

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

DEFENDANT BELOW/APPELLEE'S
REPLY BRIEF ON CROSS APPEAL

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DATED: December 31, 2012

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ARGUMENT	1
THE SUPERIOR COURT INCORRECTLY DETERMINED THAT FUTURE ROYALTIES WERE ACTUAL DAMAGES AND NOT SUBJECT TO THE WAIVER OF OTHER DAMAGES PROVISION	1
A. The Waiver provision excludes consequential damages to the fullest extent of the law	1
B. The issue of foreseeability was raised below and Mr. Wink's liability for future royalties was not foreseeable	2
CONCLUSION	5

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page</u>
<i>Cherokee County Cogeneration Partners, L.P. v.</i> <i>Dynegy Mktg. & Trade</i> , 305 S.W.3d 309, 314 (Tex. App. 2009)	1
<i>Mead v. Johnson Group, Inc.</i> , 615 S.W.2d 685, 687 (Tex 1981)	3

ARGUMENT

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

A. The Waiver provision excludes consequential damages to the fullest extent of the law

Plaintiff contends Mr. Wink's waiver argument fails because ". . . it does not recognize the crucial distinction between lost profits that would have been earned under the parties' own contract, as compared to lost profits that may have been earned from some other source." (Ans. Br. at 9.) However, this distinction is not necessary because consequential damages are waived under the Franchise Agreements to the fullest extent permitted by law. (A128, A264, A401, & A543.) In its Answering Brief, Plaintiff failed to address the effect of this type of waiver language and relies on case law which does not include an examination of a waiver provision that excludes consequential damages to the fullest extent permitted by law. In *Cherokee County Cogeneration Partners, L.P. v. Dynegy Mktg. & Trade*, for example, the disclaimer of consequential damages does not include a waiver of consequential damages to the fullest extent permitted by law. 305 S.W.3d 309, 314 (Tex. App. 2009).

Here, under the Franchise Agreements Plaintiff "waive[d] to the fullest extent permitted by law . . . consequential . . . damages." (A264 § 20.J.) Plaintiff acknowledges that under Texas law lost profits may be considered consequential damages. (See Ans. Br. at 9) (stating that under Texas law lost profits may be recoverable as consequential damages). Thus, since consequential damages are waived

to the fullest extent permitted by law and under Texas law lost profits may be considered consequential damages, then Plaintiff waived its right to lost profits under the Franchise Agreements' Waiver provision.

In addition, similar to the Superior Court, Plaintiff incorrectly focuses on the meaning of actual and consequential damages instead of focusing on the actual damages that existed on the date of the alleged breach. (Ans. Br. at 9.) Such damages are the only damages Plaintiff is entitled to under the Franchise Agreements. (Wink Op. Br. at 17.) As set forth in Mr. Wink's opening brief, the Waiver provision states that Plaintiff may only recover "actual damages sustained by it." Plaintiff failed to address the actual damages Bonanza sustained at the time of the alleged breach. At the time of the alleged breach, when the Franchisees closed the restaurant, the only damages Plaintiff sustained were unpaid royalty fees. These fees were due and owing for the last week the restaurants were open, but were not paid by the Franchisees. At that time, none of the future royalty fees Plaintiff seeks had come due. Thus, at that time, Plaintiff had not sustained those damages; and such damages are therefore waived under the Franchise Agreements' Waiver provision because they are not "actual damages sustained by it."

B. The issue of foreseeability was raised below and Mr. Wink's liability for future royalties was not foreseeable

The issue of whether future royalties was foreseeable was raised and presented to the Superior Court by Mr. Wink in his December 20, 2011 Letter to the Court (the "December 20 Letter") in response to (1)

the Court's October 25, 2011 letter to the parties seeking, among other things, a supplemental letter memorandum regarding the Waiver provision, and (2) Plaintiff's November 29, 2011 supplemental letter memorandum to the Court¹ ("Plaintiff's November 29 Letter"). (See AR1-7; AR8-22.)² In the December 20 Letter, Mr. Wink argued that Plaintiff's claim for future royalties was barred because such damages were not foreseeable. (AR1; AR3-4.) Thus, Mr. Wink's foreseeability argument is properly before the Court on appeal.

Plaintiff does not deny or dispute that unforeseeable damages may not be recovered in a breach of contract action. See *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex 1981) (stating that "[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."). Instead, Plaintiff argues that "it is just not foreseeable, but functionally inevitable, that the [F]ranchisees' breach in closing down their restaurants would deny [Plaintiff] the weekly royalty payments it was entitled to receive under the Franchise Agreements." (Ans. Br. at 12.) To begin with, the royalty payments were based on the restaurants' actual revenues. What was foreseeable is if there were no revenues, there would not be any royalty fees. It was not foreseeable that unearned royalties would be due even when the basis for those fees - revenue - was absent.

¹ Plaintiff's November 29 Letter was written in support of its opposition to Mr. Wink's motion for summary judgment. (See AR8.)

² Citations to Defendant Below, Appellee/Cross Appellant's Reply Appendix are cited as "AR___."

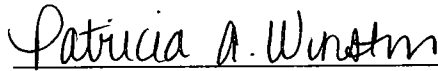
The Consent Agreements' one year Guaranty Period also makes it unforeseeable that Mr. Wink would be liable for royalty fees beyond the Guaranty Period. The Consent Agreements unambiguously state: "Notwithstanding anything contained in this Agreement or the New Franchise Agreement to the contrary, [Plaintiff] agrees that [Mr. Wink's] obligations under the Personal Guaranty shall be limited to a period of one (1) year. . . ." (A735 at ¶ 6.) Even if, Plaintiff is correct that the ". . . Franchise Agreements obligate the [F]ranchisees to make weekly royalty payments to [Plaintiff] for the full term of the agreements[,] the Consent Agreements, for Mr. Wink, limit that obligation to one year. (Ans. Br. at 12.) It was not foreseeable that Mr. Wink's guarantee to perform that obligation would extend beyond the Guaranty Period.

If, for example, prior to the termination of the Agreements and the one year Guaranty Period Mr. Wink was responsible for the Franchisees' financial obligations, Mr. Wink would no longer be obligated to continue paying at the expiration of the Guaranty Period. Mr. Wink's obligation would cease because the guarantee was limited to one year. Thus, if the Franchise Agreements were not terminated, Mr. Wink would not have been liable for any damages after the Guaranty Period. It was therefore not foreseeable that Mr. Wink would be liable for any damages beyond Guaranty Period, simply because Plaintiff terminated the Franchise Agreements.

Conclusion

For the foregoing reasons, Mr. Wink respectfully requests the Supreme Court hold Plaintiff's damage request barred by the Franchise Agreements' Wavier provision, and that future royalty fees were not a foreseeable consequence of the parties' agreements.

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