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

DRM, INC.,

Plaintiff,

v.

BLM LAND, LLC,

Defendant.

OPINION AND ORDER

14-cv-754-wmc

After a jury rendered a unanimous special verdict that the parties' use restriction agreement had been modified by plaintiff DRM, Inc.'s subsequent conduct, the court entered judgment in favor of defendant BLM Land, LLC. (Dkt. #93.) Before the court is DRM's motion for judgment as a matter of law or, alternatively, for a new trial. (Dkt. #96.) In the motion, DRM principally argues that the court erred in allowing the jury to consider a modification by conduct defense because: (1) BLM had waived the defense by failing to plead it; and (2) the evidence did not support the defense. For the reasons that follow, the court rejects both arguments and denies plaintiff's motion.

BACKGROUND

A. Overview of Parties' Dispute and Evidence at Trial

Defendant BLM owns a commercial development in Janesville, Wisconsin, referred to as "The Oasis." Among other businesses operating in that development, BLM leases plaintiff DRM the premises in which DRM owns and operates an Arby's franchise. DRM and BLM entered into a formal "Lease" on or about September 12, 2011, that

governs DRM's use of the premises, among other things. Specifically, Section 2 of the Lease, describing "Use of Premises," contains the following language:

> Lessor [BLM] shall prepare and deliver to Lessee [DRM] for Lessee's approval a recordable form of non-competition restrictive covenant in the form attached to this Lease as Exhibit "A" and incorporated herein by reference (the "Declaration of Restrictive Covenant"), covering all of Lot 2 CSM . . . prohibiting the sale, lease, or transfer of any kind of use of any part of said Lot 2 or by any concept that prepares and serves hot or cold sliced or chopped meats **or** deli-style or sub-style sandwiches including, but not limited to Subway, Panera Bread, Jimmy John's, Quiznos, Jason's Deli, and Paradise Bakery.

(Ex. 1 at § 2 (emphasis added).)

On the other hand, the Declaration of Restrictive Covenant, attached as Exhibit "A" to the Lease, contains a similar provision, but replaces the "or," which is emphasized in the quote above, with "in" as emphasized below:

> For so long as DRM, its successors or assigns, is "continuously operating" (as defined below) an Arby's restaurant on the Arby's Tract, no property within or comprising the Developer Tract, or any part thereof shall be leased, sold, occupied, used or operated by any party as a concept that prepares and serves hot or cold sliced or chopped meats **in** deli-style of sub-style sandwiches, including b[ut] not limited to Subway, Panera Bread, Jimmy John's, Quiznos, Jason's Deli and Paradise Bakery.

(*Id.* at p.15 (emphasis added).) The Declaration of Restrictive Covenant was recorded with the Rock County Register of Deeds office on or about December 9, 2011, using this same "in" language. (Ex. 5.)

No one, it appears, was aware of the discrepancy between the executed Lease and Restrictive Covenant until BLM sold a portion of the land that is subject to the

restrictive use to S&S Milton Avenue, LLC, and DRM later learned that S&S, in turn, intended to lease a portion of that purchased property to establish a Chipotle franchise. DRM opposed the lease of property to Chipotle.

At trial, BLM presented evidence that the parties had not only agreed to the language in the Restrictive Covenant at the time the Lease was executed, but DRM's attorney approved the language in the Declaration of Restrictive Use actually recorded with the Rocky County Register of Deeds. (Exs. 3, 4.) Moreover, BLM presented emails exchanged in October 2011, a month after the Lease was executed, in which DRM stated that Pancheros -- a restaurant similar to that of Chipotle -- "would fall outside of the Restrictive Covenant." (Ex. 18.)

B. Trial and Judgment

In its pretrial submissions, BLM included proposed instructions on both waiver and modification by conduct. After review of the parties' respective submissions and objections, and in light of the court's understanding of the evidence and theories at that time, the court included the waiver defense in its preliminary draft closing instructions and posed a question on waiver in the draft special verdict. The court also advised at the final pretrial conference that the first phase of the trial would concern the intent of the parties with respect to the use restriction and BLM's waiver defense. After hearing argument from both sides, at the close of the evidence at trial, however, the court determined that the modification by conduct instruction better captured defendant's theory and changed the second question on the special verdict form to reflect that conclusion.

As a result, the special verdict submitted to the jury consisted of two questions:

> **QUESTION NO. 1**: Did DRM, Inc., prove by clear and convincing evidence that the parties intended to enter into a use restriction prohibiting any concept that prepares and serves hot or cold sliced or chopped meats **or** deli-style or sub-style sandwiches?
>
> * * *
>
> **QUESTION NO. 2**: Did BLM, Land, Inc., prove by the preponderance of the evidence that DRM modified the scope of the restrictive covenant by its conduct?

(Special Verdict (dkt. #81).)

The jury answered "yes" to Question No. 1, which was the position of plaintiff DRM. Having answered that question "yes," the jury was instructed to then answer Question No. 2, which it also answered, "yes," in BLM's favor on its modification by conduct defense.

Based on this verdict and after an opportunity for the parties to weigh in, the court then: (1) entered judgment in plaintiff's favor against defendant on defendant's counterclaims; (2) entered judgment in defendant's favor and against plaintiff on plaintiff's claims; (3) reformed the lease and declaration of restrictive use as of the date of signing to reflect the "or" language; and (4) further ordered that the language was subsequently modified to "in" based on the plaintiff's conduct. (Judgment (dkt. #93); *see also* Order on the Proposed Judgments (dkt. #92).)

OPINION

I. Waiver of Modification by Conduct Defense

DRM argues as a matter of law that BLM waived this defense altogether by failing to plead it and, therefore, the court erred in instructing the jury and submitting a special verdict question on a modification by conduct defense. Modification by conduct is not included in the list of affirmative defenses a party must affirmatively state under Federal Rule of Civil Procedure 8(c). Nor is it included in the affirmative defense list under Wisconsin state law, Wis. Stat. § 802.02(3), to the extent this statute governs in a diversity action. *See Winforge, Inc. v. Coachmen Indus., Inc.*, 691 F.3d 856, 872 (7th Cir. 2012) ("This Court has previously noted that the appropriate analysis for determining whether a defense is an affirmative defense when not specifically listed in Rule 8(c) 'is not well settled, especially in diversity cases.'") (citing *Brunswick Leasing Corp. v. Wis. Cent., Ltd.*, 136 F.3d 521, 530 (7th Cir. 1998)). Still, as DRM rightly points out, these lists are not intended to be exhaustive. Rather, "a defense is an affirmative defense (a) 'if the defendant bears the burden of proof' under state law or (b) 'if it [does] not controvert the plaintiff's proof.'" *Winforge*, 691 F.3d at 872 (quoting *Brunswick Leasing Corp.*, 136 F.3d at 530).

Here, as the court instructed the jury, BLM had the burden of proof with respect to its modification by conduct defense. As such, the court agrees with DRM that BLM was required to plead a modification by conduct defense in order for it to pursue such a claim at trial. *See Goebel v. Nat'l Exchangors, Inc.*, 88 Wis. 2d 596, 614, 277 N.W.2d 755, 764 (1979) ("Modification of a contract, however, is a matter which must be pleaded by

the party who claims it was made."). But this conclusion does not resolve DRM's challenge, since the question remains whether BLM did plead a modification by conduct defense.

In its answer, BLM asserted affirmative defenses of waiver, estoppel, failure to mitigate and failure to state a claim. (Answ. (dkt. #10) p.12.) In addition, the Answer states that it "incorporates by reference as if fully set forth herein its anticipated Counterclaims." (*Id.*) In its counterclaims, BLM affirmatively alleges that "[t]o the extent that the ambiguity within the Lease is due to inconsistent wording, that ambiguity is the fault and/or responsibility of DRM or its counsel, Gary Batenhorst of the law firm of Cline Williams Wright Johnson & Oldfather, LLP," and "[t]he parties' course of conduct demonstrates that the terms of Exhibit A to the lease [the Declaration of the Restrictive Covenant] control." (Contercls. (dkt. #13) ¶¶ 13, 19.) BLM's counterclaims also allege that "DRM's claim that Chipotle is within the scope of the Restrictive Covenant is directly contrary to its agreement, confirmed in writing, after the Lease was executed that Pancheros was outside the scope of the Restrictive Covenant." (*Id.* at ¶ 31.)

These allegations are more than sufficient to satisfy Rule 8, including placing DRM on notice that it intended to pursue a modification by conduct defense. *See Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989) ("[A]ffirmative defenses are pleadings, and therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure."). Indeed, these allegations are completely consistent with the evidence at trial and the jury's findings, as the court

explained in its prior order on DRM's objections to the proposed judgment. (6/3/15 Order (dkt. #92) 2.) Moreover, BLM's subsequent filing of a proposed modification by conduct jury instruction (*see* BLM's Proposed Jury Instructions (dkt. #40) 7) should have clarified any arguable uncertainty on the part of DRM, whether justified or not.[1] Tellingly, in its objections to BLM's proposed instructions, DRM simply responded that the modification by conduct defense and others would "not be supported by the evidence"; and it did *not* object that BLM had failed to allege such a defense. (DRM's Objs. to BLM's Instructions (dkt. #52) 2.) Finally, to the extent that this is a close question, the court heeds the warning of the Seventh Circuit that "the rule that forfeits an affirmative defense not pleaded in the answer (or by an earlier motion) is, we want to make clear, not to be applied rigidly." *Garofalo v. Vill. of Hazel Crest*, 754 F.3d 428, 436 (7th Cir. 2014) (quoting *Matthews v. Wis. Energy Corp., Inc.*, 642 F.3d 565, 570 (7th Cir. 2011)).

While DRM contends that it was nevertheless prejudiced by the court's decision to make this change right before reading the instructions to the jury, DRM's claimed prejudice was simply that it elicited testimony specific to the waiver defense that was not material to the modification by conduct defense (*e.g.*, whether any waiver was knowing). Perhaps this is true, but the waiver defense was still on the table at that point, and DRM can hardly claim prejudice because the court ultimately agreed with it by not letting the

[1] This case demonstrates the role of dispositive motions in honing the parties' respective theories. While the court sympathizes with the parties' interests here in an accelerated trial date, building in time for dispositive motions into the pretrial schedule likely would have streamlined the issues for trial to the benefit of the parties and the court.

waiver defense proceed further, especially after DRM chose not to bring a motion for summary judgment that could have ripened the issue sooner. More importantly, DRM does not point to *any* evidence that it would have presented in defense of modification by conduct, but elected not to do so. On the contrary, except for the "knowing" element of waiver, the evidence in defense of waiver largely overlapped with the evidence material to the modification by conduct defense. In other words, DRM had every motive to present evidence material to the modification by conduct defense, even if it had not been pleaded in BLM's affirmative defenses and counterclaims.

At the end of the day, the court exercised its discretion in instructing on modification by conduct and posing that defense on the special verdict form because it conformed to the evidence presented at trial. The court made this determination after hearing argument by the parties, at the close of evidence but before closing arguments. Moreover, the court rejected DRM's waiver argument during the same final hearing on the closing instructions, and it finds no basis for revisiting that decision now. (*See* 5/12/15 Trial Tr. (dkt. #87) 96.)

II. Sufficiency of the Evidence

In addition to challenging the court's decision to instruct and ask the jury a special verdict question on modification by conduct, DRM also challenges the jury's finding for two reasons. First, DRM contends that it could not have modified the contract by conduct because both the lease and the statute of frauds required any modification to be in writing. Second, DRM contends that it did not act unequivocally and there was no meeting of the minds regarding any alleged modification.

As an initial issue, BLM argues that defendant cannot assert its sufficiency of the evidence challenges under Rule 50(b) because it did not raise these issues in its Rule 50(a) motion. "Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion." *Wallace v. McGlothan*, 606 F.3d 410, 418 (7th Cir. 2010); *see also Thompson v. Mem'l Hosp. of Carbondale*, 625 F.3d 394, 407 (7th Cir. 2010) (refusing to consider the defendant's argument that plaintiff failed to demonstrate that he suffered an adverse employment action, in part, because the defendant did not raise argument in Rule 50(a) motion); *see also* Fed. R. Civ. P. 50 cmt. 1991 Amendments ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion."). However, DRM's Rule 50(a) motion was made *before* the court decided to instruct on modification of conduct. As reflected in the trial transcript, it was DRM's 50(a) motion that prompted the court to reconsider whether waiver was the appropriate defense. (*See* 5/12/15 Trial Tr. (dkt. #87) 86.) As such, the court opts to view DRM's Rule 50(a) motion broadly to cover the issues raised in the present Rule 50(b) motion. Regardless, Rule 59 provides an avenue for review, albeit under a stricter standard.

Under Federal Rule of Civil Procedure 50, judgment as a matter of law may be granted where there is no "legally sufficient evidentiary basis" to find for the party on that issue. Fed. R. Civ. P. 50(a). In considering the motion, the court is to "construe the facts strictly in favor of the party that prevailed at trial," including drawing "[a]ll reasonable inferences in that party's favor and disregarding all evidence favorable to the moving party that the jury is not required to believe." *May v. Chrysler Group, LLC*, 692

F.3d 734, 742 (7th Cir. 2012) (internal citations and quotation marks omitted), *withdrawn in part on reh'g*, Nos. 11-3000, 11-3109, 2013 WL 1955682 (7th Cir. May 14, 2013). The court does not make credibility determinations or weigh the evidence, though the court must assure that "more than 'a mere scintilla of evidence' supports the verdict." *Id.* (quoting *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 859 (7th Cir. 2007)). The court's "job is to decide whether a highly charitable assessment of the evidence supports the jury's verdict or if, instead, the jury was irrational to reach its conclusion." *May*, 692 F.3d at 742.

As mentioned, plaintiff alternatively moves for a new trial under Federal Rule of Civil Procedure 59, which applies "only if the jury's verdict is against the manifest weight of the evidence." *King v. Harrington*, 447 F.3d 531, 534 (7th Cir. 2006) (citing *ABM Marking, Inc. v. Zanasi Fratelli, S.R.L.*, 353 F.3d 541, 545 (7th Cir. 2003)). To meet this standard, DRM must demonstrate that no rational jury could have rendered a verdict against it on the modification by conduct defense. *King*, 447 F.3d at 534 (citing *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 926 (7th Cir. 2004)). In making this evaluation, the court must view the evidence in a light most favorable to defendant, leaving issues of credibility and weight of evidence to the jury. *King*, 447 F.3d at 534. "The court must sustain the verdict where a 'reasonable basis' exists in the record to support the outcome." *Id.* (quoting *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir. 2004)).

With these Rule 50 and 59 standards in mind, the court then turns to DRM's two sufficient of the evidence challenges. *First*, with respect to DRM's argument that any

modification had to be in writing, the record reflects that there *was* a written document -- namely, the Lease and Exhibit A to the Lease, the latter contained the "in" language and that same language was reviewed and filed with the Register of Deeds for Rock County by DRM's counsel. As the court explained in its prior order on the judgment, even if the contemporaneous, written documents, Lease and Restrictive Covenant, were not enough for the jury to discern the parties' intent, the jury could have found that DRM modified the contract by "approving the filing of a Declaration of Restrictive Use provision containing the 'in' language." (6/3/15 Order (dkt. #92) 2.) *See also S M Rotogravure Serv. v. Baer*, 77 Wis. 2d 454, 469, 252 N.W.2d 913, 920 (1977) (holding that a contractual provision requiring written changes may be avoided where the parties evidence by their words or conduct an intent to waive or modify such a provision).

Moreover, the jury also could have found modification by conduct based on the parties' email exchange about whether a Pancheros would be acceptable under the lease. These exchanges were in writing, and thus satisfy the requirement of Wis. Stat. § 706.02(2)(c), which provides for an exception to the statute of frauds "[b]y several writings which show expressly on their faces that they refer to the same transaction, and which the parties have mutually acknowledged by conduct or agreement as evidences of the transaction."

Second, DRM challenges the jury's verdict on the basis that the evidence did not support a finding that DRM acted unequivocally, reflecting a meeting of the minds. The court instructed the jury that

> The acts which are relied upon to show modification of a contract may not be ambiguous in character. Acts which

> are ambiguous, and which are consistent either with the continued existence of the original contract or with a modification, are not sufficient to establish a modification.

(Closing Instructions (dkt. #79) 4.) As such, DRM does not, and cannot, argue that the court erred in its legal instruction.

As for whether the evidence supported the jury's verdict, the court's prior order explaining the judgment already found sufficient evidence to support the jury's determination that DRM acted unequivocally or unambiguously in modifying the contract by its acts of approving the filing of a Declaration of Restrictive Use provision containing the "in" language *and* by subsequently failing for four years to object to email and other communications in which DRM disavowed the broadly-worded "or" language of the use restriction as arguably contemplated by Section 2 of the Lease, although never by the conflicting Declaration of Restrictive Use contemporaneously "incorporated" in Section 2 itself "by reference" as Exhibit A.

While the jury could have sided with DRM in finding that the Pancheros email, for example, only reflected permission as to a specific restaurant, the jury obviously found instead that this course of conduct reflected a modification of the restrictive use provision in the lease, or at least Rules 50 and 59 now require this court to infer on the evidence before it. Accordingly, the court will deny plaintiff's motion.

ORDER

IT IS ORDERED that plaintiff DRM, Inc.'s motion for judgment as a matter of law (dkt. #96) is DENIED.

Entered this 11th day of July, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge