

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

E.J. PECK, INC.,

Plaintiff,

vs.

Case No. 2015-810-CB

WOLVERINE PLATING CORPORATION,

Defendant.

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OPINION AND ORDER

Defendant has filed a motion for leave to amend its answer and file a counterclaim. Plaintiff opposes the motion and requests that it be denied.

I. Facts and Procedural History

On September 29, 2000, the parties entered into a Manufacturer's Representative Agreement ("Contract"). On or about October 31, 2012, Defendant sent a letter to Plaintiff in which it stated: "[a]s required by our contract dated September 29, 2000, let this letter serve as notice of termination of the contract effective January 1, 2013." (See Exhibit 2 to Complaint.) Prior to the January 1, 2013 termination date, the parties met and discussed the Contract on December 5, 2012. At the December 5, 2012 meeting the parties allegedly agreed to modify/amend the terms of the Contract. The parties then allegedly continued under the terms of the Contract, as amended, for more than two years. On or about December 5, 2014, Defendant allegedly verbally terminated the Contract.

On March 10, 2015, Plaintiff filed its complaint in this matter. In its complaint, Plaintiff contends that Defendant breached the Contract by failing to comply with its termination provision and by failing pay certain commissions. Plaintiff's complaint also includes claims for unjust enrichment (Count II), promissory estoppel (Count III), and declaratory judgment (Count IV). On March 27, 2015, Defendant filed its answer and affirmative defenses in this matter.

On August 3, 2015, Defendant filed its instant motion for leave to amend its answer and to file a counterclaim. On August 17, 2015, the Court held a hearing in connection with the motion and took the matter under advisement. While Plaintiff has not filed a response to the motion, its counsel appears at the hearing and opposed the motion.

## II. Standard of Review

MCR 2.118(A)(2) provides that leave to amend a pleading shall be freely given when justice so requires. A motion to amend ordinarily should be granted, unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of amendment. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Delay alone does not justify denying a motion to amend, but a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Franchino v Franchino*, 263 Mich App 172, 191; 687 NW2d 620 (2004).

### III. Arguments and Analysis

While Defendant's proposed counterclaim contains a claim for breach of contract as well as a claim for declaratory relief, the only claim it addresses in its motion for leave is its proposed breach of contract claim. Consequently, the Court will only address the portion of Defendant's motion addressing its proposed breach of contract claim.

In its motion, Defendant seeks leave to file claim for breach of contract against Plaintiff for costs and attorney fees pursuant to Paragraph 14 of the Contract. Paragraph 14 provides:

If either party hereto shall breach any of the terms hereto, such party shall pay to the non-defaulting party all of the non-defaulting party's costs and expenses, including attorneys' fees, incurred by such party in enforcing the terms of this Agreement.

(See Plaintiff's Exhibit 1.)

In opposition, Plaintiff contends that Defendant's proposed claim is futile. While a trial court should freely grant leave to amend when justice so requires, leave should be denied where amending the complaint would be futile. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

The elements of breach of contract are: "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v. Ahrens Constr, Inc. (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). At oral argument, Plaintiff's counsel argued that Defendant has failed to state a claim for breach of contract where it

has failed to identify any breach Plaintiff has committed. Indeed, in its proposed counterclaim, Defendant identifies the Contract, but fails to allege that Plaintiff breached the Contract or that it has suffered damages as a result of the breach. Consequently, Defendant's proposed counterclaim fails to plead a claim for breach of contract. Accordingly, Defendant's proposed breach of contract claim is futile on its face. As a result, its motion for leave to amend must be denied.

#### IV. Conclusion

Based upon the reasons set forth above, Defendant's motion for leave to file an amended answer and counterclaim is DENIED. This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: SEP 14 2015

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge