

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

NICHOLSONS UNDERGROUND
SPRINKLING, INC., a Michigan corporation,

Plaintiff/Counter-Defendant,

Case No. 14-04341-CBB

vs.

HON. CHRISTOPHER P. YATES

TELSCO INDUSTRIES, INC., d/b/a
WEATHERMATIC, a Texas corporation,

Defendant/Counter-Plaintiff.

ORDER GRANTING COUNTER-DEFENDANT'S MOTION FOR
SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

Few, if any, successful companies regard litigation as a profitable undertaking. In the Court's experience, nearly all corporate defendants resent being sued, but they dutifully defend against the allegations and, in time, move on with their commercial affairs. This case constitutes an aberration in that the defendant, Telsco Industries, Inc. d/b/a Weathermatic ("Weathermatic"), responded to this rather pedestrian supply-chain dispute by asserting counterclaims for abuse of process and sanctions for violation of MCR 2.625 and MCL 600.2591. Weathermatic's frustration may be understandable, but its aggressive response enjoys no support in Michigan law. Consequently, the Court must award summary disposition on both of the counterclaims to Plaintiff Nicholson's Underground Sprinkling, Inc. ("Nicholson").*

* As Defendant Weathermatic has correctly noted, the plaintiff's name on the caption of the complaint appears to be incorrect. Although plaintiff's counsel identified his client on the caption as "Nicholson's Underground Sprinkling, Inc.," the website of the Michigan Department of Licensing and Regulatory Affairs lists the entity as "Nicholson Underground Sprinkling, Inc." Accordingly, the Court shall grant the plaintiff 14 days' leave from the entry of this order to amend its complaint to correctly identify itself as the party plaintiff in this case.

Plaintiff Nicholson has requested summary disposition on both of the counterclaims under MCR 2.116(C)(8). “When reviewing a motion brought under MCR 2.116(C)(8), the Court considers only the pleadings.” Michigan ex rel Gurganus v CVS Caremark Crop, 496 Mich 45, ___ (2014). Thus, the Court must rely upon the allegations in the counterclaims in analyzing the relief requested. Nicholson installs in-ground sprinkling systems in West Michigan, and it buys parts from Irrigation Supply Inc. (“Irrigation Supply”), which is a Weathermatic distributor. In 2011, Nicholson received customer complaints regarding failed Weathermatic sprinkler heads. Nicholson brought the issue to the attention of Irrigation Supply and Weathermatic, and after negotiations, Weathermatic agreed to provide Nicholson with 900 replacement sprinkler heads. See Defendant’s Answer to Complaint, Affirmative Defenses, and Counterclaim, Exhibit A. Three years later, on May 14, 2014, Nicholson filed a complaint against Weathermatic for negligence, breach of contract, and breach of warranty. Nicholson alleges that, “[p]rior to the 2013 underground sprinkling installation season in Michigan, [Nicholson] purchased a large number of underground sprinkling heads from [Weathermatic,]” see Complaint, ¶ 8, which proved defective. See id., ¶ 12. Counsel for Nicholson has represented to the Court that the complaint relates to parts received after the parties entered into the 2011 replacement-parts agreement. Based upon these allegations, the Court must determine whether Weathermatic’s counterclaims should be dismissed pursuant to MCR 2.116(C)(8).

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, Gurganus, 496 Mich at ___, and the Court may grant relief only if Weathermatic has “failed to state a claim on which relief can be granted.” MCR 2.116(C)(8). To present a viable claim for abuse of process, Weathermatic must plead “(1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding.” Bonner v Chicago Title

Ins Co, 194 Mich App 462, 472 (1992). The ulterior purpose alleged must be more than harassment, defamation, exposure to excessive litigation costs, or even coercion to discontinue business. Dalley v Dykema Gossett PLLC, 287 Mich App 296, 323 (2010). Here, Weathermatic’s counterclaim rests on the allegation that Nicholson “abused the process in a wrongful and unlawful manner by making false allegations in its pleadings and pursuing claims outside of an express limited warranty[.]” See Defendant’s Answer to Complaint, Affirmative Defenses, and Counterclaim, ¶ 21. First, assuming that Nicholson made false statements, that conduct constitutes nothing more than defamation, so that allegation does not support a claim for abuse of process. Second, whether Nicholson’s claims in this case fall outside Weathermatic’s warranty is manifestly in dispute, so that allegation does not support a claim for abuse of process. Finally, Weathermatic’s only additional basis for asserting a claim for abuse of process rests upon the theory that Nicholson’s claims are barred by the 2011 replacement-parts agreement. See Defendant’s Answer to Complaint, Affirmative Defenses, and Counterclaim, Exhibit A. But Nicholson’s counsel confirmed at oral argument that its claims against Weathermatic relate to products received after the 2011 replacement-parts agreement, so the Court need not afford Weathermatic leave to amend its abuse-of-process counterclaim under MCR 2.116(I)(5) because any amendment would be futile. See Ormsby v Capital Welding, Inc, 471 Mich 45, 53 (2004).

With respect to the counterclaim for sanctions, Defendant Weathermatic has acknowledged that it cannot proceed on that theory as an independent cause of action because such a request must be brought by “a motion of a party.” See MCR 2.625(A)(2). As a result, the Court must dismiss that counterclaim pursuant to MCR 2.116(C)(8), but Weathermatic remains free to pursue sanctions by motion at the conclusion of the case if Plaintiff Nicholson’s claims prove to be unfounded. Finally, the Court must deny Weathermatic’s request for summary disposition pursuant to MCR 2.116(I)(2),

which allows for relief if “the opposing party, rather than the moving party is entitled to judgment[.]” Because Nicholson has obtained summary disposition on both counterclaims, the Court has no basis to award relief to Weathermatic on either of its counterclaims. And to the extent that Weathermatic wishes to employ MCR 2.116(I)(2) to obtain summary disposition on the claims that Nicholson has pleaded in its complaint, Weathermatic cannot extend the reach of that rule to claims that Nicholson did not put in issue in moving for summary disposition. See Church Mutual Ins Co v Consumers Energy Co, No 240571, slip op at 4 (Mich App Oct 30, 2003) (unpublished decision). As our Court of Appeals put it: “To the extent defendant’s response exceeded the scope of plaintiff’s motion, we find that defendant’s motion was not responsive and that summary disposition on those issues was unavailable under MCR 2.116(I)(2).” Id. Thus, the Court simply cannot grant summary disposition to Weathermatic on the plaintiff’s claims unless and until Weathermatic moves for such an award of summary disposition through a motion of its own.

IT IS SO ORDERED.

Dated: September 9, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge