IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DUOLINE TECHNOLOGIES, L.P., ORDER

Plaintiff, 10-cv-252-bbc

v.

McCLEAN ANDERSON, LLC,

Defendant.

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In August 2008, plaintiff Duoline Technologies, LLC and defendant McClean Anderson, LLC entered into a contract under which defendant was to deliver filament winding equipment to plaintiff for a new facility plaintiff was building in Gilmer, Texas. Ultimately, plaintiff was dissatisfied with the machinery supplied by defendant and sued for breach of contract, breach of warranties, intentional misrepresentation, fraudulent inducement and unjust enrichment. Defendant filed counterclaims for breach of contract, quantum meruit and unjust enrichment, contending that plaintiff failed to pay under the last four payment terms of the parties' contract and failed to pay for additional services and materials that were not covered by the contract. In an order dated March 25, 2011, I granted summary judgment to defendant on all of plaintiff's claims in this case. Dkt. #81. The only claims remaining are defendant's counterclaims, which are to be tried to the court

on May 23, 2011.

Now before the court are several motions in limine filed by both parties. Because the parties ask for relief that is either unnecessary, inappropriate or not supported in the law, I am denying all of the motions.

OPINION

A. Plaintiff's Motions in Limine

1. Motion to exclude evidence of services or material provided by defendant outside the contract, dkt. #109

In its answer and counterclaim, defendant alleges that it "provided a substantial amount of valuable services and materials to [plaintiff] which were not covered by the express contract between the parties described above. Specifically, there were numerous change orders for services and equipment that went outside the scope of the parties' express contract, which [defendant] fully performed and which [plaintiff] accepted." Dft.'s Counterclaim, dkt. #6, at ¶ 11.

Plaintiff contends that defendant should be precluded from offering evidence and arguments regarding these services and materials because this court decided already that the Proposal 8073 Rev.5 "is the only controlling document between the parties with respect to the delivery and installation of the machinery at issue." Dkt. #81, at 14-15. This is true.

Under the Proposal's integration clause, the Proposal is the "exclusive, complete and final agreement between the parties, and both parties agree that there are no other agreements, representations, promises or statements, either oral or written, express or implied, which relate to the matters contained in these Terms and Conditions." Id. (citing dkt. #58-1, ¶ 26(10)(A)). Additionally, the Proposal provided that "[a]ll changes to [the Proposal 8073 Rev.5], must be in writing and executed by both parties." Id. (citing dkt. #58-1, ¶ 26(10)(B)).

However, I cannot conclude that defendant's claims for recovery of the services or materials it provided after delivering the equipment to plaintiff are barred by the contract without more information about the particular services or materials at issue. Neither party has provided detailed information about what these services and materials were and whether they are related directly to the matters covered by Proposal 8703 Rev.5. In addition, without more information I cannot determine whether there was a valid oral modification of the contract. Although the Proposal requires that all changes be in writing, the Wisconsin Supreme Court has held that, despite such language in a contract, some oral modifications to a contract are valid. Royster-Clark, Inc. v. Olsen's Mill, Inc., 2006 WL 46, ¶¶ 20-22, 37, 290 Wis. 2d 264, 714 N.W.2d 530; see also Allen & O'Hara, Inc. v. Barrett Wrecking, Inc., 898 F.2d 512, 518 (7th Cir. 1990) ("[A] provision in construction contracts requiring written change orders may be avoided where the parties evidence by their words or conduct an intent to waive or modify such a provision") (applying Wisconsin law).

In sum, without more information about the circumstances and particular materials and services for which plaintiff believes defendant cannot recover, I will not preclude defendant from offering testimony on the issue. Plaintiff is free to submit additional evidence and argument regarding this issue at trial.

2. Motion to exclude any hearsay testimony regarding production runoff, dkt. #110

Plaintiff contends that defendant plans to introduce hearsay testimony in support of its claim that the equipment defendant provided has met production runoff requirements. Defendant responds that it is not planning on introducing inadmissible hearsay testimony and that it will be relying on documentary and other evidence to prove its claim.

I am denying this motion as unnecessary. If plaintiff believes defendant is introducing hearsay testimony at trial, it may object at the appropriate time.

3. Motion to preclude defendant from using any discovery disclosed or produced after the discovery deadline, dkt. #111

Plaintiff alleges that defendant produced several new documents six days after the discovery cutoff date and argues that defendant should be precluded from using these documents at trial. In response, defendant says that most of the documents were produced to plaintiff earlier and that even if they were produced late, plaintiff has suffered no prejudice.

I am denying the motion. Plaintiff has not described the contents of documents or explained why a six-day delay caused it any prejudice. To the extent plaintiff has a particular objection to a particular document, it may raise that objection at trial.

4. Motion to strike designation of David Dombeck, dkt. #112

Plaintiff has moved to strike the designation of David Dombeck as a liability expert for defendant, contending that Dombeck is not qualified to testify as an expert because he does not hold a bachelors degree, his experience with filament winding machines is limited to his employment with defendant and he has no production experience with the manufacture of fiberglass liners for oilfield tubular goods. Also, plaintiff contends that Dombeck's opinion regarding the production capability of the machinery at issue is not supported by proper methods.

From Dombeck's expert report, dkt. #113, I understand that he holds himself out as qualified to testify about the design and specification of the machinery defendant shipped to plaintiff, whether the machinery was defective and whether it is capable of meeting the production requirements specified in the contract. Dombeck has worked for defendant for more than 17 years, first as a design engineer and as the general manager since 2003. Although defendant does not hold a bachelors degree, he states that he gained personal knowledge of the facts and opinions contained in his expert report through his experience working for defendant as an engineer and general manager. Plaintiff has provided no

evidence or argument that would cast doubt on Dombeck's knowledge and experience.

In addition, plaintiff's arguments related to Dombeck's interpretation of flex wind logs do not justify striking him as an expert. Plaintiff says that it does not object to Dombeck's testimony regarding the machinery design and specification, but that Dombeck is wrong about what the flex wind logs show. Although plaintiff does not develop its argument, its objections are more properly characterized as a disagreement about Dombeck's conclusions rather than whether his conclusions are reliable or whether he is qualified to make them. These challenges may be raised during cross-examination of Dombeck. Accordingly, I will deny plaintiff's motion to strike Dombeck as an expert.

B. Defendant's Motions in Limine

1. Motion for an order establishing the order of presentation of evidence and burden of proof for the respective parties, dkt. #114

Defendant contends that it can establish a prima facie claim for breach of contract against plaintiff by submitting only the parties' stipulated facts. In particular, defendant believes the stipulated facts establish (1) the existence of a contract between the parties; (2) plaintiff's acceptance of the goods at issue; (3) plaintiff's decision to keep and use the goods; and (4) plaintiff's failure to compensate defendant fully for the goods. Defendant contends that after it introduces the facts in support of the above elements, the burden should shift to plaintiff to establish that it does not owe defendant the unpaid portion of the purchase

price under the contract, either because defendant breached the contract or because defendant failed to fulfill the conditions precedent in the contract regarding production rates.

I am denying the motion. Although plaintiff has the burden to prove its affirmative defenses, defendant has the initial burden of proving all elements of its claim that plaintiff breached the contract by failing to pay defendant according to the pay schedule in the contract. One of those elements is that defendant satisfied the conditions in the contract that obligated plaintiff to pay the full contract price. Under Wisconsin law, "a condition precedent must be exactly fulfilled or no liability can arise on the promise which such condition qualifies." Town Bank v. City Real Estate Development, LLC, 2009 WI App 160, ¶ 17, 322 Wis.2d 206, 777 N.W.2d 98 (quoting Woodland Realty, Inc. v. Winzenried, 82 Wis.2d 218, 224, 262 N.W.2d 106 (1978)). "If the condition precedent fails to occur, the party seeking to enforce the contract must prove that the condition should be excused and the contract enforced absent the limitation." E.B. Harper & Co. v. Nortek, Inc., 104 F.3d 913, 919 (7th Cir. 1997).

The only case defendant cites in support of its argument is distinguishable from the present case. In Chicago Prime Packers, Inc. v. Northam Food Trading Co., 409 F.3d 894, 898 (7th Cir. 2005), the Court of Appeals for the Seventh Circuit held that a buyer seeking to avoid payment for goods under the United Nations Convention on Contracts for the International Sale of Goods has the burden of proving that goods were non-conforming. The court of appeals analogized the Convention on Contracts to the Uniform Commercial Code

and concluded that because a buyer who asserts a defense of breach of the implied warranty of fitness under the Uniform Commercial Code has the burden of proving that affirmative defense, a buyer governed by the Convention on Contracts should have the same burden. Id. In this case, however, defendant seeks to shift to plaintiff not just plaintiff's affirmative defenses, but one of the essential elements of defendant's beach of contract claim. Such burden shifting would be inappropriate. Accordingly, in order to succeed on its breach of contract claim, defendant must prove that there were no conditions precedent, that it satisfied the conditions precedent or that its failure to satisfy the conditions should be excused.

2. Motion to preclude plaintiff from presenting evidence or making reference to any pre-contractual representations, negotiations, communications and proposals, dkt. #115

I am denying this motion. I held previously that plaintiff could not rely on the parties' pre-contractual representations, negotiations, communications and proposals to support a breach of contract claim because the Proposal 8073 Rev.5 is the controlling contract between the parties with respect to the delivery and installation of the machinery at issue. However, this does not mean that the parties' pre-contractual communications are irrelevant to the issues before the court. At the very least, the communications provide relevant background information regarding the contract. Moreover, this is not a jury trial so there is no risk that such information will create confusion or prejudice defendant in any

way. This does not mean that the parties may introduce irrelevant, distracting or cumulative information. If it appears that plaintiff is introducing irrelevant information or trying to use information for the wrong purpose, defendant should object at the appropriate time.

3. Motion to preclude plaintiff from presenting testimony, evidence or argument for damages, dkt. #116

Defendant contends that plaintiff should be precluded from offering evidence, testimony or argument on any alleged damages plaintiff suffered because the court granted summary judgment to defendant on all of plaintiff's claims. Additionally, defendant contends that plaintiff should be precluded from offering the expert report and testimony prepared by Vijay Tahiliani because Tahiliani's report is limited to the topic of plaintiff's damages.

I am denying this motion. Plaintiff has asserted an affirmative defense under Wis. Stat. § 402.717, which provides that "[t]he buyer . . . may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." The summary judgment opinion did not address the merits of this defense because it was not before the court. I granted summary judgment against plaintiff on its claim for breach of express warranties in the contract. I did not conclude that plaintiff's breach of warranties claim lacked merit; rather, I concluded that plaintiff had failed to adduce sufficient evidence in support of its claim as is required at the summary

judgment stage. Plaintiff had submitted only conclusory statements to support its claim that the machinery provided by defendant was defective. Defendant has cited no cases in support of its argument that a summary judgment ruling based on a party's failure to adduce sufficient evidence would preclude the party from asserting a related affirmative defense.

In sum, plaintiff may assert an offset defense under § 402.717 and present evidence of the damages it suffered as a result of defendant's alleged breach of the contract. I note that plaintiff may use § 402.717 only as an offset and not as a means to recover damages beyond the amount still due under the contract.

ORDER

IT IS ORDERED that

1. Plaintiff Duoline Technologies, L.P.'s motion to exclude evidence of services or material provided by defendant McLean Anderson LLC outside of the contract, dkt. #109, motion to exclude any hearsay testimony regarding production runoff, dkt. #110, motion to preclude defendant from using any discovery disclosed or produced after the discovery deadline, dkt. #111, and motion to strike designation of David Dombeck, dkt. #112, are DENIED.

2. Defendant's motion for an order establishing the order of presentation of evidence and burden of proof for the respective parties, dkt. #114, motion to preclude plaintiff from presenting evidence or making reference to any pre-contractual representations, negotiations,

communications and proposals, dkt. #115, and motion to preclude plaintiff from presenting testimony, evidence or argument for damages, dkt. #116, are DENIED.

Entered this 18th day of May, 2011.

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