IP 05-1095-C H/L Viastar Energy v Motorola
Judge David F. Hamilton Signed on 6/16/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VIASTAR ENERGY, LLC,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:05-cv-01095-DFH-WTL
	)	
MOTOROLA, INC.,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT6
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VIASTAR ENERGY, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 1:05-cv-1095-DFH-WTL
	)	
MOTOROLA, INC.,	)	
	)	
Defendant.	)	

ENTRY ON MOTION TO DISMISS

Plaintiff ViaStar Energy, LLC, has sued Motorola, Inc., for breaching a contract to develop and supply automated meter reading ("AMR") devices. The central dispute concerns AMR devices that use an "encoded" interface with the meter. The Second Amended Complaint includes three counts, all pled in the alternative. Counts I and III allege breach of an express contract between the parties, though under two different theories. Count II alleges in the alternative a breach of an implied contract. Motorola has moved to dismiss Count II for failure to state a claim upon which relief may be granted because of ViaStar's allegations of an express contract covering the same subject matter. As explained below, Motorola's motion to dismiss Count II is denied. At this stage of the case, ViaStar may plead alternative theories of relief, and that is all it has done.

Standard for Rule 12(b)(6) Motion

In ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted, the court must assume as true all well-pleaded facts set forth in the complaint, construing the allegations liberally and drawing all inferences in favor of the plaintiff. *E.g.*, *Brown v. Budz*, 398 F.3d 904, 908-09 (7th Cir. 2005). Under the liberal notice pleading allowed in most federal civil actions, the plaintiff is entitled to the benefit of not only its allegations but also any other facts it might assert in briefs or otherwise that are not inconsistent with the allegations of the complaint. See, *e.g.*, *Trevino v. Union Pacific R.R. Co.*, 916 F.2d 1230, 1239 (7th Cir. 1990) (reversing dismissal). A defendant is entitled to dismissal only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A count may be dismissed under Rule 12(b)(6), however, if it includes particulars that show the plaintiff cannot possibly be entitled to the relief it seeks. *Thomas v. Farley*, 31 F.3d 557, 558-59 (7th Cir. 1994).

Background

For purposes of Motorola's motion to dismiss, the following facts are assumed true as alleged in the Second Amended Complaint. On June 27, 2003, and amended July 17, 2003, ViaStar contracted with Motorola to jointly develop, market and manufacture ViaStar's concept for an AMR solution. Cplt. ¶¶ 11, 13,

17. The utilities industry uses three different types of meter interface technology: (1) dry contact pulse interface, (2) wet contact pulse interface, and (3) encoded (digital) meter interface. Pulse meters create a "pulse" that the AMR device counts to determine the "meter read." An encoded meter has an actual meter display that the AMR reads. Cplt. ¶¶ 69, 70. ViaStar's product specifications of June 27, 2003 expressly provided for the development of pulse interface AMRs, but did not include specific provision for encoded (digital) AMRs. Cplt. Ex. 1, § 2.1.

During the joint development of the AMR, Motorola specifically requested and accepted ViaStar's services in developing and marketing an encoded version of the AMR product. Cplt. ¶¶ 50, 73. ViaStar's updated product specification report of July 8, 2004 indicated that the AMR was designed with future applications in mind. Specifically, the report noted that the product would initially be able to work only with dry contact pulse, but could incorporate encoded meters at a future date. Cplt. Ex. 3, § 2.1.6.2. The final product specifications report dated May 9, 2005 indicated that Motorola had developed an encoded AMR product. Cplt. ¶¶ 53, 75.

In October 2004, Motorola demanded that ViaStar agree to an amendment to the agreement that would expressly define the parties' rights and interests relating to the encoded AMRs. On more than one occasion, Motorola refused to deliver any encoded AMRs unless and until ViaStar agreed to the proposed amendment. Cplt. ¶ 80. ViaStar refused and filed this suit against Motorola.

Alternative Pleading of Express and Implied Contracts

Counts I, II, and III of the Second Amended Complaint allege three alternative theories for imposing on Motorola an obligation to sell encoded AMR devices to ViaStar. Count I alleges that the encoded devices constitute an "upgrade" within the meaning of the parties' express agreement. Count II alleges in the alternative that the encoded version is outside the scope of the express agreement but that the parties' conduct created an implied contract covering the encoded version. Count III alleges in the alternative that a specification stating that the product transmitters "would read meters with maximum meter display" means that the product transmitters must be capable of encoded operation.

Motorola has denied that the parties have any valid agreement, as to either pulse or encoded AMRs. Answer to Second Am. Cplt. ¶ 17. Motorola has denied the claims under Counts I and III. Motorola's motion to dismiss Count II contends that ViaStar should not be permitted to pursue the implied contract claim in the alternative to Counts I and III because it addresses the same subject matter as the express agreement as alleged in Counts I and III.

Under Indiana contract law, the terms implied contract, quasi-contract, constructive contract, and *quantum meruit* are used almost interchangeably. *Brown v. Mid-American Waste Systems, Inc.*, 924 F. Supp. 92, 94 (S.D. Ind. 1996). They are legal fictions to provide a remedy to prevent unjust enrichment and to promote justice and equity. *Id.*, quoting *City of Indianapolis v. Twin Lakes*

Enterprises, Inc., 568 N.E.2d 1073, 1078 (Ind. App. 1991). Motorola relies here on the general principle that a contract will not be implied by law where the parties have an express contract that covers the same subject matter. *Kincaid v. Lazar*, 405 N.E.2d 615, 619 (Ind. App. 1980); see *R & W Warehouse v. White Consol. Indus.*, 2003 WL 103001, *6 (S.D. Ind. Jan. 7, 2003) (granting summary judgment for the defendant on quasi-contract claim where the parties agree that their rights concerning specific services are controlled by an express contract); *Brown*, 924 F. Supp. at 94-95 (granting summary judgment for the defendant on implied contract theory where express contract allocated the disputed risk to the plaintiff); *E & L Rental Equip., Inc. v. Wade Const., Inc.*, 752 N.E.2d 655, 660-61 (Ind. App. 2001) (affirming judgment enforcing express contract and rejecting implied contract on the same subject).

Indiana courts apply this rule narrowly to preclude the implication of a contract where an express contract exists that covers *identical* subject matter. See, *e.g.*, *Berry-Jefferson Corp. v. Gross*, 358 N.E.2d 757, 759-60 (Ind. App. 1977) ("Thus an implied contract cannot exist; an express contract covers the identical subject."); *Engelbrecht v. Property Developers, Inc.*, 296 N.E.2d 798, 801 (Ind. App. 1972) ("An implied contract cannot exist where an express contract covers the identical subject matter."). In these cases, and those cited above, the parties agreed that the subject matters of the express contracts were the identical subject matters of the alleged implied contracts or quasi-contracts.

ViaStar and Motorola agree that a complaint may allege an express contract and an implied contract in the alternative. Rule 8(e)(2) of the Federal Rules of Civil Procedure permits alternative pleading. Such alternative pleading may be perfectly reasonable where (as here) the opposing party denies the existence of any valid express contract and further denies that any express contract covers the encoded version of the product. It appears to the court that ViaStar has merely exercised its rights under Rule 8(e)(2) to plead in the alternative.

In Counts I and III, ViaStar alleges that Motorola has breached the express terms of the contract by refusing to supply the encoded AMRs. Both counts assert that the terms of the express contract should be construed to include the encoded AMRs. Motorola denies both claims and denies there is a valid express contract covering encoded AMRs. Count II alleges in the alternative that the parties did not enter into an express contract for the development of the encoded AMRs, and that the encoded AMR is *not* included within the terms of the express contract. Count II alleges that Motorola's request for and acceptance of ViaStar's services created an implied promise to develop the encoded version. Pl. Br. at 3.

Motorola claims that paragraph 115 of the complaint is fatal to Count II. Motorola reads paragraph 115 as alleging in Count II itself that the express contract covers the encoded version of the product, which Motorola views as inconsistent with the implied contract claim in Count II. Paragraph 115 reads:

> Because the agreement specifically provides for upgrades and the encoded version of the Product constitutes an upgrade, Motorola's request for and acceptance of ViaStar's consideration of providing its services to develop and market the encoded upgrade implied a promise by Motorola to take reasonable steps to develop the encoded upgrade of the Product. This, in turn, provided Motorola with the contractual benefit of being able to negotiate in commercially-reasonable good faith for the sale price of the upgrade and provided ViaStar with the contractual benefit of being able to exclusively market the encoded upgrade to its customers after negotiating the sale price of the upgrade with Motorola.

Cplt. ¶ 115. The court does not see a fatal inconsistency here. ViaStar has made sufficiently clear its wish to pursue alternative theories, depending on the disputed issues: (a) whether it has a valid express contract with Motorola and (b) whether and how that express contract is interpreted as applying to encoded AMRs.

At this stage, the court must interpret Paragraph 115 favorably for ViaStar. It could mean simply that the course of the parties' dealings with one another (including the documents that both parties admit they signed) provides content and context for determining the existence and scope of any implied promise regarding encoded AMRs. This use could be especially relevant in light of Motorola's denial that there was any valid express agreement at all, on any form of AMRs. The reference to the express agreement in paragraph 115 therefore is not necessarily fatal, and certainly not at the pleading stage, to the alternative theory of an implied contract. In the light most favorable to ViaStar, Count II alleges that the two products – pulse AMRs and encoded AMRs – are not the same subject matter and that the implied promise relates to one product, the encoded

AMRs, and the express agreement to the other, pulse AMRs. That is a permissible form of alternative pleading.

Motorola argues that the express agreement covers "meter interface technology" and concludes that there can be no implied contract concerning the broad category of "meter interface technology." Def. Br. at 5. This construction of Count II runs afoul of the Rule 12(b)(6) standard, which requires that inferences be made in the plaintiff's favor. Defining the subject matter of the agreement as broadly as all "meter interface technology" construes Count II in the light *least* favorable to the plaintiff. Giving plaintiff the benefit of reasonable inferences, Count II alleges a different and distinct subject matter for the implied promise, compared to the express agreement.

Accordingly, Motorola's motion to dismiss Count II is denied. Motorola shall answer Count II **no later than July 7, 2006.**

So ordered.

Date: June 16, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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