

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

MERSINO DEWATERING, INC.,

Plaintiff/Counter-Defendant,

vs.

Case No. 2013-2023-CK

BROADCO, INC., d/b/a BROADCO  
PROPERTY RESTORTATION,

Defendant/Counter-Plaintiff.

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OPINION AND ORDER

Plaintiff Mersino Dewatering, Inc. (“Plaintiff”) has filed a motion for leave to amend its complaint. Defendant Broadco, Inc. (“Defendant”) has filed a response and requests that the motion be denied.

*Facts and Procedural History*

After Hurricane Sandy, Defendant contracted with the City of Belmar to provide property restoration and flood recovery services. In turn, Defendant contracted with Plaintiff to rent pumps, generators, other equipment, and personnel to operate the equipment. Those rentals were memorialized via rental agreements and change orders (“Rental Contract”). On October 31, 2012, which was before Plaintiff provided any of the rentals, Charles Broaddus, as Defendant’s President, executed a credit application with Plaintiff on behalf of Defendant (“Agreement”). Plaintiff contends that by executing the Agreement Mr. Broaddus personally guaranteed Defendant’s obligations under the Rental Contract and credit application. Consistent with that contention, Plaintiff now seeks to amend its complaint to add Mr. Broaddus as a defendant and to allege claims for breach of contract, quantum meruit, and account stated. In response to

Plaintiff's motion, Defendant contends that the amendment is futile as Mr. Broaddus executed the Agreement on behalf of Defendant rather than in his individual capacity, and that as a result he did not personally guarantee Defendant's performance.

#### *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).

#### *Arguments and Analysis*

In their response to Plaintiff's motion, Defendant contends that the motion should be denied as the amendment would be 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).

Defendant's opposition to the instant motion is based on its assertion that Mr. Broaddus executed the Agreement only as its President and not in his individual capacity. The Agreement provides, in pertinent part:

In consideration of the Agreement of [Plaintiff] to extend credit to \_\_\_\_\_ and as inducement to [Plaintiff] to extend such credit, the undersigned (“guarantor(s)”) in his/her/their individual capacity(s), jointly and severally, for their heirs, executors and administrators, guarantee payment to (Plaintiff), upon demand, of all monies, debt, obligations and demands of any kind, now due or which may become due in the future from debtor and consent and agree that (Plaintiff) may proceed directly against the undersigned, jointly or separately, in the event the debtor fails or refuses to pay any of said money, debts or obligations upon demand, without prior proceeding against debtor or any other person or against assets of debtor or any other person.

The Agreement contains a space for two “guarantors” to sign the document. The first space contains the name “Broadco, Inc.” The second space contains the following: “By: Charles N. Broaddus, Pres.” While Plaintiff contends that Mr. Broaddus personally guaranteed Defendant’s obligations/performance, that contention contradicts the unambiguous language of the Agreement. While the names Broadco, Inc. and “By: Charles N. Broaddus, Pres.” are written on different lines, the document is only dated once, after the second line, which is consistent with Defendant’s contention that Mr. Broaddus executed the document on behalf of Defendant rather than in his individual capacity. Additionally, the term “By:” before Mr. Broaddus’s signature provided an additional indication that Mr. Broaddus executed the document on Defendant’s behalf. Further, the document is incomplete as the first line of the above-referenced portion of the document is not filled out. Given the incompleteness of the document, as well as the form of the executions, Plaintiff should have reviewed the document and assured that it was completed properly prior to extending credit to Defendant. However, Plaintiff failed to review the guaranty and decided to extend Defendant credit notwithstanding that the guaranty was incomplete.

While Plaintiff maintains that it would not have extended credit to Defendant without Mr. Broaddus’s personal guarantee, the Court is convinced that it is insufficient to save a sophisticated commercial lender from its own mistake. See *Townsend v Chase Manhattan Mort Corp*, 254 Mich App 133, 139-140; 657 NW2d 741 (2002). By its own admission, Plaintiff

routinely requires those seeking credit to execute a personal guaranty using the same form as utilized in this case. As such, sophisticated entities, such as Plaintiff, know how to protect their own interests and the Court will not step in to save such entities from their failure to do so. For these reasons, the Court is satisfied that Mr. Broaddus did not personally guarantee Defendant's obligations. Consequently, Plaintiff's motion for leave to amend must be denied as futile.

*Conclusion*

Based upon the reasons set forth above, Plaintiff's motion for leave to file an amended complaint 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.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: May 1, 2014

JCF/sr

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