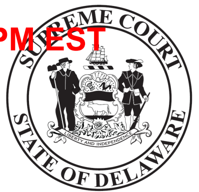
EFiled: Nov 19 2012 06:10PM EST
Filing ID 47853969
Case Number 485,2012



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT E. WINK, Defendant Below, Appellee/Cross Appellant, v. BONANZA RESTAURANT COMPANY, Plaintiff Below, Appellant/Cross Appellee.	)	No. 485, 2012 On Appeal from Superior Court of the State of Delaware in and for Sussex County, C.A. No. S10C-10-018 RFS

**DEFENDANT BELOW/APPELLEE'S
ANSWERING BRIEF ON APPEAL
AND OPENING BRIEF ON CROSS APPEAL**

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NATURE AND STAGE OF THE PROCEEDINGS

This is an appeal from the April 17, 2012 Memorandum Opinion (the "Opinion") and August 6, 2012 Order of the Superior Court in a breach of contract action brought by Bonanza Restaurant Company ("Bonanza"). Bonanza claimed that four Consent to Assignment Agreements (the "Consents") signed by Defendant Robert E. Wink obligated him to pay estimated royalties for the full contractual term of the four Franchise Agreements between Bonanza and four non-party entities who had bought Bonanza restaurants from Mr. Wink. The full contractual term for three of the four Bonanza restaurants was five years and the full contractual term for the fourth Bonanza restaurant was eight years.

Bonanza's complaint sought damages in excess of $1,319,899.83, primarily for the remaining five and eight years of future royalty fees. Mr. Wink answered the Complaint on November 19, 2010, denying the allegations.

On April 17, 2012, the Superior Court granted summary judgment in Mr. Wink's favor. The Superior Court concluded that the Consents limited Mr. Wink's obligations under the Franchise Agreements to one year (the "Guaranty Period"). In addition, the Court found that neither the Franchise Agreements nor Consents provided recovery for future royalty fees. The Court, however, rejected Mr. Wink's argument that Bonanza had also waived any right to future royalty fees. Mr. Wink then agreed that he did owe Bonanza $2,120.90 for certain unpaid fees due when the restaurants closed. As a result, based upon a

stipulation of the parties, the Superior Court thereafter entered the Order for Bonanza in that amount.

Bonanza appealed and Mr. Wink cross appealed. This is Mr. Wink's Answering Brief in response to Bonanza's appeal and his Opening Brief in support of his cross appeal.

SUMMARY OF THE ARGUMENT ON APPEAL

1. Denied. The Superior Court correctly denied Bonanza's motion for summary judgment and correctly granted summary judgment in favor of Mr. Wink. The Superior correctly ruled that the Franchise Agreements and Consents did not permit recovery for future royalty fees. The Superior Court correctly found that in addition to Bonanza's failure to include language in the Franchise Agreements entitling Bonanza to future royalty fees upon termination, Mr. Wink's obligations under the Consents are limited to the one year Guaranty Period.

SUMMARY OF THE ARGUMENT ON CROSS APPEAL

1. The Superior Court incorrectly determined that future royalties were actual damages and not subject to the waiver of damages provision in the Franchise Agreements.

STATEMENT OF FACTS

On November 6, 2006, Bonanza entered into four separate, but identical Franchise Agreements with YCL Milford Restaurant, LLC, YCL Millsboro Restaurant, LLC, YCL Delmar Restaurant, LLC, and KSL Pocomoke Restaurant, LLC (the "Franchisees") to operate four Bonanza restaurants (the "Bonanza Restaurants"). (A70, A206, A343, A485.) Mr. Wink had previously owned and operated those Bonanza Restaurants and was selling them to the four new Franchisees. On that same date, Mr. Wink entered into the four separate and almost identical Consents with Bonanza in which he guaranteed the new Franchisees "performance" (A158, A294, A430, A575) and post-termination obligations in the Franchise Agreements that included payment owed to the Franchisor at time of termination. (A122 §18.A., A258 §18.A., A395 §18.A., A537 §18.A.) All of Mr. Wink's obligations were limited to the Guaranty Period.

The Consents' one year Guaranty Period, specifically, paragraph 6 states:

> Notwithstanding anything contained in this Agreement or the New Franchise Agreement to the contrary, [Bonanza] agrees that [Mr. Wink's] obligations under the [Consents] shall be limited to a period of one (1) year from the effective date of the New Franchise Agreement (the "Guaranty Period").

(A158 ¶6, A296 ¶6, A433 ¶6, A577 ¶6.) That one year period ended November 5, 2007.

The Consents further state:

> If the Guaranty Period does not end prior to the expiration or termination of the Franchise Agreement, [Mr. Wink's] Personal Guaranty will survive beyond such expiration or

termination and will be subject to the [Franchisee's] post-termination obligations.[1]

(A158 at ¶ 6.) The Superior Court concluded that the post-termination obligations under the terms of the Franchise Agreements included "payment of obligations due at the time of termination" (Opinion at 10), but not "future royalties." (*Id.*)

On October 25, 2007, on the eve of the one year anniversary of the sale to the new Franchisees and the end of the Guaranty Period, Bonanza terminated the Franchise Agreements. (A614 ¶ 17, A618 ¶ 31, A621 ¶ 45, and A625 ¶ 60.) On that same day, Bonanza sent Mr. Wink a demand for payment. (A591-92.) Almost three years later, Bonanza filed a breach of contract action and sought future royalty fees for the five to eight years beyond the Consents' Guaranty Period.

The parties filed cross-motions for summary judgment. Mr. Wink argued that: (1) neither the Consents nor the Franchise Agreements obligated the payment of future royalty fees (A866), (2) the Consents limited Mr. Wink's obligations to the one year Guaranty Period (A866), and (3) Bonanza may not recover future royalty fees because it waived its right under the Franchise Agreements to such speculative and consequential damages. (A637.)

Mr. Wink also filed a motion *in limine* to exclude the expert report and testimony of Bonanza's expert witness who claimed Mr. Wink owed $1,674,179.83 for the remaining five and eight years after

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[1] The three other Consents have slightly different language: "If the Guaranty Period does not end prior to the expiration or termination of the Franchise Agreement, [Mr. Wink's] Personal Guaranty will survive beyond such expiration or termination and will be apply [sic] to the Assignee's post-termination obligations." (A296 at ¶ 6, A433 at ¶ 6, A577 ¶ 6.)

Bonanza had terminated the Franchise Agreements. The expert's report was based on projecting that the four failed Bonanza Restaurants would stay in business for the remaining five to eight years despite their losses, generate royalties to Bonanza calculated as a percentage of gross sales and perform as well in the future as other, successful Bonanza Restaurants. The Superior Court did not rule on that motion prior to the entry of the Order.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY RULED MR. WINK HAD NO LIABILITY UNDER THE CONSENTS AND FRANCHISE AGREEMENTS FOR DAMAGES ATTRIBUTABLE TO FUTURE ROYALTIES

A. Question Presented

The question presented is whether the Superior Court erred in granting summary judgment in favor of Mr. Wink and against Bonanza on its claim for recovery of future royalties. This issue was raised in the parties' cross summary judgment motions and addressed in the Opinion. (A637-40, A804-07, A859-62, A866-69 & Opinion at 10-11.)

B. Scope Of The Review

The interpretation of a contract is a question of law subject to *de novo* review. *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 731 A.2d 811, 816 (Del. 1999). The Superior Court's granting of summary judgment is also reviewed *de novo*. *Estate of Rae v. Murphy*, 956 A.2d 1266, 1269-70 (Del. 2008).

C. Merits Of Argument

In its Opinion, the Superior Court found (1) the Consents were limited to the one year Guaranty Period, and (2) nothing in the Franchise Agreements' post-termination obligations warranted extending Mr. Wink's one year Guaranty Period. The Superior Court was correct.

1. Mr. Wink's Obligations under the Limited Guaranties are limited to the One Year Guaranty Period

a. Bonanza's reliance on *Meineke Car Care Centers, Inc. v. RLB Holdings LLC* and *Hardee's Food Systems, Inc. v. Hallbeck* is flawed

Bonanza's appeal rests entirely on two federal court decisions that on their face do not apply to the facts in this appeal.[2] The most important fact that sets this case apart and which the Superior Court relied upon was that Mr. Wink's obligations under the Franchise Agreements were limited to the Guaranty Period. The *Meineke Car Care Centers, Inc. v. RLB Holdings LLC* court determined that "[w]hile the parties were certainly free to contract for liquidated damages or to bar a right to recover lost profits . . . they did not do so in this case." 423 F. App'x 274, 280 (4th Cir. 2011). This is exactly what the parties in the instant matter did - limit Bonanza's right to recover future royalty fees. Unlike the franchise agreements in *Meineke*, the Consents expressly limit Bonanza's recovery of prospective damages from Mr. Wink by limiting his obligations under the Franchise Agreements to the one year Guaranty Period.

Hardee's Food Sys., Inc. v. Hallbeck adopted *Meineke's* reasoning, and, thus, it too is not similar to this case where the parties expressly limited the guarantor's obligations to one year. 2011 WL 4407435, at *1. Although, both cases state a party guaranteed the franchise agreements, neither case involves the effect of a one year limitation on such obligations. *See Meineke*, 423 F. App'x at 276

[2] Op. Br. at 8-12, citing *Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC*, 423 F. App'x 274 (4th Cir. 2011) and *Hardee's Food Sys., Inc. v. Hallbeck*, 2011 WL 4407435 (E.D. Mo. 2011). Note that the *Meineke* opinion states it is "not [a] binding precedent."

(stating that the franchisee's owners executed personal guaranties as part of each shop's franchise agreement, guaranteeing the franchisee's performance and obligations under the franchise agreement); *Hardee's*, 2011 WL 4407435, at *1 (stating that the defendants signed a personal guarantee guaranteeing their performance under the franchise agreement). Thus, contrary to Bonanza's assertion based upon *Meineke* and *Hardee's* that the "Franchise Agreements' silence as to the availability of damages for post-breach royalty payments does not prevent Bonanza from recovering such damages," the Consents' limitations on Mr. Wink's obligations under the Franchise Agreements do prevent Bonanza from recovering past the Guaranty Period. (Op. Br. at 15.)

b. The Notwithstanding Provision in the Consents limits Mr. Wink's obligations

Bonanza is not entitled to future royalty fees because under the Consents Mr. Wink's guarantees were limited to the one year Guaranty Period. After setting forth Mr. Wink's obligations, the Consents unambiguously provide that:

> **Notwithstanding anything** contained in this Agreement or the New Franchise Agreement[s] to **the contrary** [Bonanza] agrees that [Mr. Wink's] obligations under the Personal Guaranty shall be limited to a period of one (1) year from the effective date of the New Franchise Agreement[s].

(the "Notwithstanding Provision"). (A160 at ¶ 6, A296 at ¶ 6, A433 at ¶ 6 & A577 ¶ 6.) (emphasis added). The United States Supreme Court held in *Cisneros v. Alpine Ridge Group* that the inclusion of a notwithstanding clause in a contract context "clearly signals the drafters intention that the provisions of the 'notwithstanding' section override conflicting provisions." 508 U.S. 10, 18 (1993).

Similarly, under Texas law, when parties use the clause "[n]otwithstanding anything to the contrary contained herein" in a paragraph of their contract, they contemplate the possibility that other parts of their contract may conflict with that paragraph, and they agree that this paragraph must be given effect regardless of any contrary provisions of the contract. *See Cleere Drilling Co. v. Dominion Explor. & Prod., Inc.*, 351 F.3d 642, 649 & n.13 (5th Cir. 2003) (applying Texas law to drilling contract containing language substantially similar to paragraph 14.11 of the Drilling Contract and stating that the "[n]otwithstanding anything to the contrary contained herein" clause constitutes an express declaration by the parties that this paragraph of the drilling contract supersedes all other provisions of the contract); *Gulf Oil Corp. v. Southland Royalty Co.*, 496 S.W.2d 547, 551-52 (Tex. 1973) (stating that the section of the lease containing "anything in this lease to the contrary notwithstanding" clause gave that section of the lease priority over any contrary lease provision); *Helmerich & Payne Int'l. Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 643 (Tex. App. 2005) (stating that notwithstanding provision must be given effect regardless of the conflict). Thus, if the Consents or Franchise Agreements provide a different time period than the one year Guaranty Period, then the Notwithstanding Provision must be given effect.

Bonanza contends that Mr. Wink seeks to use the Notwithstanding Provision to alter his duties under the Consents because this provision means that the guaranty could only be invoked during the one

year Guaranty Period. (Op. Br. at 18-20.) Bonanza's interpretation of the Consents is incorrect.

Contrary to Bonanza's contention, Mr. Wink is not seeking to "alter [his] obligation to guarantee the Franchisees' obligations or nullify any other provision." (Op. Br. at 19.) The Consents unambiguously provide that Mr. Wink's "obligations under the Personal Guaranty shall be limited to a period of one (1) year." (A735 at ¶ 6.) This language does not alter or cancel Mr. Wink's obligations, but merely provides how long his guarantee would last. Thus, Bonanza's contention that the Notwithstanding Provision means the guaranty could only be invoked during the one year Guaranty Period is directly inapposite of the contractual language.

Next, Bonanza contends that the following sentence - "If the Guaranty Period does not end prior to the expiration or termination of the Franchise Agreement, [Mr. Wink's] Personal Guaranty will survive beyond such expiration or termination and will be subject to the Assignee's post-termination obligations" (*Id.*) - confirms its interpretation of the Consents. This is also incorrect. This sentence only provides that Mr. Wink's obligations, upon termination, will continue notwithstanding the termination of the Franchise Agreement, but it does not state that his obligations will continue past the Guaranty Period.

Moreover, extending Mr. Wink's guarantee beyond the one year Guaranty Period would make the Notwithstanding Provision almost meaningless. For example, it is undisputed that if the Franchisees " . . . had operated the restaurants in compliance with the Franchise

Agreements and the franchises had not been terminated within the one-year Guaranty Period, [Mr.] Wink's guaranty obligations would have been eliminated after the first year." (Op. Br. at 20.) It makes no sense to adopt Bonanza's interpretation that if the Franchisees operated the Bonanza Restaurants for 364 days and are one day short of a year, that Mr. Wink's obligations then extended for the many remaining years of the Franchise Agreements and for millions in future estimated fees.

Significantly, Bonanza failed to offer any evidence that supports its novel interpretation of the Consents' Notwithstanding Provision. Instead, the Superior Court's interpretation that Mr. Wink was obligated for one full year, despite termination of the Franchise Agreements, is logical and consistent with a reading of the Consents as a whole.

2. Neither the Consents nor the Franchise Agreements Requires the Payment of Future Royalties by Mr. Wink

Mr. Wink's interpretation of the Consents is further supported by the fact that neither the Consents nor the Franchise Agreements obligates the payment of future royalty fees. The Superior Court correctly found that "[f]uture royalty fees are not provided for or mentioned anywhere in either the Franchise Agreements or the Guaranties. The necessary conclusion is that Bonanza is not entitled to recover lost future royalty payments." (Opinion at 11.) The Franchisee's post-termination obligations provision, Section 18.A, provides that upon termination or expiration of the Franchise

Agreements, the Franchisee must pay amounts owed to the Franchisor. [3] It does not, however, state the Franchisee must pay amounts that would be earned in the future if the Bonanza Restaurants stay open. When Bonanza terminated the Franchise Agreements Mr. Wink was only obligated to pay past due fees.

Finally, even if the Franchisees had an obligation as a matter of general, common law to pay future lost profits of Bonanza, that does not mean Mr. Wink had that obligation. His Consents are limited to the obligations set out in the Franchise Agreements, not to any other obligations the Franchisees owed.

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[3] "18.A. PAYMENT OF AMOUNTS OWED TO FRANCHISOR.

> Upon expiration or termination of this Agreement, Franchisee shall immediately pay to Franchisor all royalty fees, advertising contributions, amounts owed for products purchased by Franchisee from Franchisor or from its affiliate, and interest due Franchisor or its affiliates on any of the foregoing. Franchisee must contemporaneously with payment furnish a complete accounting of all amounts owed to Franchisor and its affiliates."

II. THE SUPERIOR COURT INCORRECTLY DETERMINED THAT FUTURE ROYALTIES WERE ACTUAL DAMAGES AND NOT SUBJECT TO THE WAIVER OF OTHER DAMAGES PROVISION

A. Question Presented

The question presented was whether the Superior Court erred in determining that future royalties were actual damages and not subject to the waiver of other damages provision. This issue was raised in the parties' cross summary judgment motions and addressed in the Opinion. (A637-40, A804-07, A859-62, A866-69 & Opinion at 4-10.)

B. Scope Of The Review

The interpretation of a contract is a question of law subject to *de novo* review. *ABB Flakt, Inc.*, 731 A.2d at 816. The Superior Court's granting of summary judgment is also reviewed *de novo. Estate of Rae*, 956 A.2d at 1269-70.

C. Merits Of Argument

In its Opinion, the Court determined that the waiver of consequential and speculative damages did not preclude Bonanza's recovery of future royalty fees. (Opinion at 10.) Instead of focusing on the actual damages that existed as of the date of the alleged breach, the Superior Court analyzed the meaning of actual and consequential damages. (*Id.*) This approach was incorrect. As of the date of the alleged breach, the only damages that existed were the unpaid royalty fees.

Section 20.J of the Franchise Agreements (the "Waiver") clearly states:

> Franchisor and Franchisee hereby waive to the fullest extent permitted by law, any right or claim for any punitive, exemplary, consequential or speculative damages against the other and agree that in the event of a dispute

> between them, except as otherwise provided herein, each shall be limited to the recovery of actual damages sustained by it.

(A 128, A264, A401, A543) (emphasis omitted.)

Accordingly, the Waiver prohibits Bonanza's future royalties claim because (1) consequential damages are waived to the fullest extent permitted by law; and (2) by their very nature, Bonanza's future royalties claim is one for consequential damages. In addition, even if Bonanza's damages are not considered consequential, Bonanza's damages claim is still barred because it was not foreseeable.

1. Bonanza is not entitled to future royalty fees because such fees are consequential damages which it waived to the fullest extent permitted by law

The Wavier excludes to the greatest extent possible consequential damages. *See generally DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *10 (Del. Ch. Jan. 23, 2006) (explaining that to "the fullest extent permitted by law" reaches as far as public policy will allow). Under Texas case law, future royalty fees may be both consequential and actual/direct damages. *See e.g., Cherokee Cnty. Cogeneration Partners, L.P. v. Dynegy Mktg. and Trade*, 305 S.W.3d 309, 314 (Tex. App. 2009) ("The category of 'consequential damages' may encompass some, but not all, claims for loss of profits'" and "[l]ost profits may be classified as either direct or consequential damages. . . ."). Since even if under Texas law future royalty fees may be considered consequential damages, they are excluded under the Wavier provision when Bonanza waived its claim to consequential damages to the fullest extent permitted by law.

The Superior Court found that direct damages flow naturally and necessarily from a defendant's wrongful act and consequential damages result naturally, but not necessarily from the wrongful act. (Opinion at 7-8.) Using this definition, Bonanza's future royalty fees are consequential damages. In this case, future royalties are the consequence of the breach of contract because they only occurred much later when there was no revenue to use to calculate those consequential damages. Thus, the nature of Bonanza's future royalties claim is that they fall into the consequential damages category.

Moreover, as noted *supra*, the Franchise Agreements state that Bonanza may only recover "actual damages sustained by it." "Sustained" is defined as experienced or suffered. The American Heritage Dictionary 1368 (3d ed. 1998). Therefore, "actual damages sustained" means actual damages suffered. At the time of the alleged breach, the only damages Bonanza sustained were the unpaid royalty fees of $2,120.90. At that time none of the royalty fees it now seeks had come due. Therefore, Bonanza had not sustained those damages.

2. Liability for future royalties was not foreseeable

Under Texas law, "[i]n an action for breach of contract, actual damages may be recovered when loss is the natural, probable, and foreseeable consequence of the defendant's conduct." *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex. 1981); see also *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Even if as Bonanza claims its damages are direct and actual, the occurrence of those "damages" was not foreseeable as the usual and necessary consequence of any wrongdoing.

First, with respect to the Franchise Agreements, these Agreements do address the Franchisees' continuing obligations upon termination. The post-termination obligations include payments of amounts "owed" to Bonanza upon termination of the agreement. (*See* A122 §18.A., A258 §18.A., A395 §18.A., A537 §18.A.; Opinion at 10-11.) However, as the Superior Court found, these Agreements do not provide for payment of future royalty fees, nor do they provide any method for the calculation of those fees. (Opinion at 10-11.) Thus, it was not foreseeable that upon termination of the Franchise Agreements, the Franchisees or Mr. Wink would be liable for any future royalty fees, especially when the business ceased making any revenue.

Second, it was not foreseeable that Mr. Wink's guarantee to perform post-termination obligations would extend Mr. Wink's obligations past the one year Guaranty Period. (*See* Section 2(b), supra). The Guaranty Period is what the parties foresaw as how long Mr. Wink was obligated to Bonanza. They certainly did not foresee he was obligated for five to eight more years despite having sold the restaurants.

CONCLUSION

For the foregoing reasons, Mr. Wink respectfully requests the Supreme Court affirm the Opinion of the Superior Court, and on the cross appeal hold Bonanza's damage request is barred by the Franchise Agreements' Waiver provision, and that future royalty fees were not a foreseeable consequence of the parties' agreements.

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DATED: November 19, 2012