

Court tests pleadings against federal rules

Today's case provides an informative and helpful discussion of three commonly raised pleadings issues:

(1) Where the jurisdictional minimum (in excess of \$75,000) in diversity cases is challenged, the plaintiff must provide "competent proof" — proof to a reasonable probability — that jurisdiction exists and what evidence will support such proof.

(2) Where a complaint pleads a count for breach of contract, it may plead a separate count for quantum meruit based on the contract.

(3) The four-pronged test to plead a claim for accounting in equity under Illinois law.

Cole-Haddon Ltd. v. Drew Philips Corp., 454 F.Supp.2d 772 (N.D.Ill. 2006).

Cole-Haddon Ltd., an independent sales representative soliciting orders on a commission basis for manufacturers of goods, sued Drew Philips, a clothing designer and manufacturer, for breach of an agreement whereby Drew Philips agreed to pay Cole-Haddon 12 percent commission on sales it made for Drew Philips. The parties had a falling out.

Cole-Haddon, an Illinois corporation, sued Drew Philips, a New York corporation, in federal court based upon diversity of citizenship claiming an amount in excess of \$92,000. The action was based upon theories of breach of contract and quantum meruit/unjust enrichment and, further, pleaded a claim for an accounting as to all sales Cole-Haddon made for Drew Philips and orders shipped.

Drew Philips filed its motion to dismiss the Cole-Haddon complaint contending: (1) no subject matter jurisdiction/jurisdictional minimum not met (Rule 12(b)(1)); and no claims for quantum meruit or accounting stated (Rule 12(b)(6)).

U.S. District Judge Ruben Castillo began discussion of the jurisdictional minimum issue noting the test for subject matter jurisdiction:

"U.S. district courts have original jurisdiction over civil actions only when there is diversity of citizenship and when the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(b) (2006). Diversity of citizenship is not at issue because the dispute involves an Illinois corporation and a New York corporation. Drew Philips argues, however, that the jurisdictional minimum was not met.

"In determining the amount in controversy, 'the sum claimed by the plaintiff controls if the claim is apparently made in good faith.' *St. Paul*



Federal Courts

By Jay S. Judge

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Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288, 58 S.Ct. 586, 82 L.Ed. 845 (1938). This court must accept a plaintiff's allegation of the amount in controversy 'from the face of the pleadings' unless 'it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed.' Additionally, if the complaint includes a number, as it does in this case, 'it controls unless recovering that amount would be legally impossible.' *Rising-Moore v. Red Roof Inns, Inc.*, 435 F.3d 813, 815 (7th Cir. 2006). If the court's jurisdiction is challenged as a factual matter by either the court or the opposing party, 'the plaintiff must support its assertion with "competent proof," which means "proof to a reasonable probability that jurisdiction exists."' *NLFC Inc. v. Devcom Mid-America Inc.*, 45 F.3d 231, 237 (7th Cir. 1995)."

Drew Philips contended it paid all but \$14,996.3; therefore, the jurisdictional minimum amount could not be legally possibly recovered.

"Drew Philips argues that commissions were calculated from orders that were paid for and shipped," Castillo wrote, "and Cole-Haddon received 12 percent of payments actually received. Drew Philips calculated that it received a total of \$1,175,853 for orders booked by Cole-Haddon. Therefore, it owed Cole-Haddon 12 percent of this amount, or \$141,102.36. Drew Philips argues that since it has already paid Cole-Haddon \$126,106 in commissions, the most that Cole-Haddon could possibly be owed is \$14,996.36."

Cole-Haddon countered with different calculations.

"In contrast," Castillo wrote, "Cole-Haddon maintains that as long as Drew

Philips accepted or confirmed a customer order. Cole-Haddon deserved a commission. Cole-Haddon argues that it procured \$1.7 million in sales for Drew Philips, of which it was owed \$208,000 in commissions. It argues that Drew Philips only paid \$115,923.81 in commissions, leaving \$92,168 in unpaid commissions."

Castillo reviewed the submissions of both parties and the question of net commissions after cancellations, returns and discounts to determine whether it was "legally possible" for Cole-Haddon to be owed an amount in excess of \$75,000. Analyzing the submissions, the court concluded there was jurisdiction.

"Cole-Haddon, however, submits several documents, including a spreadsheet and an affidavit by Patrick Haddon, the owner of Cole-Haddon, explaining the method they used to calculate the dollar amount owed in commissions," Castillo wrote. "Cole-Haddon uses the amount \$1,734,103 from which it calculates the 12 percent commissions, while Drew Philips argues that the amount from which the commissions should be calculated is \$1,175,853, which is the total amount of all orders that were paid for by customers.

"Drew Philips argues that the agreement provided that commissions were to be calculated 'net of cancellations, returns, discounts and allowances' and Cole-Haddon's methodology is based on a gross number, without any of the required deductions for cancellations, returns, discounts and allowances. Based on the spreadsheet submitted by Cole-Haddon that documents the orders it booked, even if this court subtracts the orders that were canceled or refused by Drew Philips, Drew Philips still owes approximately \$80,000 in commissions, an amount that meets the jurisdictional requirement. This court is required to view the record in the light most favorable to Cole-Haddon, and at the very least, this shows that it is legally possible that Cole-Haddon is owed an amount sufficient to meet the jurisdictional minimum."

Concluding the motion to dismiss for lack of subject matter jurisdiction required denial, Castillo next considered the failure to state a claim motion to dismiss the quantum meruit count.

The question before the court was whether Cole-Haddon's complaint could plead a breach of contract count and, on the same facts, plead a quantum meruit count. Setting out the contention of

Drew Philips and the applicable law, the court stated:

"Drew Philips maintains that because Cole-Haddon has already claimed the existence of a contract and did not properly plead its complaints in the alternative, it may not seek relief based on the implied contract theory of quantum meruit.

"Where the plaintiff asserts that the parties have an express contract governing their relationship, 'the doctrine of unjust enrichment has no application' and the count for unjust enrichment must be dismissed. *People ex rel. Hartigan v. E & E Hauling Inc.*, 153 Ill.2d 473, 497, 607 N.E.2d 165 (1992); *Am. Hardware Mfrs. Ass'n v. Reed Elsevier Inc.*, 03 C 9421, 2004 WL 3363844, *16 (N.D.Ill. Dec. 28, 2004) ('for [unjust enrichment] to be offered in the alternative to the contract claim it may not allege the existence of a contract governing the parties' relationship.'). Thus, while Federal Rule of Civil Procedure 8(e) allows parties to state claims in the alternative even if the claims are contradictory, Cole-Haddon does not properly plead the claim in the alternative, but rather, asserts the existence of a contractual agreement and then requests compensation under quantum meruit. Specifically, paragraph 29 of the complaint reasserts all allegations previously stated, including those claiming the existence of a contract. For this reason, the court grants Drew Philips' 12(b)(6) motion to dismiss for failure to state a claim. See *AA Sales & Assoc. Inc. v. T Prods.*, 48 F.Supp.2d 805, 808 (N.D.Ill. 1999) (dismissing the plaintiff's quantum meruit claim where the plaintiff alleged the existence of a contract); *Nesby v. Country Mut. Ins. Co.*, 346 Ill.App.3d 564, 567, 805 N.E.2d 241 (Ill.App. 2004)."

"However, because the court recognizes that the standard for filing complaints in federal court is merely notice pleading, see Fed.R.Civ.Pro. 8(a), the motion is granted without prejudice."

Finally, the court addressed Cole-Haddon's claim for an accounting, setting out the basis pleaded and the test under Illinois law for accounting — an equitable remedy:

"Cole-Haddon requests an action for a full accounting from Drew Philips of all sales, shipments, and revenues received by Drew Philips on the orders placed by Cole-Haddon prior to the termination of the agreement. Cole-

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Haddon claims that the amount to be accounted for is over \$675,000 of business procured by Cole-Haddon. In order to plead a claim for accounting in equity under Illinois law, 'the complaint must allege the absence of an adequate remedy at law and one of the following: (1) a breach of a fiduciary relationship between the parties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which are of a complex nature.' *Mann v. Kemper Fin. Cos.*, 247 Ill.App.3d 966, 980, 618 N.E.2d 317 (Ill.App.Ct. 1992)."

Castillo determined that the claim for accounting required dismissal with prejudice because the four-pronged test for a claim for accounting was not met:

"Cole-Haddon does not allege that it lacks an adequate remedy at law, and in fact, has an adequate remedy under its breach of contract and failure to pay commissions claims. See *3Com Corp. v. Electronics Recovery Specialists*, 104 F.Supp.2d 932, 941 (N.D.Ill. 2000) (noting that courts have dismissed accounting claims where breach of

contract is alleged); *Oil Express National Inc. v. Latos*, 966 F.Supp. 650, 652 (N.D.Ill. 1997).

"Furthermore, complete financial information and business records will be provided during discovery, and this information is not essential at this stage of the proceedings. Even if this court were to find that Cole-Haddon lacked an adequate remedy at law by virtue of the fact that we are allowing it to re-plead its quantum meruit claim (which is an equitable, not a legal, remedy), Cole-Haddon does not allege the existence of mutual accounts, or any fraud or breach of fiduciary duty on the part of Drew Philips, which dooms its claims for action for accounting. Therefore, the court grants Drew Philips' motion to dismiss the action for accounting with prejudice."

The district court denied the motion to dismiss for lack of subject matter jurisdiction and granted the motion to dismiss the quantum meruit count without prejudice and granted the motion to dismiss the claim for accounting with prejudice.