

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

DEVIN SHIMKO,

Plaintiff,

OPINION & ORDER

v.

11-cv-831-wmc

JEFF WAGNER TRUCKING, LLC,
JEFFREY M. WAGNER, and
HENRY A. WAGNER,

Defendants.

In this civil action for declaratory judgment and compensatory damages brought pursuant to 49 U.S.C. §14704(a) and state common law, plaintiff Devin Shimko claims his “lease agreement” with defendant Jeff Wagner Trucking, LLC (“JWT”) violates “Truth-in-Leasing” regulations contained in 49 C.F.R. § 376. On June 28, 2013, this court dismissed Shimko’s complaint without prejudice for failure to state a claim upon which relief may be granted. (Dkt. #24). Specifically, the court dismissed: Counts I, II, and IV because Shimko failed to allege he had leased equipment to JWT, which the court found necessary for the federal Truth-in-Leasing regulations to apply; and Count III because Shimko failed to allege any factual basis for a claim of unjust enrichment. Shimko then filed a motion to amend his complaint (dkt. #25), which defendants oppose. For the reasons stated below, the court will grant the motion in part and deny it in part.

FACTUAL ALLEGATIONS

On December 26, 2007, Shimko and JWT entered into an “Independent Contractor Driver Agreement” (the “IC Agreement”). In relevant part, this IC Agreement required that

Shimko to “[a]ccept any reasonable dispatch of loads provided to him by the broker,” “transport and move the same,” and “supply all necessary pallets and other equipment to ensure safe transport of loads.” In return, JWT would pay Shimko 90% of the amount paid for each load, less deductions for expenses and permit fees. JWT would also “[n]egotiate loads” on Shimko’s behalf and “[p]rovide license plates, permits, and evidence of authority to transport goods for loads negotiated by Broker.” Upon termination of the agreement, Shimko would return to JWT all equipment and other supplies and property provided by JWT. Shimko was neither an authorized carrier nor a private carrier under the applicable federal regulations. JWT purported in the IC Agreement to be a “broker,” but the Federal Motor Carrier Safety Administration has authorized it only to operate as a for-hire “motor carrier.”

On January 1, 2008, Shimko and JWT also entered into a separate “Equipment Lease.” The Equipment Lease provided that JWT would lease a 2000 Peterbilt #16 and a 2000 Utility Trailer 48FT #116 to Shimko for 104 weekly payments of \$472.04. At the end of the lease term, Shimko had the option to purchase the truck and trailer for \$10.00 each. The lease also stated that JWT “shall be deemed to have retained title to the equipment at all times.” The lease allocated the parties’ responsibilities for maintenance, damage and insurance, but placed no conditions on Shimko’s use of the equipment. Even so, Shimko alleges that Shimko and JWT entered into this second agreement solely for the purpose of Shimko leasing this tractor and trailer for exclusive use in support of JWT’s motor carrier business, with Shimko providing services as a driver under the terms of the IC Agreement.

Because Shimko had exclusive right to use of the truck and trailer under the express terms of the Equipment Lease, he was deemed by both sides of the transaction to be an “owner” under 49 C.F.R. § 376/2(d). Consistent with this view, Shimko assumed all risk of damage to the equipment and all liability for injury to persons caused by the use of the equipment, and agreed to indemnify JWT for all such damage or liability.

Defendants Jeff and Henry Wagner negotiated the terms of both the IC Agreement and the Equipment Lease with Shimko. The IC Agreement and the Equipment Lease each contain their own integration clause purporting to be the entire agreement and prohibiting amendment except “in writing and signed by both parties.” Jeff Wagner directed where Shimko’s equipment would be serviced and the loads Shimko would take; he also informed Shimko that he could not refuse a load. Henry Wagner served as accountant and business manager for JWT and controlled payments to and charges made back to Shimko.

OPINION

Whether to grant or deny leave to amend rests within the discretion of the district court. *Foman v. Davis*, 371 U.S. 178, 182 (1962). After the deadline for amendments as a matter of course has passed, as here, “a party may amend its pleading only with the opposing party’s written consent or the court’s leave,” but “[t]he court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2).

Thus, the Supreme Court advises in *Foman* that “the leave sought should, as the rules require, be ‘freely given,’” at least in “the absence of any apparent or declared reason” not to do so. *Id.* at 182. This latter caveat keeps courts from automatically granting leave to amend. Rather, “a court may deny a motion to amend because of ‘undue delay, bad faith or

dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.” *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1303 (7th Cir. 1993) (quoting *Foman*, 371 U.S. at 182).

Defendants raise only futility as a basis to deny Shimko’s present motion for leave to amend. (See Dkt. #27.) The court may deny leave “if the proposed amendment fails to cure the deficiencies in the original pleading, or could not survive a second motion to dismiss.” *Perkins v. Silverstein*, 939 F.2d 463, 472 (7th Cir. 1991) (citing *Foman*, 371 U.S. at 182). In answering this question, the Seventh Circuit has pointed district courts to “the same standard of legal sufficiency that applies under rule 12(b)(6).” *Gen. Elec. Capital Corp. v. Lease Resolution*, 128 F.3d 1074, 1085 (7th Cir. 1997).

To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When evaluating a complaint’s sufficiency, the court construes it in the light most favorable to the party not seeking dismissal, accepts well-pled facts as true, and draws all inferences in the plaintiff’s favor. *Reger Dev., LLC v. Nat’l City Bank*, 592 F.3d 759, 763 (7th Cir. 2010). “A pleading that offers ‘labels and conclusions’ or a ‘formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

Shimko’s proposed amended complaint contains five counts. Count I requests either a declaratory judgment that the Truth-in-Leasing regulations apply or, in the alternative, reformation of the contracts between the parties to add the required Truth-in-Leasing terms.

As Counts II, III and V all depend on the applicability of the federal Truth-in-Leasing regulations, the court will examine the sufficiency of those claims together. Since Count IV is one for unjust enrichment under Wisconsin law, the court will consider the sufficiency of that claim separately.

I. Counts I, II, III and V (“Truth-in-Leasing Claims”)

As previously noted, the flaw in Shimko’s first Complaint was that he failed to “allege[] that he leased equipment back to JWT.” (Order, June 27, 2013 (dkt. #24) (“Order”) 10.) Because the Truth-in-Leasing regulations apply only to circumstances in which an owner -- in this case, Shimko -- has leased equipment to the authorized carrier -- JWT -- Shimko had not alleged sufficient facts to demonstrate that the regulations were applicable, requiring dismissal of his complaint. Given that Shimko was involved in a lease-to-leaseback arrangement, putting form over substance for whatever reason,¹ the court also noted “the real possibility that JWT’s lease and driver agreement may violate (or at least frustrate the purposes of) those regulations.” Still, the court dismissed the complaint without prejudice to give Shimko an opportunity “to amend his complaint to address its deficiencies.” (*Id.*)

Shimko’s proposed amended complaint plainly attempts to do just that. Shimko now alleges that he is an “owner” of the leased equipment under the Truth-in-Lending regulations *and* that JWT is registered with the Federal Motor Carrier Safety Administration to operate as a for-hire “motor carrier,” making it an “authorized carrier.” (Pl.’s Mot. Ex. A

¹ The parties have left the court only to speculate as to the parties’ possible tax, regulatory or other reasons for adopting this arrangement.

(dkt. #25) ¶¶ 19, 15.) Additionally, he alleges that JWT required him to enter into the Equipment Lease “solely for the purpose of Shimko’s leasing such equipment back to JWT exclusively for use in JWT’s motor carrier business pursuant to the terms of the IC Agreement.” (*Id.* ¶ 18.) Shimko also points to section 2, page 1 of the IC Agreement, which provided that Shimko must “supply all necessary pallets *and other equipment* to insure safe transport of loads negotiated by broker.” (*Id.* ¶ 9 (emphasis added).)

Defendants argue that Shimko’s allegation as to the purpose of the Equipment Lease is a “bare legal conclusion.” The court disagrees. Shimko is alleging facts as to the parties’ intentions and expectations in entering into the Equipment Lease, not simply reciting the definition of “lease” or bluntly stating that the Truth-in-Leasing regulations apply. Indeed, evidence of the parties’ intentions and expectations as to their arrangement is exactly what this court noted was lacking in Shimko’s previous complaint. (Order (dkt. #24) 10.) Shimko’s allegation, if credited (as the court must at this stage of the proceedings), states that the parties executed the Equipment Lease so that Shimko could thereafter re-lease the equipment to JWT -- an “arrangement” that at least arguably would satisfy the regulations’ definition of “lease.”

Next, defendants contend that Shimko’s allegation as to the purpose of the Equipment Lease contradicts its own terms. They argue that “the ‘sole purpose’ of the document could not possibly have been for Shimko to lease equipment back to JWT,” since “the Equipment Lease is a lease-to-purchase agreement.” (Defs.’ Resp. (dkt. #27) 7.) The court does not find this argument persuasive. While the Equipment Lease is, in fact, a lease-to-purchase agreement, that is not at odds with Shimko’s allegation that the parties entered *into* the Equipment Lease so that Shimko could thereafter “lease” the equipment

back to defendants for purposes of performing under the parties' IC Agreement. The Equipment Lease, therefore, does not "incontrovertibly contradict[] the allegations in the complaint." *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013).

Defendants also argue that the underlying contracts contain no language demonstrating that Shimko leased equipment to JWT. Although defendants are correct that there is nothing explicit in either the IC Agreement or the Equipment Lease regarding the parties' expectations, negotiations, and practices, that does not mean no "lease" can exist within the meaning of the Truth-in-Leasing regulations. The regulations define a "lease" as "[a] contract *or arrangement* in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation." 49 C.F.R. § 376.2(e) (emphasis added). Thus, there is no requirement that the "arrangement" take the form of a formal, written contract to qualify as a "lease" for Truth-in-Leasing purposes.

However much this arrangement seems to put form over reality, it finds support in other provisions of the regulations. For example, 49 C.F.R. § 376.11(a) states that "[t]here shall be a *written* lease" governing an authorized carrier's use of equipment it does not own. The modifier would be redundant if the regulations required that the terms of an arrangement be "written" for it to qualify as a lease. *See United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008) ("We avoid interpreting a statute in a way that renders a word or phrase redundant or meaningless.").

The court in *Bonkowski v. Z Transport, Inc.*, No. 00-C-5396, 2004 WL 524723 (N.D. Ill. Mar. 5, 2004), came to the same conclusion. In *Bonkowski*, the plaintiff entered into an Independent Contractor Agreement in which he would serve as a driver for ZTI, driving

vehicles to which ZTI had title but to which he had the right of exclusive use. The arrangement by which he leased the vehicles from ZTI was entirely oral. The court found that the parties' arrangement met the definition of "lease" as set forth in the Regulations and that, therefore, it "was a lease subject to the Truth-in-Leasing Regulations." *Id.* at *3.

In light of this, the court finds that Shimko has alleged sufficient facts to state a claim for the applicability of the Truth-in-Leasing regulations and, by extension, violations of those regulations.

To survive a motion to dismiss, Shimko must only "give enough details about the subject-matter of the case to present a story that holds together." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (quoting *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010)). He has now done so here: rather than offering a conclusory allegation that he has leased equipment to JWT, he alleges facts that, if believed, indicate they entered into an arrangement, via the Equipment Lease and the IC Agreement, through which he provided JWT with the use of equipment for JWT's use in the regulated transportation of property. This would make the Equipment Lease and IC Agreement, at least taken together, an arrangement that qualifies as a "lease" as that term is defined in the regulations. Therefore, Shimko has alleged enough facts for the court to grant him leave to amend his complaint.

Allowing Shimko to go forward, at least to summary judgment, may be no great favor, since his claim faces a number of other, perhaps insurmountable hurdles. First, both the IC Agreement and the Equipment Lease contain integration clauses. Under Wisconsin law, "when [a] contract contains an unambiguous merger or integration clause, the court is barred from considering evidence of any prior or contemporaneous understandings or

agreements between the parties, even as to the issue of integration.” *Town Bank v. City Real Estate*, 2010 WI 134, ¶139, 330 Wis.2d 340, 793 N.W.2d 476. This may or may not affect the court’s ultimate ability to consider the facts Shimko alleges as to the parties’ intentions. At this point, however, JWT has not raised this issue as proof of futility, nor has either side briefed the issue, so the court declines to decide it.

Second, the regulations’ applicability remains unclear. The regulations indicate that “the authorized carrier may perform authorized transportation *in equipment it does not own only under*” particular conditions -- the conditions Shimko alleges JWT has violated. 49 C.F.R. § 376.11 (emphasis added). However, JWT *does* own the equipment, even though the regulations appear to allow Shimko to claim ownership too. *See* 49 C.F.R. § 376.2(d) (defining “ownership” as retaining title to equipment *or* having exclusive right to use the equipment). To be sure, this may simply be proof that the regulations are internally inconsistent, since once an authorized carrier leases equipment, it would have exclusive right to use that equipment and would then “own” it, making the regulations inapplicable. Like the integration clause issue, JWT has not raised this argument and the parties have not briefed it, so the court declines to decide it now.

Third, Shimko’s claim of a leaseback arrangement (really a lease-to-leaseback arrangement) rests solely on his word. Perhaps there is a practice of such arrangements in the trucking industry for reasons, as the court earlier noted, not yet made clear. Otherwise, his claim that JWT agreed to this seemingly odd arrangement may not ultimately pass the credulity test, particularly in light of the integration clauses.

II. Count IV (Unjust Enrichment)

Shimko's proposed amended complaint appears to rely on the fact that Shimko conferred the benefit of transportation services on defendants and that they paid him less than fair value for that benefit. As before, Shimko identifies other alleged bases for an unjust enrichment claim. He also admits that a contract exists between the parties but claims that his theory of unjust enrichment encompasses the "total business relationship" between the parties. Defendants argue in response that Count IV must be dismissed because Shimko's theory deals only with subject matter within the scope of the contract.

The elements of unjust enrichment under Wisconsin law are (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation or knowledge by the defendant of the benefit; and (3) the defendant's acceptance or retention of the benefit under circumstances making it inequitable for the defendant to retain that benefit without payment of its value. *Puttkammer v. Minth*, 83 Wis. 2d 686, 689, 266 N.W.2d 361 (1978). Generally, a plaintiff cannot maintain a claim for unjust enrichment when the parties have an express contract. *Continental Casualty Co. v. Wis. Patients Comp. Fund*, 164 Wis. 2d 110, 118, 473 N.W.2d 584 (Wis. Ct. App. 1991). As this court recognized in its previous order, there is an exception to this rule, and a party may not be barred from seeking equitable relief if the benefits conferred fall outside the scope of the parties' contractual relationship. *N. Crossarm Co., Inc. v. Chemical Specialties, Inc.*, 318 F. Supp. 2d 752, 766 (W.D. Wis. 2004) (citing *Kramer v. Alpine Valley Resort*, 108 Wis. 2d 417, 425-26, 321 N.W.2d 293 (1982)).

Accordingly, Shimko argues that he is entitled to present evidence "to support an unjust enrichment theory reflecting the parties' 'total business relationship.'" (Pl.'s Reply (dkt. #28) 9.) As the cases he cites indicate, however, the exception applies only when the

“benefit falls outside the scope of the parties’ contractual relationship.” *N. Crossarm Co., Inc.*, 318 F. Supp. 2d at 766 (quoting *Utility Reduction Specialists v. Brunswick Corp.*, No. 96-C-253 (W.D. Wis. Mar. 11, 1997)). The contract need not “govern all material elements of the parties’ business relationship”; it need only “encompass[] the aspect relevant to plaintiff’s unjust enrichment claim” to foreclose recovery. *Id.* at 755. For example, in *N. Crossarm Co.*, where the alleged benefit was marketing and the parties had a market support agreement, “the exception to the general rule [was] not applicable.” *Id.* at 766. Similarly here, Shimko alleges the benefit he provided was transportation service, while the IC Agreement provides that Shimko will “[a]ccept any reasonable dispatch of loads” and “[t]ransport and move the same.” Whether or not governed by the Truth-in-Leasing regulations, Shimko’s pleadings offered nothing in its factual allegations or legal claims that would render the terms of the parties’ written agreement on shipping void or unenforceable. Accordingly, his remedy, if any, sounds in contract.

Shimko also argues in his brief that defendants (1) directed him to perform work outside the scope of the Lease Agreement; (2) directed where Shimko’s equipment would be serviced; (3) directed which loads Shimko would take; and (4) informed him that he was not allowed to refuse a load. As the court held in its first order, the latter three allegations fall within the scope of the parties’ agreements, and Shimko does not appear to argue otherwise. The first allegation, as this court previously recognized, falls outside of the scope of the agreement by its own terms, but Shimko has offered no additional factual bases for compensation. Therefore, it remains a “bare legal conclusion.” (Order (dkt. #24) 12.) As such, Shimko’s proposed amendment of Count IV would not survive a second motion to dismiss and his motion to amend the complaint on this count will be denied as futile.

ORDER

IT IS ORDERED that:

- (1) plaintiff Devin Shimko's Motion for Leave to File Amended Complaint is GRANTED with respect to the Truth-in-Leasing claims and DENIED with respect to the unjust enrichment claim;
- (2) defendants shall be deemed served accordingly and shall have twenty-one (21) days to answer, move or otherwise respond; and
- (3) a telephonic preliminary pretrial conference shall be held before Magistrate Judge Stephen Crocker on April 1, 2014, at 2:30 p.m., plaintiffs to initiate the call to the court. The parties are to meet and confer in advance of that conference.

Entered this 10th day of March, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge