STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320

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JOHN DEERE FINANCIAL, f.s.b.,
f/k/a FPC FINANCIAL, f.s.b.,

Plaintiff,

v

AGRI-SCIENCE TECHNOLOGIES, LLC, a Michigan limited liability company; **DAVID C. ALEXANDER,** individually; **BOERSEN FARMS AG, LLC**, a Michigan limited liability company; **BOERSEN FARMS, INC.,** a Michigan corporation; **ARLAN J. BOERSEN,** individually; **SANDRA T. BOERSEN,** individually; **DENNIS A. BOERSEN,** individually; **ROSS M. BOERSEN,** individually; and **BOERSEN FARMS GRAIN**, a Michigan partnership,

Defendants;

and

AGRI-SCIENCE TECHNOLOGIES, LLC, a Michigan limited liability company; and **DAVID C. ALEXANDER,** individually,

Cross-plaintiffs,

v

BOERSEN FARMS, INC., a Michigan corporation; and **BOERSEN FARMS AG, LLC**, a Michigan limited liability company,

Cross-defendants.
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OPINION AND ORDER

Case No.: 18-5232-CB

Hon Jon A. Van Allsburg

Motion Before the Court

This is an action in breach of contract. Plaintiff John Deere Financial (JDF) brings a motion for summary disposition pursuant to MCR 2.116(C)(10). The motion pertains to two of the counts of JDF's complaint.[1] Count I, breach of contract, is brought against defendants/cross-plaintiff Agri-Science Technologies LLC (Agri-Science). Count II, breach of guaranty, is brought against defendant/cross-plaintiff David C. Alexander (Alexander).[2] Alexander asks that summary disposition be granted in Alexander's favor pursuant to MCR 2.116(I)(2). For the reasons stated herein, JDF's motion is denied to both count I and count II and summary disposition is granted in favor of Alexander as to count II.

Undisputed Facts

JDF is a non-bank lender. The Boersen defendants[3] are farmers. JDF advanced credit to the Boersen defendants. Agri-Science is a retail business. Alexander is Agri-Science's principal. Agri-Science sold "inputs"[4] to the Boersen defendants pursuant to a series of "customer transactions."[5]

The Boersen defendants' customer transactions were the subject of an agreement between JDF and Agri-Science titled "Multi-Use Agreement to Offer Incentive Transactions" (Agreement). Pursuant to the Agreement, JDF promised to pay Agri-Science[6] for all customer transactions – that is, all purchases by the Boersen defendants – that were submitted to JDF by Agri-Science.[7] In return, Agri-Science promised to provide JDF with prompt notice of the customer transactions by the Boersen defendants. The Agreement provides that, in the event of a material breach of the Agreement by Agri-Science, JDF may demand immediate payment from Agri-Science for the customer transactions by the Boersen defendants that had been submitted to JDF by Agri-Science for payment.[8]

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[1] The remaining counts - count III through count VI – pertain to the Boersen defendants and are not implicated by JDF's motion.

[2] JDF has entered into a stipulated consent judgment with the Boersen defendants.

[3] "The Boersen defendants" are all defendants in this case other than JDF, Agri-Science, and Alexander.

[4] An "input" is any substance used by farmers for pest control or soil fertility management. Inputs are primarily chemicals, more commonly referred to as pesticides and fertilizers, respectively.

[5] A "customer transaction" is the sale of an input by Agri-Science to the Boersen defendants for which the Boersen defendants did not pay Agri-Science. Instead, JDF paid Agri-Science for said customer transactions. Ultimately, JDF hoped to collect from the Boersen defendants for said customer transactions. Put another way, the Boersen defendants purchased inputs from Agri-Science on credit advanced to them by JDF.

[6] Agreement, ¶ 8.

[7] Agreement, ¶ 5.

[8] Agreement, ¶ 16. The essence of the parties' tri-partite arrangement was that JDF advanced credit to the farmers, the farmers purchased inputs from Agri-Science on said credit, and JDF paid Agri-Science for the farmers'

Amendment of the Agreement is governed by paragraph 22, which provides, in part:

> JDF may amend this Agreement ... by giving Merchant[9] written notice, including ... electronic means ... JDF may, at its option, provide notice of changes in the ... Agreement ... by electronic means ... if Merchant has provided JDF with an electronic mail address. Until JDF receives notice from Merchant of a new electronic mail address, notices sent by JDF to the electronic mail address Merchant most recently provided to JDF, would be deemed delivered to Merchant when sent by JDF.

In short, paragraph 22 provides that while JDF may unilaterally amend the Agreement, Agri-Science is entitled to notice of any amendment – as "notice" is defined in paragraph 22.

In October 2014, JDF amended the Agreement. The October 2014 amendment adds what amounts to a 60-day notice provision to the Agreement. The October 2014 amendment provides: (1) that Agri-Science must electronically transmit to JDF all customer transactions for which Agri-Science seeks payment from JDF within 60 days of the date of the purchase; and (2) that Agri-Science must electronically certify that each customer transaction was not older than 60 days.[10]

Alexander guaranteed Agri-Science' performance of the Agreement by executing a document titled "Farm Plan Continuing Guaranty of Obligation" (Guaranty). The Guaranty provides, in pertinent part, that Alexander "unconditionally guarantees payment of whatever sums ... [Agri-Science] shall at any time owe [to JDF]." The Guaranty is a "continuing guaranty" and "will remain in full force and effect until the effective date of a written notice of revocation delivered [to JDF]."[11]

Legal Analysis

A. Choice of Law

Both the Agreement and the Guaranty contain a choice-of-law provision stating that Wisconsin law shall govern all disputes arising thereunder.[12]

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purchases – so long as Agri-Science provided JDF with notice of the purchases within the time frame specified by the Agreement. Under the Agreement, Agri-Science' failure to provide JDF with notice of the farmers' purchases within the specified time frame would subject Agri-Science to liability to JDF for the purchases, plus other damages.

[9] Agri-Science.

[10] JDF's stated reason for the October 2014 amendment is JDF's assertion that the more time that passes between the date of a customer transaction and the date that Agri-Science seeks payment from JDF for said transaction, the higher the risk that the customer's creditworthiness will become impaired and, as a result, the higher the likelihood that JDF will have difficulty collecting from the customer for said transaction.

[11] Guaranty, ¶ 3.

[12] Agreement, ¶ 24; Guaranty, ¶ 10.

B. Standard of Review

A motion under subrule (C)(10) must "specifically identify" the issue or issues as to which the moving party believes there is no genuine issue as to any material fact. MCR 2.116(G)(4); *Bullock* v *AAA*, 432 Mich 472, 475 n 3; 444 NW2d 114 (1989). The motion tests the factual basis underlying a plaintiff's claim. *Velmer* v *Baraga Area Schools*, 430 Mich 385, 389-390; 424 NW2d 770 (1988). A court must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion and grant the benefit of any reasonable doubt to the opposing party. *Stevens* v *McLouth Steel*, 433 Mich 365, 370; 446 NW2d 95 (1989). Summary disposition may only be granted under MCR 2.116(C)(10) if, except as to the amount of damages, "there is no genuine issue as to any material fact." MCR 2.116(C)(10). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010).

C. Count I: Breach of Contract against Agri-Science

Count I of JDF's complaint alleges that Agri-Science breached the Agreement. In JDF's brief, JDF asserts that the specific issue as to which JDF believes there is no genuine issue as to any material fact is that Agri-Science breached the October 2014 amendment by falsely certifying to JDF that certain of the customer transactions made by the Boersen defendants that were transmitted by Agri-Science to JDF had taken place within sixty days of the date of transmission when in fact those customer transactions had taken place more than 60 days prior to the date of their submission by Agri-Science to JDF.[13]

Agri-Science responds that Agri-Science never received notice of the October 2014 amendment, i.e., the 60-day notice provision. Agri-Science asserts that under paragraph 22 of the Agreement, Agri-Science is entitled to notice of any amendment to the Agreement. In support of Agri-Science' response, Agri-Science has submitted two affidavits: the affidavit of Dave Alexander and the affidavit of Kevin DeHerrera.[14] In his affidavit, Alexander states that he "was never provided with a document or email which would change the terms and conditions of the Guaranty." In his affidavit, DeHerrera states: (1) from 2014 to the present, he handled emails and correspondence for Agri-Science; (2) he has reviewed said emails and correspondence; and (3) Agri-Science never received notice of the October 2014 amendment.

JDF concedes that Agri-Science was entitled to notice of the October 2014 amendment – as "notice" is defined in paragraph 22. However, JDF contends that Agri-Science did, in fact, receive such notice. In support of this contention, JDF has submitted the affidavit of Cherie Rosseter. Ms. Rosseter is employed by JDF as "multi-use account product manager." In her

[13] Paradoxically, while JDF's brief alleges that Agri-Science breached the October 2014 amendment by *affirmatively* transmitting to JDF customer transactions that were made *outside* the 60-day window, in JDF's complaint, JDF alleges that Agri-Science breached the October 2014 amendment by *failing* to transmit to JDF customer transactions that were made *within* the 60-day window. See complaint, paragraphs 23 and 80.

[14] DeHerrera is Agri-Science' general manager.

affidavit, Ms. Rosseter states that on October 20, 2014 she emailed the October 2014 amendment to Agri-Science and on October 30, 2014, she mailed a hardcopy of the October 2014 amendment to Agri-Science by regular mail.

Based on the affidavit of Cherie Rosseter and the counter-affidavits of Dave Alexander and Ken DeHerrera, this Court finds that there is a genuine and material factual dispute as to whether or not Agri-Science received notice of the October 2014 amendment. Such disputes are for the trier of fact to resolve. As to count I, JDF's motion for summary disposition must be denied.[15]

D. Count II: Breach of Guaranty against Alexander

Count II is pled in breach of guaranty against Alexander. Judging from JDF's brief, the specific issue as to which JDF believes there is no genuine issue as to any material fact is that Alexander breached the Guaranty by failing to pay JDF the amount owed to JDF by Agri-Science.

Alexander contends that, like Agri-Science, Alexander never received notice of the October 2014 amendment. Moreover, Alexander argues that even if the jury finds that Alexander *did* receive notice of the October 2014 amendment and the amendment therefore became a part of the Agreement, because the October 2014 amendment amounts to a material alteration of the Agreement, Alexander is relieved of his obligations under the Guaranty, since, under Wisconsin law, when a guarantor executes both the underlying agreement and a continuing guaranty thereof and there is a subsequent material alteration of the terms of the underlying agreement by the parties thereto without the guarantor's consent, the guarantor is relieved of his obligations under the continuing guaranty. JDF disagrees. JDF contends the guarantor's obligations under the continuing guaranty remain in full force and effect even in the event of a material alteration to the terms of the underlying agreement without the consent of the guarantor.

Lakeshore Commercial Finance Corp v *Drobac*, 107 Wis 2d 445; 319 NW2d 839 (1982), a decision of the Supreme Court of Wisconsin cited by Alexander, stands for the proposition that "... a material alteration in the principal contract, when that alteration is made after the execution of the guaranty contract and without the consent of the guarantor, discharges the guarantor if the material alteration injures the interest of the guarantor." *Id.*, at 454.

In *Lakeshore*, the guarantor, Lucille Drobac, in 1977 agreed to guarantee payment of certain notes executed by the debtor corporation. The guaranty agreement was a "continuing guaranty," as the agreement she executed in 1977 contemplated a guaranty of indebtedness to be

[15] Citing MCR 2.111(F)(3)(c), JDF argues that Agri-Science' assertion that Agri-Science never received notice of the October 2014 amendment is an affirmative defense and that Agri-Science has waived said defense by failing to assert this defense in Agri-Science' first responsive pleading. This Court disagrees. An affirmative defense is a defense based on circumstances that are not part of the plaintiff's cause of action. See 1 Longhofer & Quick, Michigan Court Rules Practice, § 2111.12, p 357. Count I alleges breach of the Agreement. Amendment of the Agreement and notice thereof are governed by paragraph 22. JDF bears the burden of proof on each element of JDF's cause of action in breach of the Agreement. The terms of the Agreement, including notice to Agri-Science of the October 2014 amendment, are part of JDF's cause of action. Therefore, notice of the October 2014 amendment is not an affirmative defense.

created as the result of future financial transactions. *Id.*, at 454-455.[16] The original 1977 agreement permitted the debtor to pay a discounted sum in full payment if made by June 30, 1980. However, a 1979 amendment to that agreement – in which Lucille did not participate – shortened the discount payment deadline to December 31, 1979. The Court found that the original agreement, "did not contemplate that, in respect to past transactions to which she has been a guarantor, she be the guarantor of changed terms in respect to those past transactions when she has not acquiesced in the changed terms." *Id.* Because the 1979 amendment prejudiced her interests by reducing the likelihood that the debtor could pay the discount payment with less time available in which to make it, her liability as a guarantor was discharged.

That is not the context of the present case. The rule cited in *Lakeshore* does not apply where the guarantor agreed, in the *original* guaranty agreement, to the subsequent modifications of the underlying contract. In *Park Bank v Westburg*, 348 Wis2d 409; 832 NW2d 539 (2013), the Wisconsin Supreme Court noted that there are exceptions to the rule cited in *Lakeshore*, as "the defenses available to a guarantor are grounded in the specific terms and conditions of the guaranty contract." *Id.* at 434-435. For example, in *Ford Motor Co v Lyons,* 137 Wis.2d 397; 405 NW2d 354 (1987), the guarantor appealed a finding of liability where the total amount of credit extended to the primary debtor had been increased after execution of the guaranty. However, the Wisconsin Supreme Court noted that the original financing and guaranty agreement clearly allowed for subsequent adjustments of credit, and denied relief to the guarantor. *Id.*, at 450 n14.

The reasons for this distinction were discussed in *U.S. Shoe Corp v Hackett*, 793 F.2d 161 (7th Cir, 1986) (applying Wisconsin law):

> "The principle that a big increase in risk discharges the guarantor is an implication of the fact that a guaranty is a commercial contract. The guarantor takes a risk in exchange for a benefit (here, the indirect benefit of appreciation in the value of the family's corporations). Unless the guarantor can estimate the size of the risk, he cannot tell whether the return is worthwhile. When events beyond the guarantor's control dramatically increase the risk, the assumptions on which the contract was founded are undercut." *Id.*, at 162. A guarantor may consent to the increased risk if he knows of the risk and proceeds heedless of it. *Closer to the point, a guarantor may consent to the increased risk by creating it. Id.*, at 163 (emphasis added).

As noted above, Alexander may have consented to the increased risk when he executed the "Multi-Use Agreement to Offer Incentive Transactions" on behalf of Agri-Science (paragraph 22 of which expressly permitted the creditor to modify terms of the agreement with

[16] In the present case, paragraph 3 of the Guaranty – titled "Duration of Guaranty" – states, inter alia, that "This is a continuing guaranty, and it will remain in full force and effect until the effective date of a written notice of revocation delivered to FPC either personally or by Registered or Certified Mail...." Paragraph 3 went on to state the guarantor's agreement to be bound by any modifications of the underlying credit agreement, even without the guarantor's consent, stating explicitly, "It's the undersigned guarantor'(s) responsibility to keep informed of and understand the business dealings of the Merchant." (Complaint, Ex. 4). As the stated "Owner" and principal of the Merchant, it appears that was an obligation the guarantor was willing to undertake, and Wisconsin law allowed him to do so.

notice to Agri-Science), and personally executed the continuing guaranty. If the 2014 amendments increased the guarantor's risk beyond the benefit to be received, Alexander, as the guarantor, could have given notice of revocation pursuant to paragraph 3 of the contract. If he did not do so, then he would be bound by the modification of the Agreement pursuant to the original continuing guaranty.

Therefore, pursuant to the above authorities, if the trier of fact finds that Agri-Science *did* receive notice of the October 2014 amendment, then the October 2014 amendment became a part of the Agreement, and Alexander is bound by his obligations under the Guaranty.

However, if the trier of fact finds that Agri-Science did *not* receive notice of the October 2014 amendment, then Agri-Science has not breached the Agreement and, consequently, Alexander's obligations under the Guaranty have not been triggered. Therefore, whether Alexander is liable as a guarantor will depend upon the trier of fact's findings on the question of notice.

Conclusion

JDF's motion for summary disposition brought pursuant to MCR 2.116(C)(10) is DENIED as to both count I and count II.

IT IS SO ORDERED.

Dated: May 20, 2019

Hon. Jon A. Van Allsburg, Circuit Judge