IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SUNNY INDUSTRIES, INC.,

OPINION AND ORDER

Plaintiff,

96-C-1020-C

v.

ROCKWELL INTERNATIONAL CORPORATION and GOSS GRAPHIC SYSTEMS, INC.,

Defendants.

- -

In this civil action for monetary relief, plaintiff Sunny Industries, Inc. has been seeking damages stemming from the failure of a multimillion dollar printing press. Its effort to collect them from defendant Goss Graphic Systems has stalled because defendant Goss has filed a petition in bankruptcy, reducing plaintiff to a bankruptcy claimant. Whether defendant Rockwell International is liable on the sales contract for the printing press is now at issue. Before discussing that issue, however, it is helpful to review this case's long and complex history.

Plaintiff ordered the printing press at issue from Rockwell Graphic Systems, then a

subsidiary of defendant Rockwell International. The press never worked to plaintiff's specifications so plaintiff brought suit for damages against defendant Rockwell International and defendant Goss, which had merged with Rockwell Graphic Systems. In an opinion and order entered on December 2, 1997, I found that the sales contract at issue limited plaintiff's remedies properly to either (1) repair or replacement of the press or (2) rescission of the contract. Although the repair or replace remedy had failed, I concluded that plaintiff was not entitled to any further relief from defendants because plaintiff had not sought enforcement of its alternative remedy of rescission. Accordingly, I granted defendants' joint motion for summary judgment. In an opinion entered on April 12, 1999, the Court of Appeals for the Seventh Circuit reversed that decision, concluding that (1) the sales agreement vested sole power of rescission in defendants and (2) because defendants were unable to repair or replace the press and had not rescinded the agreement, the exclusive remedies available under the contract had failed of their essential purpose. Sunny Industries, Inc. v. Rockwell Intl. Corp., Nos. 98-2824 and 98-2875, 1999 WL 220109 (7th Cir. Apr. 12, 1999). Because the sales contract also contained a waiver of damages provision, the court of appeals remanded the case to this court to determine whether the damages provision should be given effect despite the failure of the exclusive remedies.

On February 11, 2000, I granted defendants' joint motion for summary judgment, finding that the provision in the press sales contract excluding damages was valid despite the

failure of the contract's remedy provision. I also held that plaintiff was entitled to restitution of the money it had paid toward the purchase of the press. In an opinion and order entered on April 13, 2000, I determined that plaintiff was entitled to restitution in the amount of $434,175 plus prejudgment interest. In that order, I noted that counsel for defendant Goss Graphics Systems, Inc. had represented that defendant Goss was able to pay restitution to plaintiff and that both defendants preferred that judgment be entered against defendant Goss rather than defendant Rockwell International Corporation because it would cost significant amounts of time and money to resolve the issue of defendant Rockwell International's liability and because that issue would be moot if defendant Goss was both willing and able to pay restitution. I agreed and entered judgment against defendant Goss only. Defendant Rockwell International was dismissed from the case, subject to the judgment's being re-opened if plaintiff could show both that defendant Goss was unable to pay the full amount ordered and that there existed a prima facie case that defendant Rockwell International was liable for the unpaid amount.

More appeals were taken. Plaintiff appealed this court's refusal to enter judgment against defendant Rockwell International and the decision to limit damages to restitution. Defendant Goss cross-appealed, challenging this court's calculation of the amount of restitution owed plaintiff and the decision awarding plaintiff prejudgment interest. The court of appeals dismissed the appeals, concluding that this court's order concerning

restitution was not a final appealable judgment because it did not end the litigation on the merits, but left for later a potential decision on defendant Rockwell International's liability in the event that defendant Goss failed to pay the judgment. Sunny Industries, Inc. v. Rockwell Intl. Corp., Nos. 00-2251 and 00-2319, 2001 WL 371929 (7th Cir. Apr. 12, 2001). Following the dismissal, the parties agreed that it would be necessary for this court to determine whether defendant Rockwell International is entitled to dismissal or summary judgment, a conclusion bolstered by the fact that defendant Goss notified this court on September 14, 2001, that it had filed for Chapter 11 bankruptcy.

The only remaining question is defendant Rockwell International's liability for the damages award. Defendant Rockwell International argues that it is not a proper party defendant and asks that it be dropped as a party pursuant to Fed. R. Civ. P. 21 or granted summary judgment pursuant to Fed. R. Civ. P. 56. Although it seems absurd that it took several years of litigation for defendant Rockwell International to determine that it should never have been a party to this action, I am forced to conclude that defendant is correct and that nothing bars it from raising the point at this late date. Plaintiff argues that the "mend the hold" doctrine precludes defendant from denying it is a party, but I can find no basis for applying that doctrine to defendant in the circumstances of this case. No other version of estoppel or laches applies. Plaintiff has not sought to pierce the corporate veil to impose liability on Rockwell International for a contract entered into by Rockwell International's

subsidiary Rockwell Graphic. Therefore, defendant Rockwell International's motion for summary judgment will be granted.

From facts proposed by the parties, I find the following undisputed and material to this decision.

UNDISPUTED FACTS

Plaintiff Sunny Industries, Inc. is a Wisconsin corporation located in Mazomanie, Wisconsin. Defendant Rockwell International Corporation is a Delaware corporation with its principal place of business in Seal Beach, California. Defendant Goss Graphic Systems, Inc. is a foreign corporation with its principal place of business in Westmont, Illinois.

In 1969, North American Rockwell Corporation acquired Miehle-Goss-Dexter, Inc., a manufacturer of printing presses. At the time of the acquisition, Miehle-Goss-Dexter was merged into NRMG, Inc., a wholly-owned subsidiary of North American Rockwell Corporation, and the name NRMG, Inc. was changed to MGD Graphic Systems, Inc. In 1973, the name of North American Rockwell Corporation was changed to Rockwell International Corporation ("Old Rockwell"). In 1980, the name of MGD Graphic Systems, Inc. was changed to Rockwell Graphic Systems, Inc.

On May 16, 1994, plaintiff Sunny Industries, Inc. and Rockwell Graphic entered into a sales agreement for a printing press. On April 26, 1996, plaintiff Sunny Industries, Inc.

and Rockwell Graphic agreed to certain amendments to the sales agreement.

On August 29, 1996, in anticipation of the acquisition of Old Rockwell's aerospace and defense businesses by the Boeing Company and the spin off of certain other Old Rockwell businesses to its shareholders, Old Rockwell formed a new wholly-owned Delaware subsidiary, New Rockwell International Corporation ("New Rockwell"). Between August and December 1996, Old Rockwell transferred certain of its businesses into New Rockwell, but Rockwell Graphic was *not* one of them. Rather, on October 15, 1996, Old Rockwell sold Rockwell Graphic to Goss Graphic Systems, Inc. Rockwell Graphic was merged into Goss and ceased to be a subsidiary of Old Rockwell. Under the terms of the Stock and Asset Purchase Sales Agreement between Old Rockwell and Goss, Old Rockwell agreed to indemnify Goss against certain liabilities, but the indemnified liabilities did not include the press contract with plaintiff.

On December 6, 1996, the Boeing Company acquired Old Rockwell. As part of the acquisition, BNA, Inc., a wholly-owned subsidiary of the Boeing Company, was merged into Old Rockwell, leaving Old Rockwell as the surviving entity and a wholly-owned subsidiary of the Boeing Company. Old Rockwell's name was changed to Boeing North America, Inc. Also on December 6, 1996, and immediately before Boeing's acquisition of old Rockwell, all of New Rockwell's stock was distributed to Old Rockwell shareholders; Old Rockwell shareholders exchanged their Old Rockwell stock for Boeing stock; and New Rockwell's

name was changed to Rockwell International Corporation. New Rockwell (now known as Rockwell International Corporation) did not exist before August 29, 1996. New Rockwell never had any ownership interest in Rockwell Graphic. The only relationship between the two entities is that they were both separate, wholly-owned subsidiaries of Old Rockwell from August 29, 1996 to October 15, 1996. New Rockwell has never entered into any agreement with Goss or anyone else to indemnify Goss for any liability and has never been a party to any transaction or agreement with plaintiff. This lawsuit was filed on December 20, 1996.

OPINION

The parties agree that by virtue of a choice of law provision in the contract, the substantive law of Illinois governs this action. Defendant Rockwell International maintains that it should be dropped from the case pursuant to Fed. R. Civ. P. 21 or granted summary judgment pursuant to Fed. R. Civ. P. 56 because it was not a party to the printing press sales contract and because it cannot be held liable on a contract entered into by plaintiff and Rockwell Graphic, its former subsidiary. Defendant Rockwell International notes first that in naming Rockwell International Corporation as a defendant, it is unclear whether plaintiff is seeking relief from New Rockwell or Old Rockwell. In either case, defendant Rockwell International argues, both the contract and plaintiff's complaint clearly identify Rockwell Graphic, not Rockwell International Corporation, as the party that entered into the press

sales contract with plaintiff; New Rockwell cannot be liable under a contract formed in May 1994 and amended in April 1996 because New Rockwell did not come into existence until August 1996 and never had an ownership interest in Rockwell Graphic, but was a mere sister subsidiary to it under Old Rockwell; Old Rockwell never agreed to indemnify defendant Goss for any liability incurred by Rockwell Graphic relating to the press sales contract; and plaintiff cannot now pierce the corporate veil to impose liability on Old Rockwell for the acts of Rockwell Graphic because it failed to plead such a claim in its complaint.

Rather than addressing these arguments individually, plaintiff argues generally that the doctrine of "mend the hold" precludes defendant Rockwell International from arguing it is not a party to the contract. Plaintiff maintains that because defendant Rockwell International answered the complaint, asserted affirmative defenses and moved for summary judgment on the basis of certain of the contract's provisions and submitted a proposed finding of fact and a conclusion of law in which it identified itself as a party to the contract, it cannot now reverse course and assert it was never a party to the very contract under which it earlier sought shelter. Plaintiff also maintains that Rockwell International's argument that plaintiff did not plead a claim to pierce the corporate veil adequately is waived because it is untimely.

A. The "Mend the Hold" Doctrine

"Under the doctrine of 'mend the hold,' in force in Illinois, a party to a contract cannot, at least after the pleadings are complete, repudiate a position taken in the course of litigation over the contract." Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1251 (7th Cir. 1996); Israel v. National Canada Corp., 658 N.E.2d 1184, 1191 (Ill. App. Ct. 1995) ("Illinois law requires a defendant in a breach of contract claim to stand by the first defense raised after the litigation has begun."). Mend the hold is a common law doctrine that is a corollary to the duty of contracting parties to act in good faith. Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357, 363 (7th Cir. 1990) (citing Larson v. Johnson, 116 N.E.2d 187, 191-92 (Ill. App. Ct. 1953)); see also Restatement (Second) of Contracts § 205 cmt. e (1981) (explaining that contractual duty of good faith extends to litigation and prohibits "asserting an interpretation contrary to one's own understanding "). The doctrine derives its name from a nineteenth-century wrestling term for getting a better grip on one's opponent. Harbor Ins. Co., 922 F.2d at 362.

In its answer to plaintiff's complaint, defendant Rockwell International raised affirmative defenses based on the remedy and damages provisions of the press sales contract and argued in an earlier summary judgment motion that these contractual provisions shielded it from liability along with defendant Goss. In conjunction with that motion, defendant Rockwell International proposed a finding of fact in which it asserted that "[o]n or about May 16, 1994, Rockwell, through its wholly owned subsidiary, Rockwell Graphic

Systems Inc. ("Rockwell Graphic"), and Sunny entered into a Sales Agreement for the purchase by Sunny of a printing press." Rockwell Int'l Corp and Goss Graphic Sys. Inc.'s Proposed Findings of Fact and Conclusions of Law, dkt. #58 at ¶6. Similarly, defendant proposed as a conclusion of law: "[b]y virtue of the Letter Agreement of April 26, 1996, amending the sales agreement, Sunny and Rockwell confirmed the allocation of risk between them." Id. at ¶18. Plaintiff argues that this evidence is sufficient to show that defendant Rockwell International understood that it was a party to the press sales contract. Plaintiff points out that only when the court of appeals reversed this court's earlier grant of summary judgment in defendants' favor did defendant change its tune. Defendant asserts now for the first time that it was never a party to the contract, noting that a corporation is an entity separate from other corporations with which it is affiliated and that under Illinois law, more than a parent-subsidiary relationship must be shown before a parent corporation will be held liable for the subsidiary's contracts. Divco-Wayne Sales Financial Corp v. Martin Vehicle Sales, Inc., 195 N.E.2d 287, 289 (Ill. App. Ct. 1963). Plaintiff argues that it is too late for defendant Rockwell International to mend its hold by raising this issue, because it never asserted that it was not a party to the contract until well after the pleadings were closed.

I conclude that the mend the hold doctrine is inapplicable to this situation. As defendant notes, the mend the hold doctrine is typically thought to apply to *parties* to a contract. The very issue raised by the motion currently before the court is whether

defendant Rockwell International is indeed a party to the press sales contract. See, e.g., Horwitz-Matthews, 78 F.3d at 1251 (under mend the hold, "*a party to a contract* cannot, at least after the pleadings are complete, repudiate a position taken in the course of litigation over the contract") (emphasis added). It is true that the language used in some cases to articulate the doctrine describe its reach in potentially broader terms by, for instance, stating that "Illinois law requires *a defendant in a breach of contract claim* to stand by the first defense raised after the litigation has begun." First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1013 (7th Cir. 1985) (emphasis added); Israel, 658 N.E.2d at 1192 (same). Whether or not Rockwell International was genuinely a party to the press sales contract, it is undeniably a defendant in this breach of contract case, so a literal reading of this latter formulation would suggest that the mend the hold doctrine applies to it.

However, I am not convinced that when the courts used this broader language, they intended to suggest that the doctrine would bind a defendant who was never a party to a contractual relationship. Such a reading ignores the fact that mend the hold is rooted in the duty of *contracting parties* to act in good faith. The Court of Appeals for the Seventh Circuit has observed that Illinois law "explicitly connects the 'mend the hold' doctrine to considerations of good faith and ethical obligations in contract relations." Harbor Insurance Co., 922 F.2d at 363 (citing Larson, 116 N.E.2d at 191-92). "A party who hokes up a

phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith." Id.; see also Robert H. Sitkoff, Comment, "Mend the Hold" and Erie: Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases, 65 U. Chi. L. Rev. 1059, *2 (1998) ("[M]end the hold permits the changing of a contracting party's litigation posture only when that change comports with the implied duty of good faith that modern courts read into every contract."). Here, if defendant Rockwell International was never a party to the press sales contract, it never had a contractual relationship with plaintiff from which a good faith duty to avoid mending its hold could spring. Defendant could not be guilty of hoking up a defense to its contractual duties if indeed it never had any such duties. In Illinois, the doctrine of mend the hold is grounded in the notion that "something more [is expected] with respect to the conduct of one who enters into a solemn written engagement and then repudiates it." Larson, 116 N.E.2d at 191. In this case, there is no evidence that defendant Rockwell International ever entered into a contract with plaintiff, solemn or otherwise. As the Court of Appeals for the Seventh Circuit has noted, "mend the hold" is a "particularly severe, rather than relaxed, rule of waiver in contract cases." Herremans v. Carrera Designs, Inc., 157 F.3d 1118, 1123 (7th Cir. 1998). It would be a particularly severe rule indeed if it could be applied by plaintiff to make defendant Rockwell International a party to a contract to which it had never agreed.

I am persuaded that the mend the hold doctrine can bind a party only after it is established that a contract actually existed between the allegedly contracting parties. Plaintiff has the burden of producing some evidence that it formed a contract with defendant Rockwell International. Valenti v. Qualex, Inc., 970 F.2d 363, 366 (7th Cir. 1992) (citing Penzell v. Taylor, 579 N.E.2d 956, 961 (Ill. App. Ct. 1991)). It has failed to do so. The plain language of the press sales contract itself does not support the conclusion that defendant Rockwell International is a party to the contract. Rather, the plain language of the contract unambiguously identifies "Rockwell Graphic Systems, Inc." as the seller and plaintiff as the buyer. Aff. of Robert Bull, dkt. #149, Ex. A at 1. As noted above, in Illinois, the mere relationship between a parent corporation and a subsidiary is insufficient to render the parent liable for a subsidiary's contracts. The only evidence to which plaintiff has pointed as proof of the existence of a contract between it and defendant Rockwell International is a proposed finding of fact and conclusion of law submitted by defendant Rockwell International in support of an earlier summary judgment motion. Plaintiff combines this rather meager evidence with the mend the hold doctrine in an effort to rewrite the contract's plain language to include defendant Rockwell International as a party. But because a contractual relationship (along with the mutual duty of good faith attendant to the relationship) is a condition precedent to application of the doctrine, plaintiff cannot use it to prove the existence of the contract in the first instance. Plaintiff has not identified any

case in which the doctrine has been used to estop a party from asserting a non-frivolous argument that a contract never existed and I am aware of none. Accordingly, I conclude that the mend the hold doctrine does not estop defendant Rockwell International from pointing out that it is not a party to the press sales contract.

In any case, application of the doctrine could cut against plaintiff because it would be difficult for plaintiff to argue in good faith that defendant Rockwell International was a party to the press sales contract. In its complaint, plaintiff alleges that "[p]laintiff, Sunny, and Rockwell Graphic Systems, Inc. ('Rockwell Graphics'), at that time a subsidiary of defendant Rockwell International Corporation, entered into a 'Sales Agreement' dated May 16, 1994." Pltf.'s Compl., dkt. #2 at ¶7. The complaint further alleges that "[o]n or about April 26, 1999, Sunny Industries, Inc. and Rockwell Graphic Systems, Inc. entered into a further agreement regarding the resolution of certain issues relating to the contract and promissory notes." Id. at ¶17. Defendant Rockwell International admitted these allegations in its answer. Plaintiff never alleged that defendant Rockwell International was a party to the press sales contract or asked the court to pierce Rockwell International's corporate veil, as it must in Illinois if that relief is to be available to a plaintiff. Divco-Wayne Sales, 195 N.E.2d at 289-90. The complaint does allege that as part of the sale of Rockwell Graphic to defendant Goss, defendant Rockwell International agreed to indemnify Goss for certain liabilities incurred by Rockwell Graphic. However, as plaintiff now acknowledges, defendant

Rockwell International has no such indemnification duty regarding the press sales contract. Pl.'s Resp. to Rockwell Int'l Corp. Proposed Findings of Fact and Conclusions of Law, dkt. #158 at 8. Finally, in the appellate briefs plaintiff filed challenging this court's earlier grant of summary judgment, it reiterated its understanding that it contracted for the printing press with Rockwell Graphic, not Rockwell International. From these facts, it would be difficult for plaintiff to argue that it understood that defendant Rockwell International, rather than Rockwell Graphic, was the party with whom it contracted to buy the printing press.

These facts also suggest that plaintiff cannot avail itself of the mend the hold doctrine for a second reason: plaintiff was not unfairly surprised or prejudiced when defendant Rockwell International asserted, albeit belatedly, that it was not a party to the press sales contract. "Courts have refused to apply the 'mend the hold' doctrine in the absence of unfair surprise or arbitrariness." Smith v. Union Automobile Indemnity Company, 752 N.E.2d 1261, 1266 (Ill. App. Ct. 2001). Plaintiff argues that it was prejudiced because, had defendant Rockwell International affirmatively pleaded from the outset that it was not a party to the contract and was thus not a proper party defendant, plaintiff could have undertaken discovery regarding the relationship between Rockwell International and Rockwell Graphic and, presumably, amended its complaint to ask the court to pierce the corporate veil. However, the plaintiff in a contract case bears the burden of proving the existence of a contract. Valenti, 970 F.2d at 366. It would not be credible for plaintiff to

represent that it was unfairly surprised by being put to its proof on this burden, particularly given the fact that plaintiff acknowledged in its complaint and subsequent briefs that it had contracted with Rockwell Graphic, not Rockwell International, for the press. Cf. William J. Tempelman Co. v. U.S. Fidelity and Guaranty Co., 739 N.E.2d 883, 888-89 (Ill. App. Ct. 2000) (no unfair surprise, and thus mend the hold inapplicable, when insurer was called upon to abide by provision in its own bond, even though that provision was first raised on motion to reconsider).

Although plaintiff has not raised it as an issue, I note also that the doctrine of laches appears inapplicable. Under Illinois law, "laches is such a neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration, and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity." Meyers v. Kissner, 594 N.E.2d 336, 340 (Ill. 1992). As an initial matter, it would be unusual for laches to operate to prohibit a defendant from asserting a defense, as the doctrine is typically employed to bar an affirmative action by a plaintiff. In any case, plaintiff cannot demonstrate prejudice, as it must if laches is to apply, because it knew all along that eventually it would bear the burden of proving that defendant was a party to the contract. Similarly, plaintiff's argument that it might have looked into the possibility that it could pierce the corporate veil if defendant had asked to be dropped from the case earlier is simply too speculative to establish prejudice. Finally, even if plaintiff could establish

prejudice, it is unlikely that laches can be asserted in a case arising under Illinois law that involves only money damages. See Mother Earth, Ltd. v. Strawberry Camel, Ltd., 390 N.E.2d 393, 406 (Ill. App. Ct. 1979) ("[W]e are confident that the doctrine of laches is applicable solely to bar affirmative actions in equity."); Transportation & Transit Associates, Inc. v. Morrison Knudsen Corp., 255 F.3d 397, 400 (7th Cir. 2001) (doubting that laches is available under Illinois law as a defense to an action seeking only damages); But see Landau and Associates, P.C. v. Kennedy, 634 N.E.2d 373, 376 (Ill. App. Ct. 1994) (question whether laches is a doctrine limited to actions in equity "has not been answered uniformly by the courts in this State").

Admittedly, it is baffling why defendant Rockwell International failed to assert the defense that it was not a party to the press sales contract until several years after plaintiff had filed its complaint. Defendant Rockwell International sold Rockwell Graphic to defendant Goss more than two months before this case was filed. Nevertheless, defendants Goss and Rockwell International are represented in this case by the same counsel, who chose to assert on behalf of both defendants the same defenses on the basis of the contract's language. This might have been understandable had defendant Rockwell International agreed to indemnify Goss for any liability of Rockwell Graphic stemming from the press sales contract. However, as defendant Rockwell International and plaintiff both acknowledge, defendant Rockwell International has no such duty. Although defense counsel's failure to

seek defendant Rockwell International's dismissal from this case earlier is curious, I cannot find any ground on which defendant could be estopped from seeking such a dismissal now. Because plaintiff cannot use the mend the hold doctrine to effectively rewrite the press sales contract to include defendant Rockwell International as a party, defendant Rockwell International's motion for summary judgment will be granted.

C. Piercing the Corporate Veil

Defendant Rockwell International argues that plaintiff cannot now pierce the corporate veil to impose liability on Old Rockwell or New Rockwell for the acts of Rockwell Graphic because it failed to plead such a claim in its complaint. In Illinois, "separate corporate existence is the rule to which piercing the corporate veil is a stringently applied exception." Chicago Florsheim Shoe Store Co. v. Cluett, Peabody & Co., 826 F.2d 725, 728 (7th Cir. 1987). Piercing the corporate veil is a task that should be undertaken by a court only reluctantly. Hills of Palos Condo. Ass'n v. I-Del, Inc., 626 N.E.2d 1311, 1333 (Ill. App. Ct. 1993). Under Illinois law, "[o]ne who seeks to have the Court apply an exception to the rule of separate corporate existence must seek that relief in his pleading and carry the burden of proving actual identity or a misuse of corporate form which, unless disregarded, will result in a fraud on him." Divco-Wayne Sales, 195 N.E.2d at 289-90. Nothing in plaintiff's complaint asks the court to pierce the corporate veil so as to make defendant Rockwell

International (Old or New) liable for the activities of Rockwell Graphic. The complaint does not allege any facts from which it could be inferred that there was a misuse of corporate form or such a unity of interest and ownership between defendant Rockwell International and Rockwell Graphic that recognition by the court of the general rule of separate corporate existence would result in fraud. The complaint is certainly deficient in this regard under Illinois law and would be inadequate even under the liberal pleading standard embodied in Fed. R. Civ. P. 8(a).

In response, plaintiff notes that under Illinois law, "[a]ll defects in pleadings, either in form or substance, not objected to in the trial court are waived." 735 ILCS 5/2-612(c). Plaintiff argues that any objection to the sufficiency of its complaint is now untimely. However, the rule cited by plaintiff dictates simply that "objections to the sufficiency of pleadings either in form or substance cannot be raised for the first time on appeal unless the pleading is fatally defective." 2 Ill. Law and Practice, Appeal and Error § 244 (2001); In re Jerome, 757 N.E.2d 905, 910 (Ill. App. Ct. 2001); Arado v. Epstein, 55 N.E.2d 561, 564 (Ill. App. Ct. 1944). By pointing out in its motion for summary judgment that plaintiff has not pleaded a claim to pierce the corporate veil, defendant Rockwell International is raising the issue in the trial court, not on appeal. Plaintiff has not cited any cases or explained why 735 ILCS 5/2-612(c) prevents defendant from pointing out this defect in plaintiff's pleadings on a motion for summary judgment in the trial court. Plaintiff cannot seriously

argue that a defendant has any earlier obligation to point out to a plaintiff alternative theories on which the plaintiff might proceed against the defendant. Accordingly, I cannot conclude that defendant Rockwell International's argument on this score is untimely.

In sum, I conclude that plaintiff cannot avail itself of the mend the hold doctrine to rewrite the press sales contract to include defendant Rockwell International as a party. The doctrine is rooted in the duty of contracting parties to act in good faith and has no application absent some evidence that a contract existed between plaintiff and defendant Rockwell International. The doctrine of laches is not available to plaintiff. I conclude also that plaintiff cannot seek, at this late date, to pierce the corporate veil because it did not seek such relief in its pleadings and has alleged no facts from which it could be inferred that such relief is appropriate. Accordingly, defendant Rockwell International's motion for summary judgment will be granted. Because defendant Rockwell International will be granted summary judgment, I need not consider its alternate argument that it should be dismissed as an improper party under Fed. R. Civ. P. 21.

ORDER

IT IS ORDERED that the motion of defendant Rockwell International Corporation for summary judgment is GRANTED. The clerk of court is directed to enter judgment for

defendant Rockwell International Corporation and close this case.

Entered this 5th day of February, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge