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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVIS BROADCASTING OF ATLANTA, L.L.C., Appellant, Defendant, Counter-Plaintiff Below, v. CHARLOTTE BROADCASTING, LLC, *et al.*, Appellees, Plaintiffs, Counter-Defendants Below.	)	No. 450, 2015 Appeal from Superior Court C.A. No. N13C-04-143 WCC (CCLD)

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Appellees Charlotte Broadcasting, LLC, New Mableton Broadcasting Corporation and Radio One of North Carolina, LLC are subsidiaries of Radio One, Inc. (collectively, "Radio One"). Radio One initiated this action to obtain a declaration that it properly terminated an Asset Exchange Agreement (the "Agreement") with Appellant Davis Broadcasting of Atlanta, L.L.C. ("Davis"). Following a transfer from the Court of Chancery, Radio One filed its Complaint in the Superior Court on April 15, 2013. On May 9, 2013, Davis filed an Answer and three Counterclaims.

After the parties completed discovery, Radio One moved for summary judgment on all three of Davis's Counterclaims. Applying the plain language of the Agreement, the Honorable William C. Carpenter, Jr. granted summary judgment in Radio One's favor on Counts 1 and 3, finding that Radio One "had the right to terminate [the Agreement] and, in doing so, the Agreement did not require [Radio One] to use commercially reasonable efforts." (A972.) With respect to Count 2, the Court found that, "[w]hether [Radio One] breached the implied covenant and whether [Davis] suffered damages as a result of the breach remain issues of fact for trial." (*Id.*) Following a six-day trial, the jury returned its verdict in Radio One's favor on Davis Broadcasting's implied covenant claim. Davis filed the instant appeal on August 20, 2015.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly applied the plain language of the Agreement to find that diligent and commercially reasonable efforts were not required with respect to the parties' facilities modification applications until such applications were filed with the FCC. In particular, the Court properly found that §§ 1.3 and 8.4(a) limited the obligation to use diligent and commercially reasonable efforts to "filed" applications. The Court also properly found that the general references to commercially reasonable efforts in § 8.4(a) applied to circumstances not at issue in this matter.

2. Denied. The Superior Court correctly applied the plain language of § 15.1 of the Agreement to find that Radio One properly terminated the Agreement on April 13, 2012. The express language of § 15.1 states that either party could terminate for unacceptable engineering exhibits "between the date hereof and the date of filing the Mod Applications." The Court properly rejected Davis's attempt to add language to § 15.1 in an effort to argue that the right to terminate had expired on September 15, 2011.

3. Denied. Davis failed to preserve and waived any argument that it was prejudiced at trial by testimony related to the summary judgment rulings. Even if preserved, the summary judgment rulings did not prejudice Davis because they were irrelevant to the claims and issues presented at trial.

STATEMENT OF FACTS

A. The Parties

Appellees are subsidiaries of Radio One, Inc., a multimedia company incorporated in Delaware and headquartered in Silver Spring, Maryland. (A1021 ¶ 2; A1036 ¶ 2.) Directly and through subsidiaries and affiliates, Radio One, Inc. operates radio stations in sixteen U.S. cities, including Atlanta.

Davis, a Delaware limited liability company with its principal place of business in Columbus, Georgia, owns three radio stations and a translator (*i.e.*, a secondary radio transmitter) in Atlanta. (A23:22-A25:8.)

B. The Parties Negotiate The Asset Exchange Agreement

In the Atlanta radio market, Radio One operates radio station WPZE-FM ("WPZE") as a Class A station. (A1021 ¶ 5; A1037 ¶ 5.) For many years, Radio One had an interest in upgrading WPZE to a Class C3 station, which would have significantly increased both its power – from a maximum of 6,000 watts to a maximum of 25,000 watts – and the number of potential listeners. (A1023 ¶ 12; A1037 ¶ 12; A5:5-11; A35-A39.) Such an upgrade, however, required review and consent by the Federal Communications Commission ("FCC"). (A1023 ¶ 12; A1037 ¶ 12; A41 § 1.2.)

Under the applicable FCC regulations, Radio One could not upgrade WPZE without Davis agreeing to relocate its radio station, WLKQ-FM ("WLKQ"), due to

its close proximity to WPZE. (A35; A37; A126.) On May 10, 2011, the parties entered into a Letter of Intent, which provided that Davis would receive certain compensation in exchange for relocating WLKQ's city of license from Buford, Georgia to a rural location outside of Atlanta.[1] (A187-A195.) Thereafter, counsel for the parties negotiated and exchanged multiple drafts of the Agreement. (A235-A335; B59:20-B61:16.) While the attorneys hammered out the contract terms, the parties' consulting engineers studied the options for relocating the respective stations. (B55:23-B59:18.) As the structure of the Agreement began to take shape, the parties scheduled an August 11, 2011 meeting with FCC staff to request its feedback on the proposed transaction. (B61:17-B62:17.) The FCC responded favorably to the structure proposed by the parties. (A303.)

By the end of August 2011, Radio One's engineers had determined that WPZE could relocate to the Crown Pointe building in Atlanta ("Crown Pointe"). (B64:20-B65:1.) Davis's engineers determined that WLKQ could relocate to the rural area of Suches, Georgia. (A29:10-13.) Neither party, however, had completed its engineering by the end of August 2011. (A333.) This was significant, because, under the FCC approval process, the parties were required to

[1] WLKQ was to move from a location with over a million potential listeners to a location with 60,000 potential listeners. (B52:6-18.) As a result of the obstacles to the transaction, and Radio One's termination, Davis did not have to relocate WLKQ, and the station continues to operate as it did prior to the Agreement. (A30:21-A32:7.)

attach to their FCC applications engineering exhibits demonstrating the technical feasibility of the proposed station relocations. (A578:2-8.)

On August 24, 2011, Davis's counsel, Howard Topel ("Topel"), acknowledged that the engineering was not complete, but indicated that **"Davis is willing and would like to sign the [Agreement] today pursuant to a gentlepeople's understanding that Schedules 1.1 and 1.2 [*i.e.*, the engineering exhibits] will be inserted afterwards, when ready."** (A333) (emphasis in original). To accommodate Davis's request, on August 26, 2011, Radio One's counsel, Jessica Rosenthal ("Rosenthal"), proposed what is referred to as the "Engineering Clause," to protect both parties in the event an engineering exhibit was deemed unacceptable for any reason. (A336; A205:10-18.)[2]

Davis's counsel, Topel, accepted the Engineering Clause the same day. (A235.) Although, at that point, the parties were only days from signing the Agreement, it came to light that Davis had not yet obtained its lender's consent to the transaction. (B1; B5.) As such, the parties agreed to language in §§ 6.3 and 15.1(b) that required Davis to obtain its lender's consent within eight days of execution. (A51; A61.)

[2] The Engineering Clause provides that: "The engineering exhibits detailing the Davis FMA and the RO Mableton FMA have not been prepared as of the date hereof. In addition to the termination rights set forth above, ***if between the date hereof and the date of filing the Mod Applications*** either Davis or the Radio One Entities deem that either of the engineering exhibits is not acceptable in its sole discretion, then it may terminate this Agreement upon written notice to the other." (A336; A205:10-18) (emphasis added).

C. The Transactions Contemplated Under The Agreement

At the time the parties entered into the Agreement, there were no perceived obstacles to obtaining the FCC's consent to the proposed transaction. (B81 123:17-19; B66:2-4; B45:6-19.) The parties were in agreement that Radio One had a "clear path" to upgrade WPZE at Crown Pointe – meaning Radio One could obtain FCC approval of the upgrade without the cooperation of any third party broadcaster other than Davis. (*Id.*) Based on this understanding, the parties agreed, under §§ 1.1 and 1.2 of the Agreement, to file their respective modification applications on the "Filing Date," which was a defined term under § 2.6(a) of the Agreement. (A40-A41; A45.) Under the definition in § 2.6(a), the parties agreed that the Filing Date was calculated to be September 15, 2011. (A340.)

Under § 1.3, which is titled "Diligent Efforts," the parties agreed to "diligently prosecute the Davis FMA and the RO Mableton FMA and otherwise use their commercially reasonable efforts to obtain the FCC Consents (defined below) to those applications as soon as possible." (A41.) Under §§ 1.1 and 1.2 of the Agreement, the Davis FMA and the RO Mableton FMA are defined to mean modification applications "file[d]" with the FCC. (A40-A41.) Under § 1.3, FCC Consent is defined to mean "an order of the FCC … granting its consent and/or approval to an application ***filed with the FCC.***" (A41) (emphasis added). That the Agreement called for a short, two-week period in which to file the modification

applications, followed by diligent prosecution and the use of commercially reasonable efforts to obtain the FCC's consent to those applications, is consistent with the parties' understanding that there were no obstacles to the planned upgrade.

As the parties understood Radio One had a "clear path" to the upgrade, there is no provision of the Agreement that expressly required either party to use diligent or commercially reasonable efforts to remove obstacles to the proposed transactions. Instead, under § 8.4(a), the parties agreed to:

> use commercially reasonable efforts to cause ***the transactions contemplated by this Agreement*** to be consummated ***in accordance with the terms hereof***, and, without limiting the generality of the foregoing, use their commercially reasonable efforts to obtain (i) all necessary FCC Consents, (ii) any third party or other governmental consents necessary in connection with this Agreement ***and the transactions contemplated hereby***, including for the assignment of any RO Station Contract ***(which shall not require any payment to any third party)***.

(A54) (emphasis added). The transactions "contemplated by th[e] Agreement" are plainly set forth in the Agreement and include the transfer of Radio One's Charlotte station assets (the "RO Station Assets"), which included Radio One's Charlotte equipment and antennas, certain station contracts (the "RO Station Contracts") and its interest in certain tower leases; Davis constructing its new location in Suches; and Davis assuming certain obligations related to the Charlotte stations. (A41-42 § 2.1; A44 § 2.4; A57 § 9.7.) With respect to "other governmental consents," the Agreement contemplated potential filings with the Federal Trade Commission and the United States Department of Justice and the

renewal of certain FCC licenses. (A45-A46 §§ 2.6, 2.7.) With respect to third party consents, Schedule 2.1(d) lists 11 RO Station Contracts that required third party consent, and Schedule 2.1(c) lists a site sublease and studio lease that required such consent. (A42; A116-A118.) These are the transactions contemplated under the Agreement that required the exercise of commercially reasonable efforts, after the modification applications were filed.

It is undisputed that removing unanticipated obstacles created by conflicting FCC filings was not a transaction contemplated under the Agreement. (Appellant's Opening Brief ("Opening Brief" or "OB") at 20 ("The University filing was not a 'transaction[] contemplated by this Agreement…'"); A33:4-11 (Greg Davis testifying that, at the time of contracting, he "did not anticipate" a filing that would create an obstacle to the planned station relocations); A153:19-22 (Mark Jorgenson ("Jorgenson"), Davis's broker, testifying that the conflicting application "was just unanticipated and was not, therefore, dealt with in the agreement because no one thought it was going to come up."); *see also* B47:9-17; B83 132:17 (Radio One's Chief Executive Officer, Alfred Liggins ("Liggins"), testifying that it was an "unexpected issue"); B64:10-19 (Radio One's Chief Administrative Officer, Linda Vilardo ("Vilardo"), testifying that she "was very surprised and very upset, given that we had spent all this time negotiating. We had

a deal.... And, now, this application came out of the blue and is prohibiting us from moving forward.").)[3]

D. An Unforeseen FCC Filing Blocks The Upgrade Of WPZE

After executing the Agreement, the parties' engineers continued to prepare the engineering exhibits for the modification applications. (B64:2-9.) During his final review, Radio One engineer, Greg Strickland, discovered, on September 8, 2011, that Clark Atlanta University ("Clark Atlanta"), a private, historically black college located in Atlanta, filed an application with the FCC to relocate its radio station, WCLK-FM ("WCLK"). (A1025 ¶ 19; A1038 ¶ 19.) It is undisputed that Clark Atlanta's filing blocked the planned transaction by eliminating the designated fully spaced allotment point for WPZE as required under FCC regulations. (OB at 6; B53:17-23.)

It is further undisputed that, under the Engineering Clause, Radio One had the right to terminate the Agreement immediately upon learning of the Clark Atlanta filing. (A211:11-22; A361:15-A362:18.) When asked if Radio One could have immediately terminated the Agreement with no obligation to use commercially reasonable efforts to complete the transaction, Davis's FCC expert, Shubert, stated: "If the Agreement is terminated, it's terminated. That means all

[3] It is also the case that the parenthetical in § 8.4(a)(ii), which provides that there is no requirement to pay any third party, did not apply only to the consents required to transfer the RO Charlotte Contracts. (A54.) Davis's FCC expert, Lee Shubert ("Shubert"), testified at deposition that the language meant Radio One was not "require[d]" to pay any third parties, but, at the same time, was not "prohibit[ed]" from doing so if it wanted. (B37:2-B39:6.)

elements of the Agreement are terminated." (A362:16-18.) Under the express terms of the Engineering Clause, that termination right continued until "the date of filing the Mod Applications," *i.e.*, the actual filing of the facilities modification applications. (A61 § 15.1.) As the parties never filed the applications, Radio One had the right to terminate if the engineering exhibit for the Radio One application was "not acceptable in its sole discretion." (*Id.*)

Instead of immediately terminating, Radio One undertook to find a solution by, as stated by Liggins, contacting "people that we knew who we thought we could make a deal." (B87 148:4-6.) As described by Vilardo at trial: "Alfred [Liggins] moved immediately to try and figure out what are our options. And he set us upon a course of figuring out, is there a way to make this still work." (B67:4-7.) Within hours of learning of the filing, Liggins reached out to a family friend who was a past chair of Clark Atlanta's Communications Department. (B82 126:14-127:2.) By the next day, Liggins and Vilardo had spoken with the General Manager of the station, Wendy Williams ("Williams"), and discussed the conflict created by Clark Atlanta's filing. (A210:7-22.) Liggins and Vilardo received a "positive" response from Clark Atlanta and an indication "they were interested in working with us and moving forward with a proposal." (B72:21-23.)

At the same time it initiated communications with Clark Atlanta, Radio One had concerns on two fronts with respect to Davis. First, Davis failed to obtain its

lender's consent within the eight-day period under §§ 6.3 and 15.1(b) of the Agreement and took the position that such failure was not a breach of the Agreement. (A216-A217.) Second, Davis claimed that Radio One's "failure and inability" to file its modification application constituted a default under the Agreement. (A216.) Indeed, in an internal communication, Topel stated: "we actually could send them a formal default notice." (A769.)

For the sole purpose of addressing those two issues, Rosenthal forwarded Topel a proposed "side letter" on September 15, 2011. (A487-A489.) In her covering email, Rosenthal stated: "Radio One is reserving its rights related to Davis' representation regarding the lender consent. To resolve that and the path forward, attached is a proposed side letter between Radio One and Davis." (A487.) In response, Topel stated: "Davis, like Radio One, is reserving its rights. In Davis' case, the rights concern the failure and inability to file cleanly the FCC applications by the specified Filing Date…." (A490.) Topel further stated: "The side letter that Radio One proposes is unacceptable to Davis ***because Davis has made no misrepresentation under the Agreement.*** Davis believes that Radio One's elevation of lender consent to a required condition of FCC filing has been and is counterproductive to all parties. Such consents are typically required consents to be delivered at closing, and the far greater concern lay in not filing the applications promptly…." (*Id.*) (emphasis added). Contrary to Davis's present

position, there is not a single contemporaneous communication where Topel, or anyone else for Davis, asserted that the right to terminate under the Engineering Clause expired on September 15, 2011.

In contrast, with respect to the lender consent and Charlotte due diligence, Topel meticulously tracked the expiration of the eight-day period under § 15.1(b). In a September 7, 2011 email, Topel stated: "the applications will be filed 2 business days after the 8 business day due diligence/bank consent period if Davis does not give notice by the end of that period that Davis is terminating." (B6.) Interestingly, Topel further stated: "***Once we file the applications,*** Davis is bound to RO to close and will close, and RO will receive the end of the bargain it is to receive." (B7) (emphasis added). Once the eight-day lender consent/due diligence period expired, Topel wrote: "By this letter, Davis informs the Radio One Entities that Davis will *not* be giving notice of termination pursuant to Section 15.1(b) of the AEA." (A486) (emphasis in original). There is no similar communication by which Topel purported to inform Radio One that the termination right under the Engineering Clause expired.

E. Despite A Significant Effort, Radio One Is Unable To Reach Agreement To Remove The Clark Atlanta Impediment

Soon after learning of the Clark Atlanta filing, Radio One's engineers studied the situation and developed two options, both of which were presented to Clark Atlanta. (B67:21-B69:4.) Clark Atlanta chose the second option, under

which it would relocate to Crown Pointe and Radio One would upgrade at a location called the Richland Tower. (B70:14-B71:20.) Despite its initial enthusiasm about reaching an agreement with Radio One, the negotiations with Clark Atlanta grew complicated as the university began to involve different levels of its administration. (A383-A384.) Radio One continued to negotiate with Clark Atlanta into 2012 and ultimately offered cash compensation in the amount of $500,000, plus in-kind commitments (to be provided over a number of years) valued at approximately $800,000. (A385-A410.)

Throughout the negotiations with Clark Atlanta, Radio One kept Davis informed "every step of the way." (B46:14-16.) Jorgenson testified at trial that: "in my conversations with Mr. Davis and Mr. Topel, we were satisfied with the information we were getting from Radio One." (B46:18-21.) Notwithstanding its knowledge of the negotiations, Davis refused to assist. (A151:5-23; A411-A412.) Among other things, Davis's President, Greg Davis, declined Radio One's request to call the President of Clark Atlanta, who Davis had previously met, and declined Radio One's request that it contribute half of the $500,000 cash portion of Radio One's offer to Clark Atlanta, offering instead $100,000 to be paid over time. (A411-A412; A10:3-A11:8; A413.) At trial, it was even revealed that Greg Davis had a personal friend on the Board of Trustees of Clark Atlanta (the "Board"). (B54:15-18.) Although made aware that the negotiations with Clark Atlanta

ultimately stalled with the Board, Greg Davis never advised Radio One of this contact. (B12; B14; B73:20-B74:11.)

When the negotiations stalled, Radio One started looking for alternative options. (B84 134:17-19.) Again using his contacts, Liggins testified that he reached out to media broker, Scott Knoblauch ("Knoblauch"), who indicated he had contacts with Educational Media Foundation ("EMF"). (B84 134:19-22.) EMF could have allowed for the upgrade merely by filing a form with the FCC and without altering its operations in any way. (A154:16-A155:6; A364:10-A365:12.) For this minor accommodation, Radio One offered EMF $25,000. (A152:3-10.) EMF, however, demanded that Radio One agree to future undefined concessions, such as modifying a Radio One station, or paying EMF 10% of the increase in WPZE's appraised value as a result of the planned upgrade. (A419.) Although EMF valued 10% of the increase in value in the range of $500,000, an appraisal of the upgraded station "likely would have been in the millions of dollars of value to EMF for a paper filing" that did not affect their operations. (B85 141:19-B86 143:9.) Due to EMF's unreasonable demands, Radio One could not reach agreement with EMF, and the negotiations concluded in late March/early April 2012. (B76 10:4-13:18.)

F. Radio One Terminates The Agreement

Liggins testified that, after the negotiations with EMF were unsuccessful, he was "discouraged" and "didn't think [they] were going to be able to get it done at that point." (B85 141:16-18.) Through his significant past experience, Liggins knew the radio business was "intensely competitive" and that broadcasters are reluctant to provide accommodations unless, as was the case with EMF, they receive "a piece" of the upside. (B79 113:16-B80 116:1.) For seven months, Radio One had negotiated with various parties without success. After confirming that its engineering exhibit remained unacceptable as a result of the Clark Atlanta filing,[4] Radio One, on April 13, 2012, provided written notice of termination under the Engineering Clause (the "Termination Notice"). (A421-A427.)

The Termination Notice did not come as a surprise to Jorgenson. (B18.) Just a week earlier, on April 8, 2012, he wrote to Davis and Topel that he thought Radio One was "close to throwing in the towel." (*Id.*) Further, Jorgenson believed

[4] Vilardo plainly testified at trial that, shortly before terminating, she "realized" that Radio One "had not run a recent study of what the engineering would allow." (B77 17:10-B78 18:12.) Therefore, she asked the engineers to run an additional study to confirm the engineering had not changed. (*Id.*) Both at trial, and in its Opening Brief, Davis sought to mischaracterize Vilardo's testimony and claim that Vilardo's effort to confirm the engineering was an attempt by Radio One to determine if there was another way to complete the upgrade in furtherance of negotiating a new deal with Davis. (OB at 11.) The evidence, however, showed that it was Davis that approached Radio One about negotiating a new deal after the termination and that the parties' continued negotiations after the termination were at Davis's behest. Jorgenson testified that ***he*** reached out to Radio One to schedule a meeting in an "attempt to either revive the existing deal ***or find an alternative way to bring the parties together to get a transaction done***." (B49:21-B50:2) (emphasis added).

Radio One had the right to terminate the Agreement. (B44:9-18; A137:15-17; B20.) In addition to believing that Radio One could terminate, Jorgenson acknowledged at trial that he advised Greg Davis that he did not have a claim against Radio One arising from the termination. (B48:12-B49:9.)

Shortly after receiving the Termination Notice, Jorgenson reached out to Liggins to request a meeting to discuss either salvaging the transaction or entering into a new deal. (B49:21-B50:2; B86 145:15-B87 146:16.) In response, the parties met on April 19, 2012. (B87 146:17-148:11.) Liggins testified that the discussion at the meeting "sparked" an idea of approaching the broker, Knoblauch, about trying once more to negotiate with a third party broadcaster. (B87 147:21-148:11.) Liggins learned that the only remaining option was for another broadcaster, Augusta Radio Fellowship ("Augusta Radio"), to specify a new allotment point.[5] (*Id*.) Liggins had not previously approached Augusta Radio, because he did not have a contact there. (B87 148:3-11.) Like EMF, Augusta

[5] Both in its Opening Brief, and at trial, Davis incorrectly argued that another option was for WCKS-FM, in Fruithurst, Alabama ("WCKS" or "Fruithurst"), to file for a new reference point. (OB at 7, 11.) The misconception that such an accommodation by WCKS could allow for the upgrade was created by an email from engineer, Charles Anderson ("Anderson"), who worked with Knoblauch. (B10.) Knoblauch, however, unequivocally testified at trial that Anderson's conclusion was based on the "assumption" that Clark Atlanta had built its facility at the Richland Tower, and received its FCC license, which would free up the area where Clark Atlanta originally operated for WCKS to specify a new reference point. (B93:20-B97:15.) Knoblauch stated: "in order for Fruithurst's allotment reference point change or site spec to be of any benefit, the [Clark Atlanta] move had to be located and licensed at Richland, meaning that their original license site would leave the equation." (B97:1-7.) Clark Atlanta, however, did not build its facility until a year later, in April 2013. (B95:23-B96:3.) Thus, an accommodation by WCKS was not an option for completing the upgrade.

Radio was not asked to change its operations in any way, but rather to merely file a form with the FCC. (A87 149:12-13.) Augusta Radio, however, simply was not willing to negotiate for the requested change.[6] (B91:16-20.) As Knoblauch testified: "It's not a money thing. It's just [the owner] doesn't trust it. He's paranoid about a company asking him to do something like this, and he just won't talk to me about it anymore." (*Id.*)

The evidence at trial plainly demonstrated that Radio One acted in good faith and terminated solely because its engineering exhibit was unacceptable. In addition to the testimony of Liggins and Vilardo that there was no other reason for the termination (B86 143:15-144:13; B62:18-B63:20), Knoblauch testified, based on his 21 years of experience as a media broker, that he and Radio One "tried to explore everything we could, and they were open to explore everything that we could." (B91:21-B92:15.) As such, not only was the Superior Court's ruling on summary judgment appropriate, there was more than sufficient evidence for the jury to find that Davis's claim that Radio One terminated for pre-textual reasons lacked merit.

[6] Following numerous communications, and a monetary offer from Radio One, Augusta Radio's counsel concluded the discussions by describing his client as: "a curmudgeon good old boy I have represented for 30 years and there is no making him comfortable." (A430.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY INTERPRETED THE AGREEMENT AS REQUIRING COMMERCIALLY REASONABLE EFFORTS ONLY AFTER THE MODIFICATION APPLICATIONS ARE FILED WITH THE FCC

A. Question Presented

Did the Superior Court correctly apply the plain contract terms to find that diligent and commercially reasonable efforts applies only to "filed" applications?

B. Scope Of Review

The grant of summary judgment presents a question of law the Court reviews *de novo*. *Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 174-75 (Del. 2001).

C. Merits Of The Argument

Interpreting the Agreement as a whole, the Superior Court found "that the only reasonable interpretation of Sections 1.3 and 8.4(a) is that commercially reasonable efforts were not required because the FMAs were never filed with the FCC." (A990.) The Court began with a careful review of § 1.3, which required the parties to "diligently prosecute" and "use their commercially reasonable efforts to obtain… the FCC Consents." (A990-A992.) The Court found that:

> Under Section 1.3, "FCC Consents" means an "approval to an application filed with the FCC." ***This definition plainly requires that an application actually be filed with the FCC in order to diligently prosecute it.*** Section 1.3 plainly does not require that the parties use commercially reasonable efforts initially to file the FMAs.

(A992) (emphasis added). Applying the plain language of § 1.3, the Court found it required diligent and commercially reasonable efforts only after the applications were filed. (*Id.*) Davis does not argue to the contrary.

The Superior Court next noted the interplay between §§ 1.3 and 8.4(a). (A992 ("[Plaintiffs] contend Section 8.4 only requires commercially reasonable efforts in relation to FCC Consents and other consents contemplated by the Agreement such as lender consents.").) As § 8.4(a) specifically references the defined term "FCC Consents," the parties' obligations with respect to modification applications are governed by that specific reference, not the general language generally requiring the use of commercially reasonable efforts. *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) (specific contract provisions govern over general). As § 1.3 defines "FCC Consents" in a manner that limits the parties' obligations to prosecuting "filed" applications, § 8.4(a) is similarly limited. (A41; A54.)

Although §§ 1.3 and 8.4(a)(i) expressly state the parties' obligations with respect to obtaining the FCC Consents, Davis seeks to rely on the general provisions of § 8.4(a). Those general provisions, however, include express limitations. Section 8.4(a)(ii) only covers the third party and governmental consents set forth in the Agreement (*see* Section C, *supra*) and expressly provides that such consents "shall not require any payment to any third party." (A54.) The

introductory clause of § 8.4(a) is expressly limited to "transactions contemplated by this Agreement." (*Id.*) As properly found by the Superior Court, these limitations preclude a finding that those provisions required Radio One to negotiate with a third party, such as Clark Atlanta, to remove unforeseen obstacles to the upgrade.

1. The Trial Court properly interpreted Section 8.4(a)(ii)

In rejecting Davis's arguments, the Superior Court found that § 8.4(a) "explicitly provides that commercially reasonable efforts 'shall not require any payment to any third party.'" (A992.) Davis sharply criticizes this finding and improperly seeks to limit the language in parenthesis, "shall not require any payment to any third party," to the assignment of RO Station Contracts. (OB at 15-19.) The language before the parenthetical, however, states: "any third party or other governmental consents necessary in connection with this Agreement and the transactions contemplated hereby, ***including*** for the assignment of any RO Station Contract." (A54) (emphasis added). By using the word "including," the parties treated RO Station Contracts as an example or subset of "any third party or other governmental consent." (*Id.*) Thus, if, as Davis argues, the limitation in parentheses applied to the RO Station Contracts, it applied with equal force to any third party or other governmental consents.

Similarly, Davis's reliance on the "last antecedent rule" is misplaced. In *NBC Universal, Inc. v. Paxson Communications Corp.*, the Court rejected a party's attempt to limit application of certain language to the last few words of the antecedent phrase, instead finding it modified the "entire antecedent phrase." 2005 WL 1038997, at *7 (Del. Ch. Apr. 29, 2005). Here, the entire antecedent phrase is "any third party or other governmental consents …, including for the assignment of any RO Station Contract," and the language in parentheses applies to that entire phrase. Further, the decision in *Rag American Coal Co. v. AEI Resources, Inc.* is inapposite. 1999 WL 1261376, at *4 (Del. Ch. Dec. 7, 1999). In *Rag American*, the Court found that, if the parties intended the phrase at issue to modify earlier language, they would have used different punctuation. *Id.* The punctuation at present plainly demonstrates the parties intended the parenthetical to apply to the entire antecedent phrase, including the RO Station Contracts.[7]

It has also been found, and Davis acknowledges (OB at 16), that the "last antecedent rule" should not be "inflexibly or uniformly applied" and should not be interpreted contrary to the "sense of the entire [document]." *NBC*, 2005 WL 1038997, at *6. Here, the Agreement expressly sets forth the parties' obligations and the compensation to be paid to Davis. The parties' obligations with respect to

[7] Davis also claims there is a "clear business rationale" for limiting payments to counterparties. (OB at 17.) Even if true, that does not explain why the limitation does not also apply to other third parties.

obtaining the FCC's consent are expressly stated in §§ 1.1, 1.2, 1.3 and 8.4(a)(i). (A40; A41; A54.) Section 8.4(a)(ii) was not intended, and should not be read, to expand those obligations and require the payment of additional, undefined sums to third parties.

Davis's final argument is that the Superior Court's interpretation "makes no commercial sense." (OB at 19.) In support, Davis claims that the Court's interpretation could nullify Davis's obligation to build out its proposed transmitter site as required under § 9.7. (*Id.*) This argument also must fail, because § 9.7 is a specific provision that expressly requires Davis to construct its facilities in Suches and broadcast from there. The general provisions of § 8.4(a) could not trump that specific obligation. *See DCV Holdings*, 889 A.2d at 961. Unlike § 9.7, there is no specific contract provision requiring Radio One to negotiate with, or pay, third parties to remove unforeseen obstacles to the upgrade. If any position lacks commercial sense, it is Davis's claim that the parties agreed to be bound by such an undisclosed obligation.[8]

[8] In an effort to divert attention from the plain language of the Agreement, Davis claims for the first time in its Opening Brief that Radio One's Complaint takes a contrary position regarding the requirement to use commercially reasonable efforts. (OB at 17-18.) In support, Davis relies on a sentence in the Complaint's introductory paragraph and the fact that Radio One detailed its efforts to obtain Clark Atlanta's and EMF's assistance to complete the upgrade. (*Id.*) Davis fails, however, to tell the full story. Radio One filed its Complaint for declaratory relief ***after*** Davis's counsel issued two letters accusing Radio One of failing to use commercially reasonable efforts and threatening litigation. (A812-A821.) The Complaint details Radio One's efforts for purposes of showing there was no merit to Davis's claim.

2. The Trial Court properly interpreted the phrase "transactions contemplated by this Agreement"

The terms of § 8.4(a) are expressly limited to "transactions contemplated by this Agreement." (A54.) It cannot be disputed, and Davis acknowledges, that negotiating for an accommodation from a third party broadcaster was not a transaction contemplated by the Agreement. (OB at 20 ("The University filing was not a 'transaction[] contemplated by this Agreement,' but rather a potential obstacle to such transaction.").) Thus, under the express language of the Agreement, Radio One had no obligation under § 8.4(a) to use commercially reasonable efforts to remove the obstacle created by the Clark Atlanta filing.

Notwithstanding this plain reading of the Agreement, Davis seeks to read in an obligation that does not exist. According to Davis, § 8.4(a) "quite reasonably" can be interpreted to require Radio One to remove obstacles to the preparation of its modification application. (*Id.*) No language in the Agreement supports such a result. There is no provision stating how the parties were to prepare their applications or requiring the parties to remove unforeseen obstacles to such applications. Instead, the Agreement required the parties to file their applications by the Filing Date and diligently prosecute them before the FCC. (A40-A41.) If either party failed to do so, the other party could issue a notice of default and allow

the requisite time period to cure. (A62 § 15.2.) This was Davis's remedy under the Agreement, but it chose not to pursue it.[9]

Davis next argues that the Superior Court's interpretation makes little commercial sense, because "if an issue were to arise before the filing of the FMAs that could be resolved through commercially reasonable efforts, it is hard to imagine the parties intending that the obligation should not apply." (OB at 22.) To the contrary, it would not make commercial sense for either party to bind itself to an undefined obligation to remove unanticipated obstacles to the transactions under the Agreement. Radio One agreed to pay Davis significant compensation, including $2 million and the transfer of two radio stations, in exchange for the upgrade. There was no agreement, and it would not make commercial sense for Radio One to agree, also to pay additional unknown sums to unknown third parties. Moreover, Davis's current position is contrary to Topel's statement in his affidavit, and Shubert's testimony, that Radio One could have terminated before the Filing Date ***without*** using commercially reasonable efforts. (A906 ¶ 3 ("If a party deemed an engineering exhibit unacceptable during its review between August 31 and September 15, 2011, it could terminate then.").) Davis cannot have it both

[9] In an apparent effort to show the parties could have anticipated a conflicting filing, Davis claims its counsel, Topel, believes it "is common for radio stations to negotiate with third parties (often other stations) to remove technical impediments that arise from their applications." (OB at 21.) Instead of citing a contemporaneous communication to this effect, Davis relies on a self-serving affidavit submitted in opposition to Radio One's Motion for Summary Judgment. (A905.) If Topel, an experienced communications lawyer, anticipated a conflicting filing, it seems he would have included language in the Agreement to address it. He plainly did not.

ways. Either there was an obligation to use commercially reasonable efforts before terminating or there was not. Based on the express language of the Agreement, and the testimony of Davis's own witnesses, there was not.

Lastly, Davis argues that, in the absence of a commercially reasonable efforts requirement, the Agreement is "a contract without obligations." (OB at 22.) That clearly is not the case. Under Delaware law, every contract includes an obligation to perform. *See Comet Sys., Inc. S'holders Agent v. MIVA, Inc.*, 980 A.2d 1024, 1034 (Del. Ch. 2008). As such, a failure to perform contractual obligations, with or without commercially reasonable efforts, is a breach of contract. *Id.*

As noted above, if Davis believed Radio One breached the Agreement by not filing on the Filing Date, it had every right to issue a notice of default. Davis also could have terminated under the Engineering Clause at any time after learning of the Clark Atlanta filing. Radio One kept Davis informed "every step of the way," and Davis had remedies at its disposal if it believed Radio One acted improperly. (B46:14-16.) It was no one's fault that Clark Atlanta filed a conflicting application. Radio One badly wanted the upgrade, but simply was unable to accomplish it. Davis considered asserting a default, but, presumably for these reasons, did not. (A769.)

II. THE TRIAL COURT CORRECTLY FOUND THAT THE RIGHT TO TERMINATE REMAINED AVAILABLE UNTIL THE PARTIES FILED THEIR MODIFICATION APPLICATIONS

A. Question Presented

Did the Superior Court correctly apply the plain language of the Agreement to find that Radio One had the right to terminate on April 13, 2012?

B. Scope Of Review

Whether the grant or denial of summary judgment is appropriate presents a question of law that this Court reviews *de novo*. *Newtowne,* 772 A.2d at 174-75.

C. Merits Of The Argument

The Engineering Clause provides that: "…if between the date hereof and the date of filing the Mod Applications either Davis or the Radio One Entities deem that either of the engineering exhibits is not acceptable in its sole discretion, then it may terminate this Agreement upon written notice to the other." (A61 § 15.1.) After carefully considering the parties' arguments, and reading the Agreement as a whole, the Superior Court concluded "the only reasonable interpretation of 'the date of filing the Mod Applications' is the actual date of filing the FMAs." (A982.) There is no other way to read the language of the Engineering Clause.

1. The Trial Court properly rejected Davis's effort to replace the contract language with the defined term "Filing Date"

Where a contract provision is "clear on its face," there is no reason to "proceed to interpret it or to search for the parties' intent behind the plain

language." *Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *5 (Del. Ch. May 13, 2005). The phrase "the date of filing the Mod Applications" is clear and unambiguous and can only be read to mean – the date the applications are actually filed. As such, the plain terms of the Engineering Clause provide that, if either party deemed an engineering exhibit unacceptable, it could terminate between the date of the Agreement and the date of filing the applications. As the applications were never filed, Radio One had the right to terminate on April 13, 2012.

Contrary to this plain and clear contract language, Davis argued below that the right to terminate expired on September 15, 2011, *i.e.*, the "Filing Date." In support of this argument, Davis initially asserted that "the date of filing the Mod Applications" should be replaced with the defined term, "Filing Date." (A1060 ¶ 89.) In its Counterclaim, Davis stated that the "right to terminate under the Engineering Clause had expired on September 15, 2011, pursuant to the Filing Date under Section 2.6(a) of the Agreement." (*Id.*) Radio One demonstrated below that rewriting the Agreement in such a manner violates fundamental principles of contract interpretation by, among other things, (i) improperly adding language that would limit the right to terminate the Agreement; and (ii) improperly substituting a defined term for the language chosen by the parties.[10]

[10] *See Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 746 (Del. 1997) (a "[c]ontract interpretation that adds a limitation not found in the plain language of the contract is untenable"); *DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chicago*, 75 A.3d 101, 109

In response, Davis strenuously attempted to create ambiguity where none exists. Davis first argued, as it does at present, that "the date of filing the Mod Applications" means the date the parties "will file" the applications, *i.e.*, the "Filing Date." (OB at 26.) The Superior Court correctly found the plain contract language provides no support for this reading. (A982-A983.) If the parties intended for "the date of filing" to mean the date the Mod Applications "will be filed," they would have used that language. (A983.) Indeed, if the parties intended to limit the termination right to September 15, 2011, they would have used the defined term "Filing Date." (*Id*.) Having used "the date of filing the Mod Applications," the parties agreed that the right to terminate continued through "the date of filing," which is the date the applications are filed. Davis's attempt to change the meaning of the plain and clear language of § 15.1 must be rejected.

Moreover, the Superior Court recognized that the language in § 15.1(b) – another provision in the same termination section – demonstrates the parties knew how to restrict a termination right to a limited time period. (A983-A984.) Section 15.1(b) allows for termination "by written notice … anytime within eight (8) business days from the date hereof (but only within such period of time) if Davis…." (A61.) That the parties included no such time restriction in the

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(Del. 2013) (where contract language is undefined, it is inappropriate to apply a definition from another source); *Mehiel*, 2005 WL 1252348, at *5 (limiting defined terms to their express meaning and finding party that wanted language otherwise to apply, should have contracted for it).

Engineering Clause demonstrates their express intent similarly not to restrict the right to terminate in that provision. (A984); s*ee also MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *7 (Del. Ch. Dec. 30, 2010).[11]

Finally, Davis claims the word "then" at the end of the Engineering Clause required Radio One to terminate immediately.[12] As used in § 15.1, "then" states a consequence of deeming an engineering exhibit unacceptable. *See The American Heritage College Dictionary* 1405 (3d ed. 1997) ("In that case; accordingly: If traffic is heavy, then allow extra time."). Unlike § 15.1(b), there is no time limit provided. (A61.) It merely provides a right to terminate if, between the date of the Agreement and the date of filing, an engineering exhibit is deemed unacceptable.[13]

2. Even if the Court were to consider extrinsic evidence, it would not support Davis's position

The uncontroverted evidence demonstrates that the Engineering Clause was inserted to protect both parties in the event either engineering exhibit was found to be unacceptable. (A333; A336.) As set forth at Section B above, Davis sought to

[11] The Superior Court also found that § 2.6, which defines the term Filing Date, references § 15.1(b), but not the Engineering Clause. (A983.) Thus, the "narrow inclusion of subsection (b) cannot be read as imputed to all of Section 15.1." (*Id.*)

[12] This argument directly contradicts Davis's claim that the Agreement required Radio One to use commercially reasonable efforts before terminating the Agreement. *See* Section I(C)(2), *supra*. Davis cannot read the Agreement both ways. Either Radio One could terminate "at the time the party deems the exhibit unacceptable" or Radio One was required to use commercially reasonable efforts "to remove obstacles to the contemplated transaction."

[13] Davis's claim that the Court below ignored its argument regarding the word "then" is incorrect, as the Court recognized that Davis argued the termination right could be for an indefinite duration, but found the "termination right is reasonable." (A983.)

execute the Agreement before the parties completed their engineering exhibits. (OB at 8; A336.) Although at that time there were no perceived obstacles to the proposed transactions, Radio One was concerned that it would be unable to terminate if an issue arose with respect to the incomplete engineering exhibits. (A205:10-18.) Indeed, if an issue arose, it would do neither party any good to have only a two-week period to address it, as Davis now argues. The parties needed as much time as necessary to determine if there existed a reasonable remedy. Davis accepted the insertion and did not seek to modify the proposed language. (A336.)

In an effort to counter the undisputed course of events preceding contract execution, Davis conflates agreeing to the Filing Date with agreeing that the right to terminate under the Engineering Clause expired on September 15, 2011. (OB at 28-29.) The contemporaneous communications show that the parties calculated the Filing Date as September 15, 2011. (A340.) There are no such communications, however, indicating the parties understood or agreed that the right to terminate expired on that date. Indeed, none of the communications setting the Filing Date refer to the Engineering Clause, and, as discussed above, the Engineering Clause itself does not refer to the Filing Date. (A61 § 15.1.)

Davis next argues that the proposed "side letter" shows the parties understood the termination right had expired. (OB at 29.) That also is not the case. The parties' communications, and particularly Rosenthal's covering email,

demonstrate that the side letter was proposed to address two outstanding issues: (i) Davis's failure to obtain its lender's consent and (ii) Davis's claim that Radio One defaulted by not filing its application. (*See* Section D, *supra*.) In his response, Topel did not mention the Engineering Clause. (A490.) Rather than formalizing a path forward, which would have avoided a potential default, the parties agreed informally to delay their filings until it could be determined if the impediment created by the Clark Atlanta filing could be removed.[14] (A369-A372.)

Unlike the Engineering Clause, there is an abundance of communication regarding the deadlines applicable to the lender consent and Charlotte due diligence. As discussed in Section D above, Topel carefully tracked those deadlines and specifically advised Radio One when they expired. (B6.) There are no such communications related to the purported expiration of the right to terminate under the Engineering Clause. Instead, in a contemporaneous email, Topel acknowledges the significance of actually filing the applications, by stating: "***Once we file the applications,*** Davis is bound to RO to close and will close, and RO will receive the end of the bargain it is to receive." (B7.) (emphasis added).

[14] In a September 23, 2011 email, Topel wrote: "The WPZE technical impediment is the only thing delaying the FCC filings and progress on the transaction. Please inform us what steps Radio One has taken and is taking to cure that impediment and when it contemplates that the FCC applications will be filed." (A370.) Likewise, in an October 5, 2011 email, Jorgenson indicated that he "look[ed] forward to setting a mutually-acceptable filing date." (A373.) Shubert interpreted these communications as indicating that "a decision was made, by the parties, not to file." (A367:3-4.) Thus, the parties mutually agreed there was no reason to file the facilities modification applications, which would have been impracticable as a result of the Clark Atlanta filing, by the September 15, 2011 Filing Date. (A370; A373.)

Davis also argues that the Superior Court's interpretation would allow Davis to terminate the Agreement even if Radio One reached an agreement with Clark Atlanta and would allow Radio One to extend its right to terminate simply by not filing. (OB at 30-31.) These arguments also miss the mark. Even though Davis could have terminated, both parties wanted to close, and it is nonsensical to think Davis would terminate on the eve of an agreement with Clark Atlanta. Nonetheless, regardless of the right to terminate under the Engineering Clause, Davis could have noticed a default against Radio One. Davis does not argue that the default provisions are not enforceable. Moreover, the default served as a check on any effort by either party to extend improperly its termination right simply by not filing. If Radio One improperly failed to file, it would be subject to a default.

Lastly, Davis argues that, even if the parties agreed to delay the Filing Date, that would not extend the right to terminate under Davis's purported interpretation of the Engineering Clause. (OB at 32.) The Court below correctly found that, even under Davis's argument, the parties' contemporaneous communications demonstrated they agreed to delay the Filing Date. (A975.) There is no reason such agreement would not apply to Davis's reading of the Engineering Clause.[15]

[15] Davis improperly argues that its purported extrinsic evidence may serve as a basis for accepting its purported interpretation of the Engineering Agreement. (OB at 30). It is well-settled that "'[e]xtrinsic, parol evidence cannot be used to manufacture an ambiguity in a contract that facially has only one reasonable meaning.'" *Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp.*, 2013 WL 1821608, at *3 (Del. Ch. May 1, 2013). Nonetheless, in the Superior Court, Davis attempted to recreate the record by submitting a self-serving affidavit from

III. THE CLAIM THAT THE SUMMARY JUDGMENT RULINGS PREJUDICED DAVIS AT TRIAL WAS NOT PRESERVED AND THERE WAS NO ABUSE OF DISCRETION

A. Questions Presented

Did Davis fail to preserve its argument that references to the summary judgment rulings prejudiced it at trial; and if preserved, was Davis prejudiced when such rulings were irrelevant to the claim at trial?

B. Scope Of Review

Where a party fails to object at trial, the issue is not reviewable in the absence of plain error, *i.e.*, an error clearly prejudicial to substantial rights that jeopardizes the fairness and integrity of the trial process. *Med. Ctr. of Del. Inc. v. Lougheed*, 661 A.2d 1055, at 1060 (Del. 1995). Even if preserved, the standard for review is abuse of discretion, which requires a showing of significant prejudice that denied a fair trial. *Christiana Care Health Servs., Inc. v. Crist*, 956 A.2d 622, 625 (Del. 2008).

C. Merits Of The Argument

1. Davis failed to preserve this issue on appeal

As Davis did not object below, this issue was not preserved. Moreover, not

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its legal counsel that found no support or corroboration in the parties' contemporaneous communications. (A905.) Rather, Topel personally approved the Engineering Clause, but never proposed using the defined term Filing Date. (A235.) Moreover, Topel's communications related to § 15.1(b), and the deadlines thereunder, are telling. (B6.) The lack of any similar correspondence regarding the Engineering Clause militates against any understanding by Topel or Davis that the termination right expired. (*Id.*)

only did Davis fail to object, on the first day of trial, it expressly suggested that Radio One refer to the summary judgment rulings: "If I may suggest, I don't know … if Mr. Hanson is interested, but he may lead with: Are you aware of the rulings in the case?" (B41 172:15-18.) Having suggested that Radio One discuss the summary judgment rulings, Davis should not now be heard to claim it was inappropriate. Regardless, "plain error" or "abuse of discretion" cannot be shown because Davis was not prejudiced in its ability to present its case.

2. Davis was not prejudiced at trial

Selectively quoting from the Jury Instructions, Davis argues that the issue at trial was framed in a manner that prejudiced its ability to present its case. (B106.) This reference, however, was irrelevant to the jury's determination of the remaining issue at trial. The full Jury Instructions show the jury was specifically instructed that Davis's "claim is that Radio One breached the implied covenant of good faith and fair dealing by terminating the Agreement for pretextual reasons." (B105.) As purported pretextual reasons, Davis "assert[ed] that Radio One terminated the Agreement because it wanted to pursue other business opportunities in the Charlotte market, because it could no longer obtain access to its preferred tower location in Atlanta, and because it believed it could obtain a better deal from Davis Broadcasting by terminating." (B106-B107.) Both parties had the unfettered opportunity to present evidence for and against Davis's theories.

Whether or not Radio One was obligated to negotiate with third party broadcasters had no bearing on those arguments. As Davis argued at trial, "this case isn't about obligation; it's about motivation. … The things Radio One did and didn't do and the information it did and didn't disclose to Davis Broadcasting are directly relevant to what its motivation was, regardless of its legal obligations." (B99-B100.)

Accordingly, because Davis failed to preserve the issue below, and there was no prejudice, clear error or abuse of discretion, this argument should be rejected.

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