IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MERRILL IRON & STEEL, INC.,

Plaintiff,

v.

JOSEPH T. RYERSON & SON, INC.,

Defendant.

OPINION AND ORDER

01-C-0659-C

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This is a civil action for monetary relief in which plaintiff Merrill Iron & Steel, Inc. filed suit against defendant Joseph T. Ryerson & Son, Inc. for failure to pay rent pursuant to a lease agreement. Defendant filed an answer and counterclaim, alleging that because plaintiff failed to purchase the requisite amount of steel materials from it pursuant to an August 26 letter agreement, its performance under the lease agreement was excused. Jurisdiction is present in this case; the parties are of diverse citizenship and the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332(a)(1).

On September 6, 2001, plaintiff filed its breach of contract claim in the Circuit Court for Marathon County, Wisconsin. Defendant removed the action to this court pursuant to 28 U.S.C. §§ 1441 and 1446 on the basis of diversity jurisdiction.

Presently before the court are (1) defendant's motion for summary judgment on its counterclaim that plaintiff breached their contract as memorialized in the August 26 letter; (2) plaintiff's motion for summary judgment as to defendant's counterclaim grounded on its contention that the August 26 letter is not a binding contract; and (3) plaintiff's motion for summary judgment grounded on its claim that defendant breached their lease agreement. The parties' motions relate to the issue of liability only.

Because I find that entering into the lease agreement constituted defendant's acceptance of plaintiff's offer as set forth in the August 26 letter, I will (1) grant defendant's motion for summary judgment and deny plaintiff's motion for summary judgment on defendant's counterclaim because it is undisputed that plaintiff breached the terms of the August 26 letter; and (2) deny plaintiff's motion for summary judgment on its claim that defendant breached the lease agreement because a question remains whether plaintiff's breach was material, in which case defendant would be excused from paying rent under the lease agreement.

From the proposed findings of fact, and for the sole purpose of deciding the parties' motions for summary judgment, I find that no genuine issue exists with respect to the following material facts.

UNDISPUTED FACTS

Plaintiff Merrill Iron & Steel, Inc. is a Wisconsin corporation with its principal place of business in Schofield, Wisconsin. Defendant Joseph T. Ryerson & Son, Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois.

Defendant received a letter from plaintiff dated August 26, 1996, stating:

> As agreed upon during a recent meeting with Mr. Bob Wille held on July 30, 1996, Merrill Iron & Steel - Structural & Plate Divisions agree to purchase all of their warehouse needs for hot rolled shapes and structural tube steel for a fixed fee of 12-1/2% over published mill prices and/or Ryerson's cost. We also agree to purchase all typically warehouse purchased sheet and plate for a fixed price of 11% over Ryerson's cost. All non stock orders of sheet and plate to be negotiated (truck load quantity or greater). This offer is contingent upon Ryerson setting up an estimated 50,000 square foot satellite warehouse facility in the west portion of our building located in Schofield, Wisconsin.
>
> The estimated dollar value of the warehouse purchases is between $1,500,000 - $2,500,000 dollars per year.

Sometime later, plaintiff and defendant entered into a lease agreement for a three-year term beginning February 1, 1997, in which defendant leased 35,000 square feet of plaintiff's building located in Schofield, Wisconsin for $3.60 per square foot per year. The leased space was used as a warehouse facility. On February 1, 2000, the parties renewed the lease for another three-year term at a slightly higher rate. As of May 25, 2002, defendant had failed to pay rent pursuant to the February 2000 lease.

After executing the first lease agreement, plaintiff made steel purchases from defendant. However, during the period August 1996 through May 2000, plaintiff failed to

purchase all of the steel it needed from defendant. As a result, defendant suffered loss of revenue.

OPINION

A. Standard of Review

To prevail on a motion for summary judgment, the moving party must show that even when all inferences are drawn in the light most favorable to the non-moving party, there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); McGann v. Northeast Illinois Regional Commuter Railroad Corp., 8 F.3d 1171, 1178 (7th Cir. 1993). Summary judgment may be awarded against the non-moving party only if the court concludes that a reasonable jury could not find for that party on the basis of the facts before it. Hayden v. La-Z-Boy Chair Co., 9 F.3d 617, 618 (7th Cir. 1993). If the non-movant fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

B. Choice of Law

In a federal lawsuit based upon diversity of citizenship, the court will apply the

choice-of-law principles of the jurisdiction in which it sits to determine the substantive law that will apply. See generally, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941). Therefore, Wisconsin's choice-of-law principles apply to both the lease agreement and the August 26 letter.

The lease agreement contains a choice-of-law provision which states that "[t]his Lease shall be governed by the Laws of the State of Wisconsin." As there are no public policy reasons to disregard the provision, Wisconsin law recognizes the parties' choice-of-law provision in the lease agreement. See Bush v. National School Studios, Inc., 139 Wis. 2d 635, 642, 407 N.W.2d 883 (1987). Therefore, this court will apply Wisconsin law to the lease agreement.

In disputes regarding the interpretation of contracts, Wisconsin uses the "grouping of contacts" test to determine choice of law. See Urhammer v. Olsen, 39 Wis. 2d 447, 450, 159 N.W.2d 688, 689 (1968); see also Handal v. American Farmers Mutual Casualty Co., 79 Wis. 2d 67, 73, 255 N.W.2d 903, 906 (1977); Employers Insurance of Wausau v. Certain Underwriters Lloyd's London, 202 Wis. 2d 673, 691, 552 N.W.2d 420, 427 (Ct. App. 1996). Under this test, a court applies the law of the state with which the contract has the most significant relationship. See Schlosser v. Allis-Chalmers Corp., 86 Wis. 2d 226, 239, 271 N.W.2d 879, 885 (1978). Under this approach, interpretation of the August 26 letter will be governed by the law of the state with the most significant relationship to the

letter. Because the letter refers to a meeting which took place in Wisconsin, the subject matter of the letter involves a warehouse facility in Wisconsin, steel purchases to be made in Wisconsin and the letter was written in Wisconsin, I find that Wisconsin law will govern interpretation of this letter. (Although defendant does not address the choice-of-law question in its briefs, it appears to agree with plaintiff that Wisconsin law governs because it cites Wisconsin case law.)

C. August 26 Letter and Lease Agreement

Defendant argues that the August 26 letter is a contract on its face. Plaintiff counters by arguing that the letter was intended merely as an offer with a condition; a condition never met by defendant because it leased only 35,000 square feet when the letter required 50,000. Therefore, the threshold question is whether the August 26 letter sent by plaintiff and defendant's act of leasing the warehouse space formed a binding contract.

"Whether a contract exists is a question of law." Barefield v. Village of Winnetka, 81 F.3d 704 (7th Cir. 1996) (citing Peters v. Shell Oil Co., 77 F.3d 184 (7th Cir. 1996)). First and foremost, the court must determine whether the parties intended the letter to be binding on them. See Mays v. Trump Indiana, Inc., 255 F.3d 351, 357 (7th Cir. 2001) ("Under . . . the law of every jurisdiction, a meeting of the minds on all essential terms must exist in order to form a binding contract."). "[T]he best indication of the intent of the

parties is the language of the contract itself," Levy v. Levy, 130 Wis. 2d 523, 535, 388 N.W.2d 170, 175 (1986) (citing Matter of Estate of Alexander, 75 Wis. 2d 168, 181, 248 N.W.2d 475 (1977)), but the parties' actions may also be considered. See Household Utilities, Inc. v. Andrews Co., 71 Wis. 2d 17, 29, 236 N.W.2d 663, 669 (1976).

The critical elements of a contract are offer, acceptance and consideration. See Kamikawa v. Keskinen, 44 Wis. 2d 705, 710, 172 N.W.2d 24, 26 (1969) (citing Briggs v. Miller, 176 Wis. 321, 325, 186 N.W. 163, 164 (1922)). These elements are met by the letter. First, plaintiff admits that it was intended as an offer to enter into a contract. Second, when defendant and plaintiff later entered into the lease agreement, defendant fulfilled plaintiff's condition to its offer. In essence, defendant accepted the offer through performance of the condition. See Hoffman v. Ralston Purina Co., 86 Wis. 2d 445, 454, 273 N.W.2d 214, 217 (1979) (noting there may be acceptance by action).

Plaintiff argues that the lease for 35,000 square feet is not acceptance of the offer because it required a lease for "an estimated 50,000 square feet." Given that the offer's square footage term was an estimate, the parties' agreement to 35,000 square feet instead of 50,000 does not amount to rejection of the offer. Moreover, plaintiff demonstrated its satisfaction with the square footage term in the lease by not objecting to the term. The mutual promise to buy and sell the steel materials constitutes adequate consideration.

Plaintiff argues that the offer's lack of a rent term and the absence of defendant's

signature demonstrate plaintiff's lack of intent to bind itself. First, under Wis. Stat. § 402.201, a contract for goods of $500 or more is enforceable if "there is some writing to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." For defendant to enforce the contract, only plaintiff's signature is needed. Second, plaintiff's conditional offer could not have provided a specific rental term because the parties had not decided the exact terms of the lease at the time the letter was written. Not until the first lease was executed did the parties agree on the rental term of $3.60 per square foot per year.

The unambiguous language of the letter demonstrates the parties' intent. Plaintiff agreed to purchase all of its needs for specified steel materials from defendant if defendant leased part of plaintiff's building. The word "agree," or variations thereof, permeate the August 26 letter.

In addition, the letter indicates the materials to be purchased and the purchase price of such materials. Although the duration of the contract is not specified, this does not invalidate the contract because the letter implies that the agreement is valid as long as defendant continues to lease plaintiff's building and the lease specified a three-year duration. A lack of specific amounts of the designated materials to be purchased is not problematic because the Wisconsin Uniform Commercial Code allows this type of requirements contract. See Wis. Stat. § 402.306, ("a term which measures the quantity by . . . the requirements of

the buyer means such . . . requirements as may occur in good faith.") Therefore, the contract for plaintiff's requirements is not indefinite for lack of a quantity term because it implies plaintiff's good faith requirements.

In sum, when the parties agreed on the 35,000 square foot lease of plaintiff's building, defendant accepted plaintiff's offer and a binding contract was created including the terms of the letter. Further support of the parties' intent is found in the fact that plaintiff purchased some of the designated materials after the first lease execution. Taking into account the language of the letter coupled with the subsequent actions of the parties, I find that it was the unambiguous intent of the parties that the terms of the lease and the August 26 letter form one binding agreement.

Having found that the parties were bound by a contract, I must determine whether plaintiff breached its terms. Plaintiff concedes that it did not comply with the terms of the August 26 contract by failing to purchase all of its requirements from defendant. It is clear that a breach occurred when plaintiff purchased some of its requirements from other vendors; whether that breach was material so as to excuse defendant's subsequent nonperformance is a question for the jury. See discussion infra. However, this finding is all that is necessary for defendant to prevail on its motion for summary judgment on its counterclaim that plaintiff breached the August 26 contract.

With respect to the lease agreement, plaintiff argues that it is undisputed that

defendant breached that agreement by failing to pay rent. However, defendant argues that nonpayment of rent was excused because of plaintiff's failure to comply with the terms of the August 26 contract. Therefore, the question is whether defendant had the right to cease performance of the lease agreement because plaintiff breached the terms of the August 26 contract.

A party is generally obligated to perform according to the terms of an enforceable contract, absent a material breach by the other party (or other legal excuse such as impossibility or frustration of purpose, none of which is applicable in this case). See Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis. 2d 158, 183, 557 N.W.2d 67, 77 (1996). "[I]t is a question of fact for the jury whether a breach is sufficiently material to permit the exercise of the common law right of nonperformance for a material breach." Michael B. Apfeld et al., Contract Law in Wisconsin § 12.18, p.25 (2d ed. 2000); see Entzminger v. Ford Motor Co., 47 Wis. 2d 751, 755, 177 N.W.2d 899, 901 (1970).

This question of fact may be decided as a matter of law if the court concludes that no material issue of fact exists whether plaintiff's breach was material. However, the parties failed to propose facts that would allow me to make this determination. Although it is undisputed that plaintiff did not purchase all of its requirements pursuant to the August 26 contract, it is not clear what portion of plaintiff's requirements were not purchased from

defendant.

Because the factfinder must determine whether plaintiff's breach was material, I cannot decide whether defendant's failure to pay rent pursuant to the terms of the lease agreement was excused because of plaintiff's nonperformance of the August 26 contract. Therefore, I will deny plaintiff's motion for summary judgment on its claim as to liability under the lease agreement.

ORDER

IT IS ORDERED that

1. Defendant Joseph T. Ryerson & Son, Inc.'s motion for summary judgment on its counterclaim that plaintiff breached the parties' contract is GRANTED as to liability only;

2. Plaintiff Merrill Iron & Steel, Inc.'s motion for summary judgment as to defendant's counterclaim is DENIED;

3. Plaintiff's motion for summary judgment on its claim that defendant breached the parties' lease agreement is DENIED; and

4. Trial will go forward on the issue of the materiality of plaintiff's breach and the matter of damages.

Entered this 19th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge