

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

GARRETT-STOTZ COMPANY,)	
)	
Plaintiff,)	
)	
v.)	4:10-cv-56-WGH-TWP
)	
ROSE SEEDING AND SODDING, INC.,)	
MARK D. ROSE, LLC,)	
SUPERIOR EROSION CONTROL LLC and)	
MARK ROSE,)	
)	
Defendants.)	

**ORDER GRANTING, IN PART, AND DENYING, IN PART,
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

This matter is before the Honorable William G. Hussmann, Jr., United States Magistrate Judge, on the Plaintiff’s Motion for Summary Judgment filed December 3, 2010. (Docket Nos. 21-22). Defendants have failed to file a response to the motion.

The Plaintiff is an insurance agency which assists its clients in addressing their risk management needs through obtaining insurance policies and related services from third-party insurers. The Plaintiff alleges that “pursuant to an agreement” between the Plaintiff and the Defendants, the Plaintiff obtained commercial insurance policies for the defendants. (See Complaint, ¶ 11). However, the agreement between the Plaintiff and all of the Defendants is not attached to the Complaint or the Motion for Summary Judgment, and therefore its terms – whether written or oral – are not before the Court. As a result of

there being no written agreement between the parties to interpret, and this Court's inability to ascertain what the terms of any oral agreement might have been with respect to the Plaintiff and the Defendants, this Court is unable to grant the Plaintiff's Motion for Summary Judgment on the Plaintiff's claim that the Defendants have breached their agreement to pay for certain insurance policies.

However, Exhibit 5 to the Motion for Summary Judgment is a document entitled "Forbearance and Security Agreement." That document is signed by Mark Rose, as President of Rose Seeding and Sodding, Inc., and is signed by Mark Rose, personally. Undisputed facts show that payments under that agreement have not been made by those two entities. The Court notes that there is no signature on this document on behalf of Mark D. Rose, LLC, or Superior Erosion Control, LLC.

Under the terms of the agreement, Defendants Rose Seeding and Sodding, Inc., and Mark Rose acknowledge and agree that they owe \$76,364.00 to the Plaintiff, jointly and severally. In addition, under paragraph 2.04 of the agreement, the Defendants have agreed that the amount owed shall earn interest at the annual rate of 18% until paid in full.

Pursuant to the Affidavit of William A. Kantlehner, III, the Defendants have made no payments since April 14, 2010. The Court concludes that default occurred when the Defendants did not make a payment within five (5) days of April 14, 2010 and, therefore, interest commences to run in this case as of April 19, 2010.

There being no just reason for delay with respect to Defendants Rose Seeding and Sodding, Inc., and Mark Rose, a final judgment will enter this date as to those entities on the Plaintiff's claim for breach of the forbearance agreement only.

In the event the Plaintiff wishes to pursue further claims for breach of some contract to provide insurance against any of the four named defendants or further claims for breach of the forbearance agreement against Mark D. Rose, LLC, or Superior Erosion Control, LLC, this matter is set for an **EVIDENTIARY HEARING** on **THURSDAY, MAY 5, 2011**, at 2:30 p.m., New Albany time (EDT), in Room 200, U.S. Courthouse, New Albany, Indiana. In the event the Plaintiff does not wish to pursue those claims or entities, it should file motions to dismiss or stipulations to dismiss prior to the date of the evidentiary hearing.

SO ORDERED.

Dated: January 20, 2011



William G. Hussmann, Jr.
United States Magistrate Judge
Southern District of Indiana

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