

ORIGINAL

No. 39853-2-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
10 MAY 17 PM 1:55
STATE OF WASHINGTON
BY Ch
CLERK

KAHALA FRANCHISE CORP., a Delaware corporation,

Plaintiff

v.

HIT ENTERPRISES, LLC, a Washington limited liability company; and THOMAS S.
KLUTZ, JR., and HEIDI KLUTZ, husband and wife

Defendants and Third Party Plaintiffs / Respondents

v.

DRAGON FIRE INVESTMENTS, LLC, a Washington limited liability company;
REGINA NORBY-THORBECKE and WILLIAM THORBECKE, KYLE LEONARD a
single man; RODNEY MANZO a single man; and CHRISTOPHER BOYD and JANE
DOE BOYD, husband and wife,

Third-Party Defendants / Appellants (Dragon Fire & Thorbeckes)

APPELLANT'S REPLY TO RESPONDENT HIT'S REPLY BRIEF

Robert D. Michelson, WSBA # 4595
Attorney at Law
PO Box 87096
Vancouver, WA 98687-0096
(360) 260-0925 Fax (360) 944-1947
Email: rmitchelson@msn.com

01/14/10

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1. INTRODUCTION

Appellant is aware a reply brief is not to serve the purpose of regurgitating points raised in their opening brief. They do however wish to point out some allegations of a procedural nature that appear to be miss-statements in Hit's Response.

Dragon Fire also wishes to respond to a couple of new matters raised that were not the subject of the Summary Judgment proceeding nor should they have been raised for the first time on review.

Hit alleges on page 1 that Dragon Fire did not "specifically assign error to any order the trial court entered". Obviously this is an incorrect statement. Dragon Fire, under their Issues Pertaining to Assignment of Error section (e), specifically take issue with the letter opinion of the Judge which contains the heart of his summary of his findings concerning all of the documentary submissions of the parties. Dragon Fire also sets out in detail in their Notice of Appeal

those matters being challenged together with attached copies of submissions to which they assign error.

Normally the same designations of what Dragon Fire would have considered error would have been contained in the Statement of Arrangements however in this case, the Statement of Arrangements is not applicable.

2. THE RCW 19.100 ISSUE

The Summary Judgment Motions in this case were Motions for Partial Summary Judgment, C.P. 62, Dragon Fire's Motion, as was Hit's Motion for Partial Summary Judgment, C.P. 30. Neither document addressed the RCW 19.100 issue raised in Dragon Fire's Complaint nor did the Court entertain argument or consider submissions on that issue. Therefore that issue is raised for the first time on review by Hit.

Should RCW 19.100 become an issue, it could only occur should the Court remand for trial on all issues or determine certain issues on their own and leave others to be resolved on remand.

3. Addressing Hit's Reply

Hit takes a cut and paste approach in response to Dragon Fire's Opening Brief. They repeatedly refer only to portions of the three most important documents construed by the trial court. When referring to whether or not Mr. Klutz intended to transfer "franchise rights", the Reply Brief, whenever possibly, uses the words "transfer of the franchise". Dragon Fire never contended they were becoming the owner of a Samurai Sam's franchise, only those rights Hit had under the franchise agreement with Kahala.

Mr. Klutz's deposition is full of statements that would lead a reasonable person to believe transfer of the franchise rights were discussed as part of the contract negotiation and that he led the Thorbeckes to believe he had consent to transfer those rights. At C.P. 61, page 46 of Mr. Klutz's deposition, line 6, he says "I did get

consent” when asked about a transfer arrangement (C.P. 61 page 46, line 6, attached after page 4 of 7 of the Declaration of Kyle Leonard). In the same deposition, a discussion occurred at page 48, where Mr. Klutz was asked if he had permission to sell the Samurai Sam’s name to Dragon Fire. His answer at line 7 was “I did”. When questioned at line 8, “how did you get that permission?”, he states at line 9 that he got it through Sean Wieting (page 45 through 48 are duplicated in C.P. 61). He goes on to say at page 48, lines 20 through 22, that he sent the royalty payments to the accounting department.

Again, Thorbeckes submit there was absolutely no basis for the trial court to have determined it was not the intent of Mr. Klutz to transfer the franchise rights or why would Mr. Klutz have said he went to the trouble of getting approval for the consent and believed he had it. On page 96 of Klutz’s deposition, lines 12 through 22, he attempts to explain a loose under the table agreement that if he sent the checks to the accounting department, no one would essentially catch on to the transfer.

A similar discussion occurs at page 103 (C.P. 61 lines 8 through 15) about later discussions with an employee named Mike Reagan at Samurai Sam's that possibly one of the employees would not have approved of the arrangement he had made with Dragon Fire, at least the chance was 50/50, (C.P. 61, page 103, line 19), but Mr. Klutz went on to say at line 21, he didn't need to make the call because Sean (referring to Sean Wieting) was taking care of it. All of this raises a reasonable inference that the intent of the agreements taken together was to transfer franchise rights and collect royalties.

The glaring fact that raises a reasonable inference is the open discussion by Mr. Klutz in his deposition about getting consent to transfer the rights, collecting royalties and Dragon Fire paying the royalties. This makes it obvious the parties contemplated the transfer of the franchise rights even though as lay persons, they did not include that in the contractual agreements. A judge or a jury in a trial on the merits could certainly determine those reasonable inferences and logic would dictate a transfer of franchise rights. Hit's reply cannot simply wash away these disputed facts..

On pages 3 and 5 of Hit's Introduction they devote portions to discussing the income received by Dragon Fire during the course of operation. This argument was orally proposed at hearing but is not reflected in the Clerk's Papers. Obviously it has nothing to do with the principal issue here being that even if after the fact the business was not so good it has nothing to do with the contract issues.

Throughout the Reply there is the argument that on one hand extrinsic evidence should not have been considered by the trial court nor the Court of Appeals. Yet at the same time Hit replies that references to the franchise agreement (page 14 argument) and such, would indicate Dragon Fire somehow should know they were not getting franchise rights because the franchise agreement required permission to transfer and generally a transfer fee. This is extrinsic evidence and Hit wants it considered.

Furthermore, Mr. Thorbecke did not see the Franchise Agreement until March or April of 2006, C.P. 20, page 43 deposition of Bill Thorbecke.

Another problem which makes it difficult to reply is Hit's refusal of citing use Clerk's Papers references which do not cite the actual number of the Clerk's Paper but rather apparently use a numerical system running from page 1 of the first page of the first document throughout all documents supplied to the Court. There is a statement on page 3 of Hit's statement of the case that the Thorbeckes were not interested in paying such a fee.

It is difficult to identify such a statement in the Clerk's Papers but it is believed Mr. Thorbecke in his deposition said the Franchise Transfer Fee was included in the down payment.

4. CONCLUSION

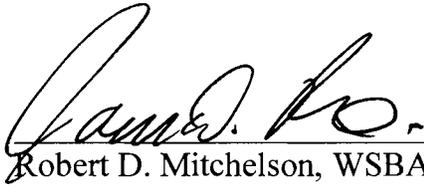
The trial court should have concluded that the plain language of the contract of sale by using the language in paragraph 2 that seller desires to sell and buyer desires to buy "the business known as Samurai Sam's Teriyaki Grill "and" all assets therefore" raised an reasonable inference that not just hard assets were being sold.

When one moves onto the Bill of Sale, C.P. 61 Exhibit "1", the same obvious conclusion occurs with a reasonable reading and interpretation of the Bill of Sale. It contains two numbered paragraphs. The first specifically list the hard assets on Schedule A, paragraph 2 then goes on to name the "whole of the goodwill of the Samurai Sam's Teriyaki Grill Business of the undersigned which is the subject of the Sale".

Furthermore, the final paragraph of the Bill of Sale should lead to the reverse conclusion reached by the trial court. One does not assert a non-compete agreement concerning goodwill, i.e. the name of the company, logically if the name of the company is not being transferred as part of the sale. Mr. Klutz did not own the name Samurai Sam's, the Kahala Corporation owned it.

The court on review should determine the Sales Agreements when interpreted correctly and together displayed an intent to transfer the franchise rights available to Hit to Dragon Fire and remand on other issues not addressed in the Summary Judgment proceeding.

Respectfully submitted this 13th day of May, 2010 by:

A handwritten signature in cursive script, appearing to read "Robert D. Mitchelson", written over a horizontal line.

Robert D. Mitchelson, WSBA#4595
Attorney for Dragon Fire / Thorbeckes

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10 HIT ENTERPRISES, LLC, a Washington
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12 KLUTZ, JR., and HEIDI KLUTZ, husband and
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22 NORBY-THORBECKE and WILLIAM
23 THORBECKE, husband and wife; KYLE
LEONARD a single man; RODNEY MANZO a
single man; and CHRISTOPHER BOYD and
JANE DOE BOYD, husband and wife,

24 Third-Party Defendants.
25

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**CLARK COUNTY SUPERIOR
COURT CASE NO.: 07-2-02065-2**

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ROBERT D. MITCHELSON
ATTORNEY AT LAW
PO Box 87096
Vancouver, Washington 98687
(360) 260-0925
Fax (360) 944-1947

