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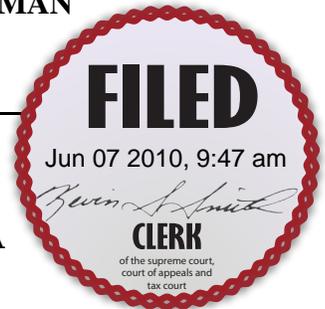
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**IN THE
COURT OF APPEALS OF INDIANA**



STUART REED d/b/a MAGNOLIA HEALTH)
SYSTEMS and HOOSIER ENTERPRISES II,)
INC. d/b/a/ ESPECIALLY KIDZ HEALTH &)
REHABILITATION CENTER,)

Appellants,)

vs.)

No. 49A02-0910-CV-1044

BLUE RIVER WELDING SUPPLY, INC.)
d/b/a MEDICAL OXYGEN COMPANY)
f/d/b/a SOUTHEASTERN WELDING SUPPLY)
AND GASES, INC.,)

Appellee.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cynthia J. Ayers, Judge
Cause No. 49D04-0809-CC-40990

June 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

On September 9, 2008, Blue River Welding Supply, Inc. d/b/a Medical Oxygen Company (“Blue River”) f/d/b/a Southeastern Welding Supply and Gases, Inc., a provider of oxygen and medical supplies, sued Stuart Reed d/b/a Magnolia Health Systems¹ and Hoosier Enterprises II, Inc. d/b/a Especially Kidz Health & Rehabilitation Center (collectively, “Reed defendants”) for replevin and payment on account.² The Reed defendants filed a seven-count counterclaim, therein asserting that Blue River had breached a written contract, violated a duty of good faith in connection with that contract, and committed criminal deception entitling the Reed defendants to recover treble damages under the crime victims’ statute, Indiana Code Section 34-24-3-1. The Reed defendants also sought equitable relief. Attached to the counterclaim was a Product Supply Agreement, which named the seller as Medical Oxygen Co., division of Indianapolis Welding Supply, Inc. and the purchaser as Hoosier Enterprises, Inc.

Blue River filed an Indiana Trial Rule 12(B)(6) motion to dismiss the breach of contract, statutory, and tort claims, asserting that it was not a party to the product supply agreement.³ Following a hearing, the motion was granted as to the breach of contract and tort

¹ Reed is the majority shareholder and President of Hoosier Enterprises II, Inc.

² Blue River asserted in its amended complaint that it had formerly done business under the name of Southeastern Welding Supply and Gases, Inc. and that Southeastern had installed copper outlets and piping at Especially Kidz Health & Rehabilitation Center and had subsequently supplied oxygen for which Blue River had issued invoices. Nonetheless, the attached invoices had been issued from “Medical Oxygen Company,” also referred to as “MedO2” of Edinburgh, Indiana, and did not reference Southeastern. (App. 474-77.)

³ Rule 12(B)(6) provides in relevant part: “the following defenses may be made by motion: . . . (6) Failure to state a claim upon which relief can be granted, which shall include failure to name the real party in interest under Rule 17[.]” Indiana Trial Rule 17(A) provides: “Every action shall be prosecuted in the name of the real party in interest.”

claims. The equitable claim and the statutory claim survive. Finding no just cause for delay, the trial court certified its order of dismissal as a final order, pursuant to Indiana Trial Rule 54(B). This appeal ensued.⁴ We affirm.

Discussion and Decision

Standard of Review

A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim rather than the facts supporting it. Babes Showclub v. Lair, 918 N.E.2d 308, 310 (Ind. 2009).

Accordingly, review of a trial court's grant or denial of a motion based upon Trial Rule 12(B)(6) is de novo. Id. Upon review of a motion to dismiss, we view the pleadings in the light most favorable to the non-moving party, with all reasonable inferences construed in the non-movant's favor. Id. "A complaint may not be dismissed for failure to state a claim upon which relief can be granted unless it is clear on the face of the complaint that the complaining party is not entitled to relief." Id.

Analysis

Counterclaim Counts I, II, IV, and V were premised upon a "Product Supply Agreement" dated January 12, 2006. (App. 485, 495.) The Product Supply Agreement, attached as Exhibit 1, disclosed the Seller as "Medical Oxygen Co. div. of Indianapolis Welding Supply, Inc. 315 W. McCarty St., Indianapolis IN 46225." (App. 495.) The named Purchaser was "Hoosier Enterprises Inc., 9455 Delegates Row, Indianapolis IN 46240." (App. 495.)

⁴ Blue River asserts, and the Reed defendants do not dispute, that Reed filed a Third Party Complaint against Indianapolis Welding Supply, Inc. d/b/a Medical Oxygen Company d/b/a Med 02 and Dwight Darlage.

As such, the Product Supply Agreement identifies a seller other than the named plaintiff/counterclaim defendant herein and further identifies a corporate purchaser other than the named defendant/counterclaimant herein.⁵ As the Reed defendants point out, there are some circumstances in which an unsigned document may constitute a contract. See Coca-Cola Co. v. Babyback's Intern, Inc., 841 N.E.2d 557, 562 (Ind. 2006). Here, however, the dismissed claims were not premised upon unsigned documents claimed to be sufficient to constitute a contract. The claims specifically premised on the written Product Supply Agreement were properly dismissed for failure to state a claim upon which relief can be granted, which includes failure to prosecute the claim in the name of the real party in interest.

Affirmed.

MAY, J., and BARNES, J., concur.

⁵ Hoosier Enterprises Inc. is either non-existent or a corporation not affiliated with the Reed defendants. The Reed defendants averred that “while the Agreement purports to be executed by ‘Hoosier Enterprises, Inc.’, there is no such de jure corporation formed by Mr. Reed.”