

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STARS INDUSTRIES, INC.,

Plaintiff,

v.

PLASTECH ENGINEERED
PRODUCTS, INC.,

Defendant.

MEMORANDUM

06-C-0349-C

Presently before the court is the question whether jurisdiction existed when I decided plaintiff's motion to amend and clarify the August 27, 2007 order in this case. Defendant raised this question in its objection to the motion to amend and clarify but I failed to address it in the order. Doing so now requires a review of the recent flurry of motions and orders in what I hope is the last stage of this lawsuit.

On June 5, 2007, I entered an order resolving the parties' claims following a trial to the court, concluding that plaintiff was entitled to judgment in its favor on the breach of contract claim raised in its lawsuit and that defendant's counterclaim was legally meritless. Final judgment was not entered immediately, however, because it was not clear what amount

of prejudgment interest plaintiff was owed. After giving the parties an opportunity to address that question, I calculated the full amount defendant owed to plaintiff and, in an order entered on July 11, 2007, directed entry of judgment in the amount of \$1,270,850.50 for plaintiff. On July 16, 2007, judgment was entered in that amount. Dkt. #134. Subsequently, on July 30, 2007, defendant filed a timely motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59. Dkt. #143. This motion was denied on August 6, 2007. Dkt. #147. On August 9, 2007, defendant filed a notice of appeal from the July 16 judgment and the August 6 denial of its Rule 59 motion. Dkt. #151.

Meanwhile, on June 27, 2007, plaintiff moved for sanctions against defendant under Fed. R. Civ. P. 37 for defendant's discovery violations, and against defendant's lawyer, Jones Day, under 28 U.S.C. § 1927, "for excess attorneys' fees and costs incurred as a result of [his] unreasonable and vexatious multiplication" of the proceedings. Dkt. #132. Briefing on that motion was complete on August 24, 2007. On August 27, 2007, the motion was granted in part and plaintiff was awarded attorney fees and costs in the total amount of \$30,253.99. Dkt. #161. However, I failed to specify in the order whether the sanctions applied to defendant, defendant's lawyer, or both. The next day, on August 28, 2007, at 4:59 p.m., defendant filed electronically an amended notice of appeal, to include an appeal from the August 27 sanction order. Dkt. #164. That same day at 8:59 p.m., plaintiff filed a motion "to amend and clarify" the August 27 order, asking for a precise indication of the

person or entity responsible for payment of the sanctions. Dkt. #162. (The apparent discrepancy in docket numbers reflects the fact that docketing and filing do not take place at the same time or even in the same order.)

On August 29, 2007, the clerk of court entered a judgment independent of the July 16 judgment, reflecting only the decision to award plaintiff attorney fees and costs. Dkt. #163. On the same day, I granted plaintiff's motion to amend and clarify, amending the August 27 order to specify that the motion for sanctions under 28 U.S.C. § 1927 against Jones Day was granted and plaintiff's motion for sanctions against defendant pursuant to Fed. R. Civ. P. 37 was denied, and I vacated the judgment entered earlier in the day and directed that an amended judgment be entered to reflect the clarified ruling. Dkt. #165. Minutes later, the clerk amended the judgment docketed as dkt. #163 as directed in the order granting plaintiff's motion to amend and clarify. Dkt. #167.

Still, the volley of filings continued. Defendant objected to plaintiff's motion to amend and clarify in another document filed on August 29, 2007, dkt. #166, and filed a second amended notice of appeal at 3:50 p.m. on August 30, 2007. Dkt. #169. Defendant filed yet another notice of appeal at 3:55 p.m. on August 30, 2007, by Jones Day personally. Dkt. #170. Defendant contends that this court could not decide plaintiff's motion to amend and clarify the August 27 order because its filing of a notice of appeal "automatically divest[ed] this court of jurisdiction" to consider the motion. Defendant is wrong. It was

unnecessary to ask the Court of Appeals for the Seventh Circuit to relinquish jurisdiction over defendant's August 28, 2007 appeal in order to rule on the motion.

The August 27, 2007 decision to grant plaintiff's motion for sanctions was a final, appealable decision. Thus, plaintiff's motion to amend the order and clarify the decision was in the nature of a Rule 59 motion, timely made within 10 days of the decision (indeed, made within one day of the decision). Because this motion for reconsideration was timely, it suspended the operation of defendant's notice of appeal, which had been filed four hours earlier.

Once a "final" decision has been made, the clock for filing a notice of appeal begins to run. It stops if a motion for reconsideration is filed while time for appeal remains, see United States v. Dieter, 429 U.S. 6, 97 S. Ct. 18, 50 L. Ed. 8 (1976) (holding that this principle applies even if the order is interlocutory and no rule specifically authorizes a motion for reconsideration), and starts anew once such a motion is denied. Fed. R. App. P. 4(a)(4).

Fairley v. Fermaint, 482 F.3d 897, 901 (7th Cir. 2007). See also Florian v. Sequa Corporation, 294 F.3d 828 (7th Cir. 2002) (citing Otis v. City of Chicago, 29 F.3d 1159, 1166 (7th Cir. 1994) (en banc) (notice of appeal filed before district court rules on Rule 59 motion does not take effect until motion is decided)).

This reasoning makes perfect sense. It would be an inefficient and wasteful use of judiciary resources to allow a party's dash to the court of appeals moments after entry of an appealable order to prevent the opposing party from obtaining a ruling on a timely filed Rule

59 motion. Although the district court can always go through the time consuming process of asking for and receiving consent from the court of appeals to relinquish jurisdiction over the action, that process should be reserved for different situations. Accordingly, for the record, I find no merit to defendant's argument that this court lacked jurisdiction to rule on plaintiff's motion to amend and clarify.

One additional point should be addressed to tie up all the loose ends. Defendant's counsel was sanctioned under § 1927, which speaks of awarding sanctions against "[a]ny attorney or other person admitted to conduct cases in any court of the United States." This could be read as prohibiting awards against law firms for their conduct, or at least imposing sanctions on just one lawyer from the firm. Rule 11 was interpreted in that manner before it was amended in 1993 to make it explicit that a lawyer *or* a law firm could be sanctioned for a violation of the rule. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (holding that only lawyer could be sanctioned for violation of Rule 11). Rule 11 is directed at written pleadings and papers and includes the requirement that they be signed by an attorney. In that circumstance, it is relatively easy to determine which lawyer is responsible for a misleading or unsupported pleading or motion. By contrast, § 1927 applies to the unreasonable multiplication of proceedings. It is not always possible (or the best use of the court's and counsel's time) to determine which member or associate of the firm is responsible for the acts or omissions that led to the multiplication of the proceedings.

In this case, the offending actions included the filing of a baseless counterclaim, assertion of an untimely and contradictory damages theory and the filing of a baseless motion in limine. It is improbable that the Jones Day firm left the decisions undergirding these actions to the young associate who played a supporting role in the trial, despite the fact that he is the attorney of record on the court's docket sheet. I am satisfied that under ordinary principles of agency, imposition of the sanction upon the firm is proper.

Entered this 12th day of September, 2007.

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