreement," but plaintiff provides no explanation of what the spoken agreement was. Without knowing how plaintiff determined that a payment was past due, it is impossible to know whether plaintiff calculated interest rates correctly.

Finally, it is not clear whether plaintiff included any interest in the amount it is claiming and if so, how plaintiff calculated that interest. Plaintiff has submitted only a few invoices that list an interest rate, and the credit application on which plaintiff relies was dated April 2008, although it appears from the account statements plaintiff submitted that it is claiming unpaid invoices dating back to 2007. Plaintiff does not explain on what basis it is claiming interest on pre-April 2008 invoices. Additionally, it is not clear whether plaintiff is contending that all post-April 2008 purchases are governed by the April 2008 credit application.

For their part, defendants do not suggest a specific amount they believe they owe plaintiff. Rather, they have several arguments about why they are entitled to set-offs resulting from the services they provided to plaintiff, including the trips to Michigan and the storage unit

rental. As plaintiff points out, defendants never pleaded "set-off" as an affirmative defense. However, "a delay in raising an affirmative defense only results in waiver if the other party is prejudiced as a result." Schmidt v. Eagle Waste & Recycling, Inc., 599 F.3d 626, 632 (7th Cir. 2010). Plaintiff has not shown that it has been prejudiced by defendants' assertion of a set-off defense and it admits that defendants notified plaintiff of at least some of its set-off assertions during discovery. Dkt. #17, Exh. B, Dfts.' Resp. to Plt.'s Interr. ¶ 1 ("[T]he amount alleged fails to reflect credits for swaps between the parties, as well as credit for payments made by defendant to plaintiff. Further plaintiff has failed to pay or credit defendant for magazine rental."). Without further evidence and argument from the parties regarding the prejudice caused by defendants' set-off defenses, I will not disregard those defenses.

However, there is a problem with defendants' set-off arguments: they are supported only by the vague and conclusory affidavit of defendant Vincent, in which he asserts that plaintiff failed to give defendants credit for payments made or services performed. For example, he states that certain "set-off deductions were never made to my account," dkt. #21 at ¶¶ 5, 6, that the account statements provided by plaintiff did not reflect certain deductions, id. at ¶ 7, and that payments he made "were not being applied accurately" or at all, id. at ¶¶ 8, 9, 11. However, Vincent never explains the basis for his belief that his payments were not applied accurately or that the account statements are flawed. In particular, defendants have submitted no evidence from their own accounting records to contradict plaintiff's assertion that the account statements are accurate.

Under Fed. R. Civ. P. 56(e), "[i]f a party fails to properly support an assertion of fact or fails to properly address another parties' assertion of fact as required by Rule 56(c), the court

may

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

Fed. R. Civ. P. 56(e). Under the circumstances, I conclude that it is appropriate to follow option (1). Neither side's submission is sufficient. Thus, I will give them an opportunity to file supplemental materials to address these problems. Plaintiff should explain the sum and interest it is claiming with more detail and clarity the bases for them. It should provide an affidavit from someone with personal knowledge of plaintiff's accounting and should submit all necessary documentation of the amounts it is contending that defendants owe. In addition, plaintiff should explain why it would be prejudicial to consider defendants' set-off defense at this stage. In their response, defendants should explain why they believe they should be permitted to assert a late set-off defense and explain in detail why they dispute plaintiff's claimed amount of damages. They should support their explanation with specific facts and documentary evidence.

ORDER

IT IS ORDERED that

1. Plaintiff Maxam North America, Inc.'s motion for summary judgment, dkt. #15, is GRANTED IN PART and DENIED IN PART. The motion is GRANTED with respect to plaintiff's claim that defendants Applied Energies, LLC and Kevin Vincent are liable for breach

of contract by failing to pay plaintiff for all of the goods plaintiff delivered to defendants. The motion is DENIED with respect to the amount defendants owe to plaintiff for their breach.

2. Plaintiff may have until December 21, 2012 to file supplemental summary judgment evidence and argument clarifying how much money defendants owe for goods plaintiff delivered to defendants. Defendants may have until January 11, 2013, to file a response.

Entered this 6th day of December, 2012.

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