

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Wiley Y. Daniel

Civil Action No. 09-cv-02118-WYD-CBS

ENGLERT, INC., a New Jersey corporation,

Plaintiff,

v.

NEW TECH MACHINERY CORP., a Colorado corporation,

Defendant.

ORDER

THIS MATTER is before the Court on a review of Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Claim One of Plaintiff's Complaint for Lack of Standing (docket #16), filed November 2, 2009. Attached to the Response are matters outside the pleadings, including a declaration, an assignment, and a patent assignment agreement.

The matters that Plaintiff attaches relate to Defendant's motion to dismiss which seeks dismissal under FED. R. CIV. P. 12(b)(6). Accordingly, if the evidence is not excluded, the motion to dismiss pursuant to Rule 12(b)(6) shall be treated as a motion for summary judgment. FED. R. CIV. P. 12(b); *Lucero v. Gunter*, 52 F.3d 874, 877 (10th Cir. 1995).

I find that it is appropriate to consider the evidence Plaintiff attaches to its response in resolving Defendant's motion. Accordingly, notice is hereby given that Defendant's Motion to Dismiss Claim One of Plaintiff's Complaint for Lack of Standing

Pursuant to Fed. R. Civ. 12(b)(6) and Failure to Join a Party Pursuant to Fed. R. Civ. P. 12(b)(7) (docket #14) shall be treated as a motion for summary judgment and the evidence attached to the response shall be considered. Conversion of a motion to dismiss to a motion for summary judgment is proper where, even though the motion does not rely on matters outside the pleadings, the response attaches such materials which are then considered by the court in deciding the motion. See *Whitesel v. Sengenberger*, 222 F.3d 861, 866 (10th Cir. 2000).

Any party who wishes to submit additional materials for the Court to consider in connection with the motion for summary judgment may do so by Thursday, November 12, 2009. Alternatively, Defendant may attach such matters in its reply brief.

In conclusion, it is

ORDERED that Defendant's Motion to Dismiss Claim One of Plaintiff's Complaint for Lack of Standing Pursuant to Fed. R. Civ. 12(b)(6) and Failure to Join a Party Pursuant to Fed. R. Civ. P. 12(b)(7) (docket #14) is converted to a motion for summary judgment. It is

FURTHER ORDERED that if any party wishes to submit additional materials to be considered in connection with the motion for summary judgment, it shall do so by **Thursday, November 12, 2009**. Alternatively, Defendant may submit such material in connection with its reply brief, which is due pursuant to the deadline set forth in D.C.COLO.LCivR 7.1.C.

Dated: November 3, 2009

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
Chief United States District Judge