IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DOUG LIEN,

Plaintiff,

v.

RAMROD INDUSTRIES, LTD. and
EMIL JOHNSON,

Defendants.

OPINION AND
ORDER

00-C-240-C

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This is a civil action for monetary relief brought by plaintiff Doug Lien against his former employer, defendant RamRod Industries, Ltd. and RamRod's president, defendant Emil Johnson. Plaintiff contends that defendants breached an employment contract by failing to pay him the proper bonus and percentage of defendant's business for work performed in 1999 and 2000. Also, plaintiff contends that defendants violated Wis. Stat. § 109.03 by failing to pay him the amount provided in the employment contract.

On October 20, 2000, plaintiff moved for summary judgment on both of his claims. Defendants contend that plaintiff's motion for summary judgment should be denied because there are disputed issues of material fact whether (1) there was a mutual mistake as to the

terms of the contract; (2) there was an oral modification of the contract the day after it was signed; (3) the contract is unenforceable because its lacks the requisite specificity; and (4) there was a meeting of the minds in forming the contract. A week before plaintiff's summary judgment reply brief was due, defendants filed a motion for leave to file an amended answer in which they seek to add the additional affirmative defense that defendant Johnson made a unilateral mistake because of plaintiff's misrepresentation or fraudulent behavior and a counterclaim against plaintiff for reformation of the contract. Plaintiff contends that defendants should not be allowed to file an amended answer because defendants unduly delayed in seeking to amend their answer, he will be prejudiced and the amendment is futile.

Presently before the court is defendants' motion for leave to file an amended answer and plaintiff's motion for summary judgment. Subject matter jurisdiction is proper. See 28 U.S.C. § 1332.

The central issues in this case are whether plaintiff and defendant Johnson agreed that plaintiff would be paid one tenth of one percent (.1%) of defendant RamRod's sales or one percent (1%) of RamRod's sales and whether they agreed that plaintiff would be paid a new account bonus for prototype orders or for production orders only. In construing all facts in the light most favorable to the non- moving party, see Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir.1996), I find that it is disputed whether the parties agreed to an oral

modification of the written sales agreement the day after it was signed. See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In addition, I conclude that the meaning of "new accounts" in the sales agreement is ambiguous and the ambiguity must be resolved by the trier of fact. Accordingly, I will deny plaintiff's motion for summary judgment. I will grant defendants' motion for leave to file an amended complaint because plaintiff will not be unduly prejudiced and the proposed additional defense and counterclaim are not futile.

BACKGROUND FACTS

Plaintiff Doug Lien is a resident of Minnesota. Defendant RamRod Industries, Ltd. is a Wisconsin corporation with its principal place of business in Marshfield, Wisconsin. Defendant RamRod manufactures hydraulic cylinders. Defendant Emil Johnson is the president of defendant RamRod and owns 51% of RamRod's shares. Plaintiff worked for defendant RamRod from March 31, 1999 until April 1, 2000, as an 1.

On March 30, 1999, plaintiff and defendant Johnson met at RamRod's offices in Marshfield, Wisconsin. They discussed the possibility of plaintiff's working for defendant RamRod. Plaintiff's duties were to include obtaining new business and providing service support for existing customers. During the meeting, defendant Johnson told plaintiff that

defendant RamRod had $12,000,000 in business in 1998 and projected business of $15,500,000 in 1999 but that $14,000,000 was a more realistic figure for 1999.

During the meeting, plaintiff prepared a handwritten sales agreement. The handwritten agreement is titled, “Sales Agreement with Ramrod Ind.” and dated “3-30-99." The agreement states,

> Base - $50,000 per year salary
> Car - Company vehicle - 1-2 yrs. old. sub.
> Med - Insurance pd. by company
> Travel exp. paid by company
> 1% commission on <u>all</u> sales*
>
> $5000 bonus on new accounts
> RamRod to handle all accounting
>
> *1% commission on
> <u>existing & new business</u>

(The handwritten agreement contains strike overs and doodles.) Plaintiff gave defendant Johnson the sales agreement for his signature and both plaintiff and defendant Johnson signed it.

During plaintiff’s employment with defendant RamRod, he was paid the base salary that had been agreed upon and three $5,000 bonuses for new accounts (Continental, Blount and Simon R.O.) and was provided a company vehicle and medical insurance. Defendant Johnson refused to pay plaintiff bonuses for prototype orders from two new customers, London

Machinery and T.L. Smith. In October 1999, defendant Johnson told plaintiff that plaintiff would be paid a new account bonus only for production orders, not for prototype orders. On February 21, 2000, defendant RamRod paid plaintiff $7,371 as a portion of his commission. On May 3, 2000, defendant Johnson sent plaintiff a check in the amount of $4,119. Defendant Johnson's letter said that defendant RamRod had completed its final accounting for 1999 and that the check represented the balance due to plaintiff under his sales formula payment of "1/10 of 1%." Plaintiff demanded the balance of the commission based on a commission formula of one percent of defendant RamRod's sales.

DISPUTED FACTS

During the March 30, 1999 meeting with plaintiff, defendant Johnson described two compensation options. It is disputed how much commission plaintiff was to be paid under option one, the option plaintiff chose. According to plaintiff and the written sales agreement, option one provided that plaintiff would receive a one percent commission on sales for all new and existing business. According to defendant Johnson, Johnson did not use a percentage figure for the commission but instead described a scenario in which plaintiff would get a $14,000 bonus based on anticipated sales of $14 million. It is disputed whether defendant Johnson called plaintiff on March 31, 1999, from his car phone to tell plaintiff that the written

agreement did not represent the deal Johnson had described the previous day and whether plaintiff responded that he understood. It is disputed at what point plaintiff became aware of defendant Johnson's view of the sales agreement. According to plaintiff, he did not know about defendant Johnson's view that the sales agreement was mistaken until February 2000. According to four RamRod employees, plaintiff told them in individual conversations that the contract between plaintiff and defendant Johnson was mistaken and that plaintiff was aware of the mistake in the writing.

Plaintiff and defendant Johnson agreed that plaintiff would be paid a $5,000 bonus for each new account. It is disputed whether "new account" includes prototype orders from potential customers and production orders or production orders only.

OPINION

I. DEFENDANTS' MOTION FOR LEAVE TO FILE AN AMENDED ANSWER

Fed. R. Civ. P. 15(a) states that "a party may amend [its] pleading only by leave of court" and that "leave shall be freely given when justice so requires." Whether to grant leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court. See Sanders v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995). The Court of Appeals for the Seventh Circuit has enumerated four conditions that justify denying a motion to amend:

undue delay; dilatory motive on the part of the movant; repeated failure to cure previous deficiencies; and futility of the amendment. See Cognitest Corp. v. Riverside Publishing Co., 107 F.3d 493, 499 (7th Cir. 1997). In addition, a motion to amend should not be granted if it will unduly prejudice the opposing party. See Samuels v. Wilder, 871 F.2d 1346, 1351 (7th Cir. 1989).

Defendants seek leave of this court to amend their answer to add an affirmative defense that defendant Johnson made a unilateral mistake because of plaintiff's misrepresentation or fraudulent behavior as well as a counterclaim against plaintiff for reformation of the contract.

A. Delay

Plaintiff argues that defendants' motion should be denied because of their delay in filing the amended answer. In support of his argument, plaintiff points out that he filed his complaint on April 26, 2000 and defendants deposed him on June 7, 2000, but defendants waited until November 17, 2000 to file a motion to amend their answer. Plaintiff also points out that the Preliminary Pretrial Conference Order required amendments to pleadings to be filed by July 21, 2000. Defendants argue that plaintiff had an opportunity to discuss the defense of unilateral mistake in his summary judgment reply brief because they filed their motion for leave to amend before plaintiff's brief was due.

Defendants' argument is unpersuasive. They moved to amend their answer one week before plaintiff's reply brief was due and plaintiff had no reason to respond to defendants' motion in his summary judgment brief. Furthermore, defendants have failed to provide an explanation for their delay in filing a proposed amended answer. It seems as though in the course of responding to plaintiff's summary judgment motion, defendants realized their initial failure to plead a potentially viable defense. If the only question were timeliness, I would deny defendants' request. However, the overriding question is prejudice. See 6 Charles Alan Wright, et al., Federal Practice and Procedure: Civil 2d § 1487 (1990 & 2000 supp.).

B. Prejudice

Plaintiff argues that allowing defendants to amend their answer will unduly prejudice him because he will be forced to incur additional expenses, including the costs of taking additional depositions and preparing supplemental summary judgment materials. Defendants refute this, saying plaintiff has had notice throughout this suit of defendants' position that the sales agreement was the result of a mistake and that their original answer was sufficient to put plaintiff on notice of the newly alleged defense of unilateral mistake coupled with fraud or misrepresentation.

Allowing defendants to amend their answer will cause plaintiff minimal prejudice.

Defendants' proposed amended answer does not significantly alter the scope of this lawsuit. The real prejudice would result from not allowing defendants to defend against plaintiff's claims if they have a potentially viable defense. Plaintiff is mistaken in his argument that he will incur additional expenses in preparing supplemental summary judgment materials. Plaintiff's motion for summary judgment will be decided on the basis of the materials submitted without the benefit of an additional defense. In terms of plaintiff's argument that he will incur costs in performing additional discovery, it appears that defendants' proposed amendment will create the need for minimal additional discovery, if any.

Defendants' strongest argument in support of their motion is that plaintiff will not be prejudiced by an amendment because they are not raising new facts in support of their newly alleged defense; instead, they are merely alleging a new legal theory. Because plaintiff has been on notice since the beginning of this case that defendants' argument is that the written agreement did not reflect what the parties actually agreed upon, he will not be prejudiced by the additional legal theory that the agreement reflects defendant Johnson's mistake coupled with plaintiff's misrepresentation in addition to the theory that the agreement represents a mutual mistake of the parties.

C. Futility

Plaintiff contends that allowing defendants to amend their answer would be futile. Defendants respond that they have evidence to support their defense that defendant Johnson signed the contract that plaintiff had prepared because of plaintiff's representation that the agreement reflected their discussion as to the terms of plaintiff's employment. Defendants seek to amend their answer to add an additional defense of unilateral mistake coupled with misrepresentation. See Henning v. Ahearn, 230 Wis. 2d 149, 174, 601 N.W. 2d 14 (Ct. App. 1999) ("Reformation of a written instrument is appropriate when the instrument fails to express the intent of the parties, either because of the mutual mistake of the parties, or because of the mistake of one party coupled with fraud or inequitable conduct of the other.") At this point in the litigation, it is not clear that defendants' amendment is futile. Although defendants waited until the seventh inning to file a request for leave to file an amended answer, I will grant their request because it will not unduly prejudice plaintiff. If the parties decide that additional discovery will be needed, they should seek an extension of the January 12, 2001, discovery deadline in this case.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a

matter of law. See Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

A. Commission: Subsequent Oral Modification

Plaintiff contends that he is entitled to summary judgment because the contract signed by plaintiff and defendant Johnson on March 30, 1999 is a valid, unambiguous, enforceable contract that was not orally modified by the parties and that plaintiff was not mistaken as to the terms of the contract. Defendants contend that during a conversation between defendant Johnson and plaintiff on March 31, 1999, they agreed to orally modify the agreement or replace the written agreement. Although the parties agree that plaintiff and defendant Johnson spoke on March 31, 1999, they dispute whether defendant Johnson raised the issue of the sales agreement that had been signed the previous day.

Under Wisconsin law, a written contract may be modified by a subsequent oral agreement, and that oral modification is binding if it satisfies all the requirements of a valid contract. See Kohlenberg v. American Plumbing Supply Co., 82 Wis. 2d 384, 393, 263 N.W.2d 496, 500 (1978); see also Allen and O'Hara, Inc. v. Barrett's Wrecking, Inc., 898 F.2d 512, 518 (7th Cir. 1990) ("It is clear under Wisconsin law that a written contract may be

subsequently modified orally by the parties."); S & M Rotogravure Service, Inc. v. Baer, 77 Wis. 2d 454, 469, 252 N.W.2d 913, 919 (1977) ("It is universally accepted that, unless a contract is one required by law to be in writing, the contract can be modified orally although it provides that it can be modified only in writing."). "The determination that the parties to a written contract have entered into a subsequent oral agreement to rescind or modify the previous contract is a factual determination." Kohlenberg, 82 Wis. 2d at 393, 263 N.W.2d at 500. Because the parties dispute whether they discussed the terms of the sales agreement in their conversation on March 31, there is a disputed issue of material fact requiring the denial of plaintiff's motion for summary judgment in order to allow the trier of fact to determine whether there was a valid modification of the agreement.

B. New Account Bonus: Ambiguity

Whether a contract is ambiguous is a question of law. See Garriguenc v. Love, 67 Wis. 2d 130, 133, 226 N.W.2d 414, 416 (1975). "Words or phrases in a contract are ambiguous when they are reasonably or fairly susceptible to more than one construction." Id. at 135. "In determining whether a contract is ambiguous, the court begins with its plain language, construed in harmony with the plain and generally accepted meaning of the words used, with reference to all of the agreement's provisions." 11 Richard Lord, Williston on Contracts § 30:5

at 67 (4th ed. 1999).

Plaintiff contends that according to the written sales agreement, he was entitled to a $5,000 bonus for each of defendant RamRod's "new accounts," which includes both prototype orders and production orders for new clients. Defendants contend that defendant Johnson did not consider an order for a prototype from a potential customer to be a new account, pointing out that the fee for prototype orders is far below $5,000. After considering the language of the sales agreement and the parties' respective interpretations of "new account," I find that the contract language is ambiguous. "Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the intent of parties in entering the contract. Thus, the fact finder must interpret the contract's terms, in light of the apparent purposes of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning." 11 Williston on Contracts § 30:7 at 87-91. Plaintiff's motion for summary judgment will be denied.

C. Other Penalties

Plaintiff contends that he is entitled to attorney fees as well as penalties under Wis. Stat. § 109.11(2) because defendants failed to pay him in full "by no later than the date on which [he] regularly would have been paid under the employer's established payroll schedule" as

required by § 109.03(2). Because plaintiff's motion for summary judgment will be denied, I need not decide at this time whether plaintiff is entitled to statutory damages under Wisconsin law.

ORDER

IT IS ORDERED that

1. The motion of defendants Ramrod Industries, Ltd. and Emil Johnson for leave to file an amended answer is GRANTED. The amendment shall be deemed served and filed

as of the date of this order; and

2. Plaintiff Doug Lien's motion for summary judgment is DENIED.

Entered this 8th day of January, 2001

BY THE COURT:

BARBARA B. CRABB
District Judge