IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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J-B MARKETING, INC.,

OPINION AND ORDER

Plaintiff,

12-cv-106-bbc

v.

GOLDEN COUNTY FOODS, INC.,

Defendant.

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This is a contract dispute under Wisconsin state law. Plaintiff J-B Marketing, Inc. contends that defendant Golden County Foods, Inc. breached a contract between the parties by failing to pay for more than $500,000 worth of potatoes that plaintiff sold and delivered to defendant. In its counterclaim, defendant contends that plaintiff breached the contract by failing to deliver the quantity and quality of potatoes required under the parties' contract. Jurisdiction is present under 28 U.S.C. § 1332 because plaintiff's citizenship is diverse from defendant's and more than $75,000 is in controversy. (Plaintiff is a Wisconsin corporation with its principal place of business in Wisconsin. Defendant is a Delaware corporation with its principal place of business in Illinois.)

Now before the court is plaintiff's motion for summary judgment, dkt. #24, in which plaintiff contends that there are no material facts in dispute relevant to its contract claim. (Plaintiff did not move for summary judgment on defendant's counterclaim and plaintiff did

not move for partial summary judgment on any particular issue.) Defendant opposes the motion, contending that summary judgment would be improper because there are disputed facts concerning whether defendant was entitled to withhold payment as a result of plaintiff's material breach of the contract and as a set-off for the money defendant was spending to obtain potatoes from another distributor. After reviewing the parties' briefs and the evidence, I conclude that there are material facts in dispute related to defendant's affirmative defenses. Both parties failed to provide sufficient facts about their business relationship, the reasons plaintiff failed to deliver more potatoes to defendant and their respective damages. Therefore, I am denying plaintiff's motion for summary judgment.

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 or missing facts in parentheticals.

UNDISPUTED FACTS

Plaintiff J-B Marketing, Inc. is in the business of marketing and selling produce. Defendant Golden County Foods, Inc. is a manufacturer of frozen food products. On July 22, 2010, plaintiff and defendant entered into a contract under which plaintiff would deliver potatoes each week to defendant's plant in Plover, Wisconsin. Dkt. #28-1. The contract provided that plaintiff would deliver 10-15 loads each week and that the "delivery schedule (and buying obligations) of above products shall be subject to adjustments by the buyer to the extent that daily delivery of this and other agreements may not be in excess of processing

capacity or production requirements. Buyer shall provide supplier with advance notice of monthly run schedules and estimated product usage per week as possible." The potatoes were to be "fry" potatoes that were 3.5 to 5 inches in length with a "gravity" above 1.072. The contract specified a price for the potatoes and stated that "all pricing [was] subject to be paid within our invoiced terms." The contract also stated that "if the price of fuel rises significantly, seller can negotiate new delivered pricing." The parties intended the contract to last three years, from August 2010 through July 2013. On July 15, 2011, the parties modified the prices under the 2010 contract but did not change any other terms. Dkt. #28-2.

Plaintiff shipped potatoes to defendant from July 2010 to January 2012. Each week, defendant would submit purchase orders to plaintiff, requesting a certain number of loads, and plaintiffs would obtain potatoes meeting defendant's specifications from growers and then ship the potatoes to defendant. Plaintiff would not ship any potatoes unless it received a purchase order from defendant and would ship only as many loads as defendant requested. There were several weeks from 2010 through 2012 when defendant requested fewer than ten loads in a week, and defendant sometimes requested as few as two or three loads in a week.

From May 9, 2011 through September 15, 2011, defendant paid plaintiff the agreed price for the potatoes plaintiff delivered. Starting in September 2011, plaintiff had difficulty obtaining potatoes that met defendant's specifications and could not provide defendant with 10 or more loads each week. (The parties dispute whether defendant ever requested 10 or more loads of potatoes in a week. According to plaintiff, it filled every purchase order that

defendant submitted and defendant did not request more than it received. Although defendant does not state that it submitted purchase orders that were not fulfilled, it does state that plaintiff could not supply what defendant needed and demanded. It is not clear whether defendant limited the number of orders it made because it knew plaintiff could not deliver more potatoes.) Beginning in September, defendant stopped paying for the potatoes delivered by plaintiff.

On four occasions in September and October 2011, defendant rejected loads delivered by plaintiff because they did not conform to the specific weight and gravity requirements of the contract. Plaintiff did not replace the loads and defendant had to buy potatoes from the "spot market," which is a cash market for a commodity that is traded for immediate delivery. Before September 2011, defendant had used potatoes suppliers on the spot market to purchase additional potatoes to meet its production needs. (It is not clear from the record whether defendant purchased the potatoes from the spot market in the past because plaintiff was unable to provide sufficient potatoes, or for some other reason.)

On October 27, 2011, defendant emailed plaintiff, stating that it was not getting enough potatoes to run its production, asking plaintiff how many potatoes it could provide for the week and asking whether plaintiff was going to provide the "contracted ten loads per week." Dkt. #35-5. Defendant also asked plaintiff whether it could obtain potatoes from Idaho, but plaintiff responded that the Idaho potatoes were too big. On November 6, defendant emailed plaintiff again, stating that it needed "to understand where our deal for the crop year is going. As you know, we have received few loads from JB Marketing since

[September 15] . . . At this point we are in a critical place . . . and are struggling to keep product on the shelf. . . . We need to understand what you[r] availability is to provide material to [us] for this coming year." Id.

Throughout September, October and November, defendant used the spot market to purchase several loads of potatoes to make up for the potatoes that plaintiff could not provide. Defendant paid a higher price on the spot market than it would have paid plaintiff for potatoes. On November 21, 2011, defendant sent plaintiff a letter, stating that plaintiff's consistent failure to deliver 10-15 loads of potatoes each week was a breach of the 2010 contract. Dkt. #35-9. The letter demanded that plaintiff immediately deliver the specified quantities identified in the contract and reimburse defendant for all of the additional costs it had incurred as a result of purchasing potatoes on the spot market.

On December 29, 2011, plaintiff's counsel sent a letter to defendant, saying that defendant was in material breach of the agreement between the parties and identifying the numerous invoices that were outstanding and demanded payment in full. Plaintiff stated that it was canceling the contract. Dkt. #28-5. To the present date, defendant has not paid for 67 shipments of potatoes from plaintiff between September 23, 2011 and January 9, 2012. Defendant has spent more than $500,000 buying potatoes from the spot market since September 2011.

OPINION

Plaintiff has moved for summary judgment on its claim that defendant owes it more

than $500,000 for potatoes plaintiff sold and delivered to defendant pursuant to the parties' initial 2010 contract. Plaintiff also claims interest and attorney fees under the terms of the invoices its submitted to defendant. The parties assume that Wisconsin law applies to their dispute, so I have done the same. RLI Insurance Co. v. Conseco, Inc., 543 F.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.

Plaintiff contends that this is a "fairly straightforward breach of contract action" because it is undisputed that defendant ordered potatoes from plaintiff between September 2011 and January 2012, plaintiff delivered potatoes to defendant during that time and defendant received and accepted the potatoes. Plt.'s Br., dkt. #26, at 1-2. It is also undisputed that plaintiff has sent invoices to defendant reflecting the amount owed for the potatoes and that defendant has not paid plaintiff for any potatoes delivered between September 23, 2011 and January 9, 2012.

I agree with plaintiff that under Wisconsin law, defendant is liable to plaintiff for goods plaintiff delivered and defendant accepted. 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).

However, plaintiff's motion addresses only a portion of the dispute between the parties. In its opening brief, plaintiff ignores the affirmative defenses that defendant raised. In particular, plaintiff does not address defendant's argument that plaintiff materially breached the contract by failing to deliver the quantities and qualities of potatoes required under the contract. Because defendant's set-off defense has the potential to cancel out any unpaid debt defendant may owe plaintiff, it must be addressed together with plaintiff's breach of contract claim.

Defendant contends that as a result of plaintiff's breach, defendant was forced to purchase potatoes from the spot market at a high rate and that under Wis. Stat. § 402.717, defendant is entitled to a set-off for the damages it incurred from buying potatoes on the spot market. Under that provision, a "buyer on notifying the seller of the buyer's 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." Wis. Stat. § 402.717. According to defendant, its set-off is higher than any amount it owes for the potatoes plaintiff delivered.

Defendant has adduced sufficient facts to raise a genuine factual dispute relevant to its set-off claim. In particular, defendant has adduced facts that the parties' contract required plaintiff to deliver 10-15 loads of potatoes with certain specifications to defendant each week and that plaintiff was unable to meet its contractual obligations in the fall of 2000. Defendant submitted evidence that it asked plaintiff many times about its ability to

provide more potatoes and told plaintiff that the lack of potatoes was causing defendant's production to suffer. Defendant also submitted evidence that it purchased potatoes at a high rate from the spot market to make up for plaintiff's inability to provide potatoes. This evidence is sufficient to create a dispute about whether defendant is entitled to a set-off as a defense to plaintiff's breach of contract claim.

In its reply brief, plaintiff acknowledges defendant's affirmative defenses but does not discuss the factual issues noted above. Instead, plaintiff contends that defendant's defenses do not preclude summary judgment on its breach of contract claim because defendant's arguments relate to a "different contract" from the one underlying plaintiff's claim. In particular, plaintiff contends that defendant's arguments and defenses relate to the initial contract between the parties that was signed in July 2010 and amended in July 2011, while plaintiff's breach of contract claim arises from the 67 separate purchase orders and invoices for potato deliveries. Plaintiff contends that because the parties are arguing about separate contracts, defendant cannot assert its set-off defense under Wis. Stat. § 402.71, which permits a buyer to deduct, "damages resulting from any breach of the contract from any part of the price still due *under the same contract*." Wis. Stat. § 402.717; U.C.C. § 2-717 (emphasis added). Plaintiff cites several cases in which courts have rejected a defendant's set-off defense because the defendant was complaining about a breach of a separate agreement. E.g., 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); Schieffelin & Co. v. Valley Liquors, Inc., 823 F.2d 1064, 1067 (7th Cir. 1987) (same).

Plaintiff's assertion in its reply brief that its breach of contract claim is based on the 67 separate invoices is a significant shift from the theory plaintiff asserted in its opening brief, which was that the contract at issue was the one signed in July 2010 and modified in July 2011. Plt.'s Br., dkt. #26, at 2,5. Now, plaintiff states that it is not suing about those general agreements, but about 67 separate invoices. It seems that plaintiff has altered its theory simply to avoid addressing defendant's affirmative defense. However, because plaintiff raised this new argument for the first time in its reply brief, defendant did not have an opportunity to respond to it and it would be unfair to consider it now. Narducci v. Moore, 572 F.3d 313, 324 (7th Cir. 2009) ("[T]he district court is entitled to find that an argument raised for the first time in a reply brief is forfeited.").

Moreover, even if I were inclined to consider plaintiff's argument that defendant's set-off defense does not meet the requirements of Wis. Stat. § 402.717, I would have to reject the argument as undeveloped. Although plaintiff included several pages worth of case law in its brief, it makes little effort to apply the case law or the language of Wis. Stat. § 402.717 to the facts of this case. As the court of appeals explained in ECHO, 52 F.3d at 705-06, whether agreements constitute one or multiple contracts depends on the nature and details of the particular agreements at issue and rules of contract interpretation. For example, in deciding whether multiple documents constitute the same or separate contracts, it is necessary to consider which document designates the price, type and quantity of goods to

be sold. Id. at 705; Schieffelin, 823 F.2d at 1067-68. If an initial agreement contains only general terms and separate purchase orders or invoices contain the specific terms or relate to different goods, the agreements are more likely to be considered separate contracts under the law. Id. However, in this case, the initial agreement between the parties designated the price, type and range of quantity of goods to be sold and the invoices and purchase orders were clearly related to the initial agreement. Plaintiff does not acknowledge these facts, makes no effort to engage in any interpretation of the agreements at issue in this case and makes nothing more than conclusory assertions that the general agreement and the 67 invoices should be considered separate and "unrelated." Plt.'s Br., dkt. #37, at 15.

In sum, although it is undisputed that defendant has not paid plaintiff for all of the potatoes it received, plaintiff has failed to show that there are no genuine factual disputes regarding whether defendant actually owes plaintiff any money. Because defendant adduced facts to support its assertion that it is entitled to a set-off in an amount greater than the amount it owes plaintiff, I must deny plaintiff's motion for summary judgment and set this case for trial.

ORDER

IT IS ORDERED that plaintiff J-B Marketing, Inc.'s motion for summary judgment,

dkt. #24, is DENIED.

Entered this 31st day of January, 2013.

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