[Cite as *MCS Marketing v. Univ. of Akron*, 2004-Ohio-5453.]

IN THE COURT OF CLAIMS OF OHIO

MCS MARKETING, INC.	:	
Plaintiff/Counter Defendant	:	CASE NO. 2003-05381 Judge Joseph T. Clark
v.	:	DECISION
THE UNIVERSITY OF AKRON	:	
Defendant/Counter Plaintiff	:	

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{¶ 1} Plaintiff/counter defendant, MCS Marketing, Inc. (MCS), brought this action against defendant/counter plaintiff, The University of Akron (UA), alleging claims of breach of contract and negligent misrepresentation. UA filed an answer and counterclaim against MCS for an accounting and remittance of withheld revenues. The case proceeded to trial on the issues of liability and damages.

{¶ 2} On March 25, 2002, David McGrew, president and sole employee of MCS, an Illinois corporation licensed to do business in Ohio, entered into a contract with UA, a state institution of higher education created pursuant to R.C. 3359.01. The contract granted MCS the exclusive marketing rights for corporate sponsorships of UA's department of intercollegiate athletics in exchange for periodic "rights fees" payments. The term of the contract was from January 1, 2002, through June 30, 2005.

{¶ 3} Section III of the contract provided that MCS would pay UA a guaranteed sum of $485,000 for "contract year 2002-2003." The guarantee was subject to a reduction if any current sponsor defaulted on or terminated its contract with UA. Section III(B) of the contract provided that MCS was entitled to the first "$20,000 net" in new business once the guarantee was met and that UA was entitled to the next "$20,000 net." Section III(D) of the contract provided that MCS would pay

UA rights fees in three installments due on September 1, January 3, and April 1 of each contract year. Sections IV(A) and (B) of the contract provided that at the conclusion of each contract year beginning on June 30, 2003, MCS would provide a year-end accounting statement to UA calculating and reflecting that contract year's revenues from guaranteed rights fee payments, profit apportionments, and barter agreements, and that UA would have the right to audit MCS' records at UA's expense for up to one year.

{¶ 4} Section V of the contract also contained the following language:

{¶ 5} "B. **Early Termination Rights.** The term of this Agreement is subject to early termination by either party hereto upon the occurrence of any of the following.

i. "***

ii. "3. Material Default. The occurrence of any event of material default by either party that shall remain uncured for more than thirty days (30) after written notice."

iii. "***

{¶ 6} "C. **Notice of Termination.** In the event of the applicability of Section V-B-3, the party having the option to terminate shall give written notice of its intent to elect early termination. The defaulting party shall have thirty days (30) to correct the default. If the defaulting party fails to correct the alleged default, this Agreement shall terminate subject to the terms hereof.

{¶ 7} "***." (Plaintiff/Counter Defendant's Exhibit 1.)

{¶ 8} On February 4, 2003, UA notified MCS that it was terminating the contract for a number of reasons, including failure to perform the obligation of soliciting corporate sponsorships, failure to communicate, failure to provide UA with proposed sponsorship agreements, failure to "service" sponsors, using university resources for non-university purposes, and failure to timely pay rights fees. (Plaintiff/Counter Defendant's Exhibit 2.) In the letter, UA stated that "[w]hile the Agreement provides for a 30-day cure period on material breach of a party, Athletics feels that the above-cited breaches are not capable of being cured, and the overall failure of the Agreement cannot be remedied." (Plaintiff/Counter Defendant's Exhibit 2, page 5.) The letter also stated, "[t]his

correspondence will serve as the Department of Athletics notice of intent to terminate the Agreement, with such termination to be effective 30 days from the date of this letter. This will give Athletics and MCS ample time to transition contracts and billing, to perform an accounting, and to make final payments." (Id.)

{¶ 9} MCS asserts that UA breached the contract when it unilaterally terminated the contract without giving MCS 30 days to cure the alleged material breaches. UA argues that MCS failed to utilize its best efforts in marketing and soliciting corporate sponsorships on behalf of UA and that this failure constituted an incurable, material breach of the contract.

{¶ 10} David McGrew testified that he had 20 years of marketing experience and that he founded MCS in 1995. According to McGrew, he developed a new concept to have local businesses, the city of Akron, and UA join together to promote the city and UA through advertisements during UA's sporting events. The concept, known as "Team Akron," was comprised of a number of pre-existing, high-dollar sponsors such as First Energy, ALLTEL, Giant Eagle, Summa Health, and new sponsors such as Pepsi, Hilton/Sheraton Hotels and Adidas. McGrew further testified that his main contact with UA was with Assistant Athletic Director Mike Waddell and that, over time, communication problems arose between the two.

{¶ 11} McGrew testified that throughout the contract period, a series of "missed opportunities" arose during his efforts to acquire additional Team Akron accounts. The first missed opportunity occurred when the city of Akron pledged $15,000 to be a Team Akron sponsor. Along with the monetary pledge, the mayor agreed to introduce televised basketball games for UA. Subsequent to the city's pledge, UA mistakenly canceled the mayor's season tickets to university basketball games and gave those tickets to UA's Board of Trustees. As a result, the mayor became upset and canceled both the pledge and his participation. McGrew testified that the mayor's participation would have been invaluable and would have benefitted UA in excess of the $15,000 pledge.

{¶ 12} Another missed opportunity, according to McGrew, involved the college bookstore which initially had pledged $90,000 worth of savings to the athletic department over three

years. After much negotiation on McGrew's part, McGrew was informed by UA that the bookstore could not sign a contract with the athletic department. McGrew also testified that he had begun negotiations with the United States Army (U.S. Army) before UA terminated the contract.

{¶ 13} McGrew testified that MCS earned $110,000 for UA in renewals of existing contracts from ALLTEL, National City, Time Warner Cable, Akron Beacon Journal and Papa John's. He further testified that MCS acquired new sponsorship accounts from Hilton/Sheraton Hotels ($61,500 for a two-year contract with $10,000 committed for the first year), Triple A Akron ($10,000), and Wings Warehouse ($1,700). McGrew also testified that MCS paid rights fees on September 1, 2002; that MCS made the January 3 payment on January 9, 2003; and that MCS has not paid the April 1, 2003, rights fees because the contract was terminated before that date.

{¶ 14} Regarding the rights fees due on April 1, 2003, McGrew testified that MCS collected $84,000 for fiscal year 2003 in addition to an advance payment from First Energy in the amount of $83,000. The total of approximately $167,000 is currently being held in MCS' account with Bank One in Chicago, Illinois. McGrew testified that if the contract had not been terminated, MCS would have paid rights fees to UA in the amount of $140,000; that MCS would have retained $25,000 for fiscal year 2003; that MCS would have retained an additional $2,500 from the First Energy payment; and that MCS was entitled to three percent of a $50,000 pouring-rights contract from Pepsi ($1,500) that was paid to UA pursuant to page six of the contract.

{¶ 15} Michael Thomas, UA's director of athletics, testified that MCS was hired because UA did not have enough in-house resources to effectively market its athletic teams. According to Thomas, the goal of the contract was to expand the existing sponsorship program by targeting smaller sponsors in the range of $1,500 to $25,000. Thomas testified that before the contract was signed, MCS provided UA with an estimate of net new business in the amount of $150,000, but that in fiscal year 2003, MCS generated only $21,700 in new business and pursuant to the contract, the first $20,000 of that was retained by MCS.

{¶ 16} Defendant/Counter Plaintiff's Exhibit H shows that in June 2002, Thomas requested that McGrew supply sales reports every two weeks to monitor MCS' progress and that

McGrew agreed to provide them. However, according to Thomas, the sales reports were usually provided late. Thomas further testified that he wanted to terminate the contract because he felt that there was a "complete lack of effort" on McGrew's part in achieving the goal of the contract; and that McGrew was concentrating too much on the Team Akron idea rather than obtaining new sponsorships at lower dollar levels. On January 30, 2003, Thomas met with McGrew to discuss his disappointment with MCS' performance. At the meeting, McGrew suggested that he report directly to Thomas instead of to Waddell, and that a college intern, Bob Rich, focus on smaller accounts while McGrew worked on Team Akron accounts. McGrew's suggestions were unacceptable to Thomas.

{¶ 17} Mike Waddell testified that he began his employment with UA in June 2001. According to Waddell, the Team Akron concept was an expansion of the existing "Team Zippy" concept (named for the university mascot) and that it consisted of mainly pre-existing accounts. Waddell testified that McGrew was not receptive to seeking out new sponsors at smaller dollar levels and as a result, he pursued new sponsors himself. Waddell testified that McGrew contacted only 15 to 20 of 260 potential sponsors.

{¶ 18} Waddell further testified that McGrew insisted on producing the broadcasts of two basketball games himself, and that the production was poor and did not meet required specifications for broadcasting. Waddell also testified that McGrew aired a commercial for Damon's restaurant, which was not a paid sponsor, during the basketball broadcasts. He stated that McGrew's decision to run that commercial had the potential to anger other sponsors and that it wasted an opportunity to promote the university. Waddell also testified that UA renegotiated contracts with ALLTEL and U.S. Army after MCS' contract was terminated and that the renegotiations resulted in better contracts for the university.

{¶ 19} As a general rule, the goal of the court in construing written contracts is to arrive at the intent of the parties, which is presumed to be stated in the document itself. See *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202; *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 1996-Ohio-393. Where the terms of a contract are

clear and unambiguous, the court cannot find different intent from that expressed in the contract. *E.S. Preston Assoc., Inc. v. Preston* (1986), 24 Ohio St.3d 7.

{¶ 20} Upon review of the contract, the court finds that the language of the contract is unambiguous. Pursuant to Section V(C), UA was obligated to allow MCS 30 days to correct the alleged material defaults that UA referred to in its February 4, 2003, letter of termination. The court finds that UA breached the contract by unilaterally declaring that MCS' alleged material defaults could not be remedied within 30 days and by failing to provide MCS 30 days within which to cure the alleged defaults. Moreover, the court finds that there is no provision in the contract that permits either party to unilaterally terminate the contract in the event that the party's expectations are not met.

{¶ 21} UA asserts that it relied on McGrew's representation that he could generate $150,000 in new sales in the first year of the contract. However, the court notes that although the $150,000 estimate is referred to in an e-mail (Defendant/Counter Plaintiff's Exhibit G), the $150,000 figure does not appear in the contract. Furthermore, the e-mail was part of negotiations before a written contract was executed. Having found that the contract language is unambiguous, the estimate contained in the e-mail constitutes parol evidence and is not admissible to vary the terms of the contract. "[W]here the terms of a contract are clear and unambiguous, extrinsic evidence may not be used as an aid in interpretation." *Whitley v. Canton City School Dist. Bd. of Edn.* (1988), 38 Ohio St.3d 300, 301, quoting *Rose v. New York Life Ins. Co.* (1933), 127 Ohio St. 265, 273.

{¶ 22} UA argues that McGrew failed to utilize his best efforts in marketing and soliciting corporate sponsorships on behalf of UA and that this failure constituted an incurable, material breach of the contract. "A contractual provision which gives a party the exclusive right to market a product on behalf of another imposes upon that party a duty to employ reasonable efforts to generate sales of the product." *Illinois Controls, Inc. v. Langham,* 70 Ohio St.3d 512, 1994-Ohio-99, paragraph 1 of the syllabus. Although McGrew may have focused on the Team Akron sponsors more than UA desired, the court finds that McGrew put forth reasonable and good faith efforts to expand UA's program as required by the contract. In addition, the contract specifically states that

UA shall assist MCS in advertising, sponsorship sales and promotional activities, and that UA shall assist in "any and all sales and servicing efforts for current sponsors plus all sponsors and potential sponsors." (Plaintiff/Counter Defendant's Exhibit 1, Sections II(B)1 and 8.) Moreover, testimony at trial revealed that McGrew trained UA's intern, Bob Rich, and paid for part of Rich's stipend. Therefore, the court finds that the parties contemplated that they would work together to expand UA's athletic department sponsorships.

{¶ 23} UA also argues that MCS' lack of effort effectively frustrated the purpose of the contract and that, therefore, UA was not obligated to comply with the 30-day notice provision to terminate the contract. In order to prove that a contract has been substantially frustrated, "[i]t is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks he assumed under the contract." *Printing Industries Assn. of N. Ohio, Inc. v. Internatl. Printing & Graphic Communications Union* (N.D. Ohio 1984), 584 F.Supp. 990, 1000. The court finds that although MCS' efforts did not generate the amount of revenue that UA had originally anticipated, MCS did not frustrate the purpose of the contract.

{¶ 24} MCS also asserts a claim for negligent misrepresentation regarding its efforts to obtain a contract with the university bookstore at UA's request. However, the court finds that MCS failed to present sufficient evidence at trial to support this claim. Therefore, the court finds that MCS has failed to prove this claim by a preponderance of the evidence.

{¶ 25} "[F]or a breach of contract, the complaining party is entitled to such damages as might have been expected by the parties as the natural result of a breach." *J.R. Trueman & Assoc., Inc. v. McFadden* (Nov. 26, 1976), Franklin App. No. 76AP-172. "'[B]reach of a contract terminable at any time upon notice entitles the aggrieved party to recover only those net profits which he could have earned during the notice period; he may not recover profits for the entire term of the contract.'" *Zoller v. Rowe Mfg. Co.* (June 15, 1978), Seneca App. No. 13-77-4, citations omitted. The court finds that based upon McGrew's testimony, MCS would have retained $27,500 from the money that MCS collected in 2003, and that MCS was entitled to an additional $1,500 from

the Pepsi pouring-rights contract. Therefore, the court finds that MCS is entitled to retain $29,000 from the funds held in MCS' account in Bank One, Chicago. Since the contract permitted either party the right of termination, the court finds that MCS' damages are limited to what it would have earned during the 30-day notice period, or $29,000, plus the $25 fee for filing the complaint in this court. The court further finds that MCS must remit the remainder of the rights fees to UA.

{¶ 26} MCS also asserts a claim for prejudgment interest. R.C. 2743.18(A)(1) provides that interest shall be allowed with respect to any civil action on which a judgment or determination is rendered against the state for the same period of time and at the same rate as allowed between private parties to a suit. Former R.C. 1343.03(A) provided the applicable rate of interest as follows: "*** [w]hen money becomes due and payable upon any *** contract or other transaction, the creditor is entitled to interest at the rate of ten per cent per annum, and no more, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract."

{¶ 27} Effective June 2, 2004, R.C. 1343.03(A) provides: "*** [w]hen money becomes due and payable upon any *** contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract."[1] R.C. 5703.47(B) states: "On the fifteenth day of October of each year, the tax commissioner shall determine the federal short-term rate. For purposes of any section of the Revised Code requiring interest to be computed at the rate per annum required by this section, the rate determined by the commissioner

[1]The notes regarding the current version of R.C. 1343.03 state as follows: "The interest rate provided for in division (A) of section 1343.03 of the Revised Code, as amended by this act, applies to actions pending on the effective date of this act. In the calculation of interest due under section 1343.03 of the Revised Code, in actions pending on the effective date of this act, the interest rate provided for in section 1343.03 of the Revised Code prior to the amendment of that section by this act shall apply up to the effective date of this act, and the interest rate provided for in section 1343.03 of the Revised Code as amended by this act shall apply on and after that effective date."

under this section, rounded to the nearest whole number per cent, plus three per cent shall be the interest rate per annum used in making the computation for interest that accrues during the following calendar year." Because this judgment shall be rendered after the effective date of amended R.C. 1343.03(A) but before the federal short-term rate has been determined by the tax commissioner, the court shall calculate the entire amount of prejudgment interest on this judgment at the rate of ten percent per annum.

{¶ 28} Under R.C. 1374.03(A), prejudgment interest attached to MCS' damage award in this case when the money owing MCS became "due and payable." The court finds that the rights fees became due and payable on April 1, 2003. Therefore, MCS is entitled to recover $29,000, which represents MCS' share of the profits made in 2003 pursuant to the contract, plus prejudgment interest and the $25 filing fee. Prejudgment interest on $29,000 calculated at the rate of ten percent per annum from April 1, 2003, to September 30, 2004, equals $4,353.97. Accordingly, judgment shall be rendered in favor of MCS in the total amount of $33,378.97.

{¶ 29} UA also asserts a counterclaim for remittance of withheld revenues and an accounting. Upon review of the evidence, judgment shall be rendered in favor of UA on its counterclaim in the amount of $133,621.03, which represents $167,000 minus $33,378.97. The court notes that although McGrew testified that the funds he collected on behalf of UA for the April 1, 2003, rights fees total approximately $167,000, the parties did not present results from an audit or an accounting which would show an exact dollar amount. Therefore, UA is also granted the right to conduct an accounting of all records of MCS related to the revenue and expenses of MCS' performance of the contract, such accounting to be at UA's expense. UA shall notify the court in writing on or before *October 15, 2004*, whether it intends to conduct an accounting. The judgments for both parties shall be held in abeyance pending either an accounting or a written request by UA to forego an accounting and enforce the judgments. The court ORDERS that MCS is enjoined from withdrawing any funds held in its Bank One, Chicago account until further notice. If necessary, the court may conduct a hearing to finalize the judgments once the parties notify the court that an accounting has been completed.

IN THE COURT OF CLAIMS OF OHIO

MCS MARKETING, INC. :

Plaintiff/Counter Defendant : CASE NO. 2003-05381
Judge Joseph T. Clark
:
v. JUDGMENT ENTRY
:
THE UNIVERSITY OF AKRON
:
Defendant/Counter Plaintiff :
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This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, the court ORDERS that defendant/counter plaintiff may conduct, if it chooses to do so, an accounting of all of plaintiff/counter defendant's records related to the revenue and expenses of plaintiff/counter defendant's performance of the contract at defendant/counter plaintiff's expense. The court further ORDERS that plaintiff/counter defendant is ENJOINED from withdrawing any funds held in its Bank One, Chicago account until further notice. Judgment is rendered in favor of plaintiff/counter defendant in the amount of $33,378.97, which includes the filing fee paid by plaintiff/counter defendant, and which shall be HELD in abeyance until further notice. Judgment is rendered in favor of defendant/counter plaintiff on its counterclaim in the amount of $133,621.03, which shall also be HELD in abeyance until further notice.

A status conference is scheduled for *October 20, 2004, at 9:00 a.m.,* to discuss whether defendant/counter plaintiff will conduct an accounting at its own expense and, if so, to determine a timetable for such accounting. At the time of the conference, the court will contact all counsel via telephone.

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JOSEPH T. CLARK
Judge

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