IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LATINO FOOD MARKETERS, LLC.,

Plaintiff,

v.

OLE MEXICAN FOODS, INC.,

Defendant.

OPINION AND ORDER

03-C-190-C

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Judgment was entered in this case on April 23, 2004, on the jury's determination that defendant Ole Mexican Foods, Inc. had failed to pay plaintiff Latino Food Marketers, LLC for cheese delivered to defendant and that plaintiff Latino had intentionally misrepresented to defendant's customers that plaintiff was no longer making cheese products for defendant in violation of its duty of good faith and fair dealing. The case is now before the court on 1) plaintiff's motion for prejudgment interest; 2) plaintiff's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) and then to conform the pleadings to the evidence presented at trial pursuant to Fed. R. Civ. P. 15(b); 3) defendant's motion to alter or amend the judgment and then to conform the pleadings to the evidence presented at trial to show that defendant prevailed on a claim of tortious interference with contract; and 4)

defendant's motion to deny an award of costs to either party or alternatively award costs to both parties.

A. Motion for Prejudgment Interest

On April 21, 2004, five days after the jury returned its verdict in this case, plaintiff moved pursuant to Wis. Stat. § 138.04 for prejudgment interest in the amount of $51,388 (representing the amount of the unpaid cheese invoices ($1,121,193), multiplied by 5% simple interest divided by 12 months and then multiplied by the 11 months making up the period from May 15, 2003 to April 16, 2004). Defendant objects to the motion on two grounds: plaintiff did not ask for prejudgment interest in its complaint and it has not shown that its claim and damages were sufficiently certain before trial to merit an award of prejudgment interest.

Neither objection succeeds. The law does not require that a party plead its entitlement to prejudgment interest in its complaint. It is permissible for a party to make the request for interest in a post-trial motion, as plaintiff has done in this case. Brooms v. Regal Tube Co., 881 F.2d 412, 424 n.9 (7th Cir. 1989) (citing Williamson v. Handy Button Machinery Co., 817 F.2d 1290, 1298 (7th Cir. 1987)). In Williamson, the court noted that the plaintiff had not asked for prejudgment interest until after the verdict had been returned, but found that this was not dispositive. Fed. R. Civ. P. 54(c) provides in part: "Except as to

a party against whom a judgment is entered by default, every final judgment shall grant the relief to which a party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." The court held that "Rule 54(c) was designed to divorce the decision what relief to award from the pleadings and arguments of counsel; the court is to determine, and award, the right relief in each case even if the complaint is silent on the question." Id.

Defendant contends that plaintiff's claim was not certain before trial because defendant might have prevailed on its own claim that plaintiff had violated the duty of good faith. As plaintiff points out, if the possibility that a plaintiff might lose were a reason to deny prejudgment interest, no court could ever award it. Wisconsin law does not support such an outcome. Bigley v. Brandau, 57 Wis. 2d 198, 208, 203 N.W.2d 735 (1973) ("Ordinarily, where the amount of a demand is sufficiently certain to justify the allowance of interest thereof, the existence of a set-off, counterclaim, or cross claim which is unliquidated will not prevent the recovery of interest on the balance of the demand found due from the time it became due.") (citing 47 C.J.S. Interest § 19b, p. 31; Note, 3 A.L.R. 809). Plaintiff's claim for unpaid invoices was known and determinable before trial. Defendant admitted as much when it conceded before trial that if plaintiff were to succeed on its claim, it would recover the precise amount it sought. Dft.'s Reply Br. in Supp. of Motion to Allow Defendant Open First and Close Last, dkt. #139, at 5. Plaintiff's motion

for prejudgment interest will be granted.

B. Plaintiff's Motion to Conform the Pleadings

Plaintiff has moved to conform the pleadings to add Mexican Cheese Producers as a plaintiff, on the grounds that the two entities are and were in privity with each other for the purposes of this suit and that the parties treated them as interchangeable throughout all the proceedings. Plaintiff seeks to do this pursuant to Fed. R. Civ. P. 15(b), after moving first to alter or amend the judgment pursuant to Rule 59(e), in accordance with the ruling in Sparrow v. Heller, 116 F.3d 204, 206 (7th Cir. 1997), that amendment of the pleadings after judgment has been entered should be allowed only if a party has first succeeded in having the judgment set aside.

Plaintiff's motion to alter or amend is timely; it was filed within ten days of the entry of judgment. See Fed. R. Civ. P. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."). Plaintiff has good reason to seek an alteration in the judgment to add Mexican Cheese Producers as a party. Defendant has filed a new suit in the United States District Court for the Northern District of Georgia, alleging that *Mexican Cheese Producers* and Miguel Leal tortiously interfered with defendant's current and prospective contractual relationships when one of its agents informed defendant' s customers that defendant was no longer having its Mexican cheese products manufactured

by Mexican Cheese Producers. In effect, defendant's suit in Georgia is an attempt to substitute Mexican Cheese Producers as defendant in place of Latino Food Marketers and then re-litigate all of the counterclaims it litigated at great length in this court, including the claim of tortious interference that defendant brought against plaintiff Latino in this court and lost on at the summary judgment stage. Such redundant litigation does not serve the interests of justice.

Amending the pleadings to add Mexican Cheese Producers as a plaintiff would conform the pleadings to the evidence, a step that Rule 15(b) allows. Indeed, it is the purpose for which the rule was enacted. Charles Alan Wright et al., Federal Practice & Procedure § 1491 (2d ed. 1990). An amendment to the pleadings can be made provided that the parties were aware that the amended matter was being tried and consented to it, either explicitly or implicitly, id. at § 1493, p. 19, and the opposing party is not prejudiced. Throughout the litigation in this court, both parties referred to plaintiff Latino Cheese Producers (the marketing arm) and Mexican Cheese Producers (the manufacturing arm) interchangeably, as illustrated by the verdict form. Question No. 8 read as follows: "Did plaintiff Latino intentionally misrepresent to defendant's customers that *plaintiff* was no longer making cheese products for defendant?" (Emphasis added.) Neither party denies that plaintiff Latino Food Marketers is not a cheesemaker and never has been. It was the broker for Mexican Cheese Producers, which is the actual producer of the cheese. Question

No. 8 makes sense only if the jury understood that Latino Food Marketers and Mexican Cheese Producers were to be treated as one entity.

In responding to plaintiff's motion for summary judgment on defendant's claim of tortious interference with contract, defendant asserted that "Mr. Padron [an agent of plaintiff] was instructed by Mr. Leal to falsely tell Wal*Mart, Kroger, and Publix that MCP was no longer making OMF's cheese and that they would need to buy from MCP." Dft.'s Br. in Resp. to Summ. J., dkt. #115, at 40. At the videotaped deposition of Padron, defendant's counsel asked questions treating plaintiff and MCP as one and the same, such as "In terms of your making a decision to go to work for Mexican Cheese Producers," Padron Dep., dkt. #130, at 15, lns.15-16; "So, after [Albert Garcia] joined Latino, did he talk to you about joining with Latino MCP," id. at 10, lns. 4-5; "Did there come a time when your discussions about possibly going to work for Latino Mexican Cheese Group greater [sic] in intensity?" Id. at 10, lns. 7-9. Defendant cannot argue plausibly that it would be prejudiced if the pleadings are amended to show Mexican Cheese Producers as an additional defending party with respect to defendant's counterclaims. (I see no necessity to add Mexican Cheese Producers as an additional plaintiff with respect to the claim for payment for the cheese. As to this claim, the only relevant relationship was that between plaintiff Latino Food Marketers and defendant Ole Mexican Foods. Plaintiff has never alleged that defendant owed Mexican Cheese Producers any money for cheese deliveries.)

Moreover, both parties are aware that Miguel Leal and Martina Leal are the controlling owners of both entities. The evidence at trial showed that the two entities are so closely identified with each other as to be in privity with one another and to be capable of representing the legal rights of the other.

Given the parties' understanding of the close relationship of Latino Food Marketers and Mexican Cheese Producers and their reliance upon this relationship throughout the trial, I will grant plaintiff's motion to set aside the judgment and amend the pleadings to conform to the evidence presented at trial. Doing so will present a more accurate picture of the proceedings in this case.

Plaintiff has asked for an award of attorney fees and costs, pursuant to 28 U.S.C. § 1927. Section 1927 allows a court to impose costs and attorney fees on any lawyer who "multiplies the proceedings in any case unreasonably and vexatiously." Plaintiff contends that defendant's effort to re-litigate its counterclaims against plaintiff's privy, Mexican Cheese Producers, in the federal court in northern Georgia amounts to an unreasonable and vexatious multiplication of the proceedings and made it necessary for plaintiff to bring this motion. Defendant argues that it never had a fair opportunity to prove its tort claims against plaintiff in this court and certainly never had a chance to prove them against Mexican Cheese Producers.

In light of my determination that the judgment in this case will apply to Mexican

Cheese Producers as well as to Latino Food Marketers, defendant cannot succeed on his argument that he was entitled to file suit against Mexican Cheese Producers in Georgia. As I have found, defendant was well aware throughout this case that the parties were treating the entities as interchangeable. Defendant was the one that kept emphasizing the close relationship of the two, often referring to them as one single entity. If defendant believes that the court erred in dismissing its tortious interference counterclaim on summary judgment, its recourse is to appeal to the Court of Appeals for the Seventh Circuit, not to file a redundant suit in another federal court.

I conclude that plaintiff is entitled to its reasonable attorney fees and costs for bringing this motion. However, I will deny plaintiff's request to order defendant to cease and desist the filing of new litigation against either plaintiff or Mexican Cheese Producers that is grounded on any legal claim that was raised in this suit. The rulings in this order should achieve the same purpose as a cease and desist order.

C. Defendant's Motion to Conform the Pleadings

Defendant's motion to conform the pleadings is notable for its audacity. After disavowing on the record any attempt to make its claim for bad faith a substitute for its earlier claim of tortious interference with contract, see Trial Tr., dkt. #230, at 63, lns. 14-15 ("This isn't another effort to get to defamation or tortious interference"), defendant is now

arguing that because the jury found that plaintiff had breached its duty of good faith and fair dealing and plaintiff stipulated to an amount of damages for this breach, defendant has proved its claim of tortious interference. Defendant wants the judgment amended to show that it prevailed on this claim so that it can use the judgment as offensive collateral estoppel against Miguel Leal and Mexican Cheese Producers in its suit in Georgia.

I conclude that defendant is bound by its own representations to the court and my ruling that the evidence defendant wanted to introduce (Padron's testimony) would come in only for the purpose of showing lack of good faith and fair dealing. Id. at 65, lns. 22-23. Defendant cannot retract its representations and ask that the evidence and the jury's finding be treated as a finding of tortious interference. Even if it had not waived his right to make such a request, it has no basis for doing so.

A tortious interference with contract claim requires five showings before the issue of damages is even reached: 1) the party alleging injury has a contract with a third party at the time of the alleged interference; 2) the alleged wrongdoer has interfered with the contract; 3) the interference is intentional; 4) the interference caused damages to the allegedly injured party; and 5) the alleged wrongdoer's interference was not justified. Minnesota Mining & Mfg. Co. v. Pribyl, 259 F.3d 587, 602 n.6 (7th Cir. 2001).

The jury's finding on good faith is not the equivalent of a finding of tortious interference. The jury found only that plaintiff made intentional misrepresentations to

defendant's customers; it was not asked to find whether defendant had contracts with these customers or if it did, whether plaintiff caused any customer not to perform its contract with defendant or made it more burdensome for defendant to perform its contract with the customer or whether plaintiff's interference was not justified. Defendant put in no evidence on these elements of the claim (for the good reason that it had represented to the court that it was not advancing the claim); it cannot gloss over this omission by asserting that plaintiff's willingness to stipulate to damages is a tacit admission that defendant could have proved all the elements of the claim of tortious interference. Plaintiff had no reason to think that by agreeing to an amount of damages relating to a finding of breach of the duty of good faith, it was agreeing that defendant had proved a claim of tortious interference with a contract.

Again, pursuant to 28 U.S.C. § 1927, plaintiff has asked for an award of reasonable attorney fees and costs against defendant as a sanction for bringing this motion. The motion will be granted. Defendant had no justification for changing its position and asserting that it had succeeded in proving tortious interference. In doing so, it has breached its obligation of candor to the court.

D. Defendant's Motion to Deny Costs to Plaintiff

Fed. R. Civ. P. 54(d) allows the court discretion in awarding costs to the prevailing party in any litigation. Defendant asks the court to deny an award of costs to plaintiff, on

the ground that both parties prevailed on significant issues in the litigation, or alternatively to award costs to both parties. Plaintiff asks for dismissal of the motion on procedural grounds, asserting that it was not filed until May 13, 2004, three days after it was due. Although it could be dismissed on this ground, I will dismiss it on its merits.

It is true that both parties prevailed in some respect. However, plaintiff prevailed on its entire claim (payment for the cheese it had delivered to defendant) whereas defendant prevailed on only one of its many claims. Plaintiff recovered over $1,100,000; defendant recovered $954. Under any reasonable view of the results, plaintiff prevailed on the substantial part of the litigation and is therefore entitled to recover its costs. Northbrook Excess and Surplus Insurance Co. v. Procter & Gamble Co., 924 F.2d 633, 642 (7th Cir. 1991) (party whose recovery is de minimis cannot be deemed prevailing party under Rule 54(d)).

The bulk of both parties' effort in this case was devoted to the issue that defendant raised: the existence of a written contract. The court held a four-day evidentiary hearing on that issue; the same issue consumed a good share of the seven days of jury trial. Defendant lost on that issue in both proceedings. Defendant's unsuccessful efforts to persuade the court and the jury that its president had executed a contract extended the proceedings, making them vastly more expensive for plaintiff. It is not plausible for defendant to argue that this is a case in which both parties secured such significant victories that the court

should hold each party responsible for its own costs. Its motion to deny an award of costs to plaintiff and to secure an award of costs for itself will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff Latino Food Marketers, LLC's motion for prejudgment interest is GRANTED; defendant Ole Mexican Foods, Inc. is to pay plaintiff $51,388.00 in prejudgment interest;

2. Plaintiff's motion to alter or amend the judgment is GRANTED; the judgment entered on April 23, 2004, is VACATED and AMENDED to conform to the evidence adduced at trial to provide that for purposes of defendant's counterclaims, the plaintiffs are Latino Food Marketers, LLC *and* Mexican Cheese Producers; in all other respects it is to remain as entered on April 23, 2004;

3. Defendant's motion to alter or amend the judgment to show that defendant prevailed on a claim of tortious interference with contract is DENIED; and

4. Plaintiff is awarded its reasonable attorney fees and costs for bringing its motion to alter or amend the judgment to amend the pleadings to conform to the pleadings and for responding to defendant's motion to alter or amend; plaintiff may have until June 14, 2004, in which to file and serve an itemized statement of its fees and costs; defendant may have

until June 23, 2004, in which to file and serve objections to the statement; and

5. Defendant's motion to deny an award of costs to plaintiff and alternatively to award costs to both parties is DENIED.

Entered this 3rd day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge