[Cite as *Pertoria, Inc. v. Bowling Green State Univ.*, 2013-Ohio-5955.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

PERTORIA, INC.

Plaintiff/Counter Defendant

v.

BOWLING GREEN STATE UNIVERSITY

Defendant/Counter Plaintiff

Case No. 2010-03967

Judge Dale A. Crawford

DECISION

{¶ 1} This matter comes before this Court pursuant to a Decision rendered on July 5, 2012, in which this Court found that Plaintiff/Counter Defendant, Pertoria, Inc. (Plaintiff), proved, by a preponderance of the evidence that Defendant/Counter Plaintiff, Bowling Green State University (Defendant) (1) breached an October 17, 2001 contract and (2) engaged in tortious interference with business relationships.1

{¶ 2} Plaintiff owns and operates several "Wendy's" franchise restaurants. On October 17, 2001, Plaintiff and Defendant entered into a written operating agreement and a lease whereby Plaintiff agreed to operate a Wendy's restaurant in Defendant's newly renovated student union on the Bowling Green State University (BGSU) campus. Both the operating agreement and lease had an initial term of five years, and each was renewed for an additional five-year term, to expire on May 12, 2012. On May 1, 2009, Plaintiff was informed via letter that beginning July 1, 2009, student meal plan dollars

[1] The original trial judge is not able to proceed with the trial on damages. This judge has certified, pursuant to Civ.R 63, that he has familiarized himself sufficiently with the record to proceed on damages. While this judge may have issues with the prior decision, it will be followed in total.

would no longer be available for use at the restaurant. Prior to the change in student meal plan dollars, Plaintiff's annual sales at the BGSU Wendy's between 2005 and 2008 averaged roughly $1.7 million. In 2009, Plaintiff's sales were $1.3 million. In 2010, Plaintiff's sales were $810,023 and in 2011 Plaintiff's sales were $825,185.

{¶ 3} Pursuant to a previous order, the issues of liability and damages were bifurcated and this hearing was on the issue of Plaintiff's damages and Defendant's counterclaim. While the Court previously determined liability on the issues of breach of contract and tortious interference with a business relationship, Plaintiff has advised the Court that it is only seeking damages on the breach of contract.

{¶ 4} Plaintiff claims that subsequent to July 1, 2009, its BGSU Wendy's store realized a significant decline in revenue until the end of the lease and that such a decline in revenue was proximately caused by Defendant's breach and tortious interference with its business relationship. Defendant asserts that while there was a decline in revenue subsequent to July 1, 2009, it does not believe that Plaintiff proved that the decline in revenue was proximately caused by the breach of contract and/or tortious interference with business relationships.

{¶ 5} "[T]he proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred." *Aiken v. Industrial Com.*, 143 Ohio St. 113, 117 (1944). Thus a contracting party is liable for damages that are the natural and probable result of the breach. *Mills v. Best Western Springdale*, 10th Dist. No. 08AP-1022, 2009-Ohio-2901. "Lost profits may be recovered by the plaintiff in a breach of contract action if: (1) profits were within the contemplation of the parties at the time the contract was made, (2) the loss of profits is the probable result of the breach of contract, and (3) the profits are not remote and speculative and may be shown with reasonable certainty." *Charles R. Combs Trucking, Inc. v. International Harvester Co.*, 12 Ohio St.3d 241 (1984), paragraph two of the syllabus. "In order for a plaintiff to recover lost

profits in a breach of contract action, the amount of the lost profits, as well as their existence, must be demonstrated with reasonable certainty." *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65 (1988), syllabus, *citing Charles R. Combs Trucking, supra*.

{¶ 6} The Court has reviewed the record and has determined that the drop in revenue experienced by Plaintiff from 2009 to 2012 was proximately caused by Defendant's breach of contract and the tortious interferences with the business relationships. Defendant would have this Court speculate that other causes, including the decline in the national economy, were a factor in the decreased revenue. Defendant has provided the Court with no evidence that support its claim that factors outside of the breach caused Plaintiff's economic harm. The Court finds that Plaintiff has proved by a preponderance of the evidence that all of its economic harm from July 1, 2009 to May 12, 2012 was proximately caused by Defendant's breach of contract and its intentional interference with the business relationships.

Plaintiff's Calculations

{¶ 7} Plaintiff submitted the testimony of Rex Decker, a CPA and attorney who has more than 30 years of experience valuing corporate economic data and rendering opinions regarding that data. Mr. Decker opines that Plaintiff's loss is $846,229. In reaching this opinion, Mr. Decker found that general and administrative expenses were fixed, rather than variable; that Plaintiff's annual sales from 2003-2008 should be weighted; and that the damages should include a gross up because of increased taxes as a result of additional profits.

Defendant's Calculations

{¶ 8} Defendant submitted the testimony of Jonathan Libbert, a CPA who has extensive experience in forensic accounting, especially for insurance companies who

seek valuation of losses due to various causes. Mr. Libbert opined that Plaintiff's losses are at most $459,963. Mr. Libbert and Mr. Decker differ regarding the classification of general and administrative expenses; the weighing of Plaintiff's pervious sale's history; and whether any losses should include a gross up to account for increased taxes. Mr. Libbert believes that general and administrative expenses should be classified as variable; that there should be no weighing of annual sales history, and only 2008 should be used as a benchmark; and, since Plaintiff is a subchapter S Corporation, the tax ramifications to the owners are too speculative to be considered an increase of loss.

{¶ 9} While this Court would prefer to calculate damages with certainty, that is an impossibility. The law only requires that damages "be demonstrated with reasonable certainty." *Gahanna supra, citing Charles R. Combs Trucking, supra*.

{¶ 10} The Court finds Mr. Libbert's testimony to be more persuasive then Mr. Decker's. The Court concludes that a gross up of losses to account for any increased taxes is too speculative. While such a gross up might be proven, Plaintiff has failed to prove such damages to a reasonable degree of certainty. Additionally, the Court is persuaded by Mr. Libbert's testimony that general and administrative expenses should be classified as fixed expenses. Indeed, Mr. Decker admitted that general and administrative expenses can vary in the long term and are related to Plaintiff's sales volume. Finally, the Court finds that using Plaintiff's sales from 2008 is an appropriate benchmark and is a better representation of loss of revenue than weighing sales from 2003-2008. The Court is persuaded by Mr. Libbert's testimony that the most recent data from 2008 is relevant in determining Plaintiff's damages. Accordingly, the Court finds that Plaintiff has proven by a preponderance of the evidence that it has suffered $459,963 in damages as a result of the breach of contract. Therefore judgment shall be entered in favor of Plaintiff in the amount of $459,963 on Plaintiff's claims.

Counterclaim

{¶ 11} The lease agreement provides as follows:

{¶ 12} "3.1 Rent. Throughout the Term, Tenant shall pay to the University, without demand, set-off or abatement except as provided in this Lease, the Minimum Rent and Percentage Rent (collectively, 'Rents') at the rates set forth in Section 3.2 below commencing on the Rent Commencement Date, as adjusted in accordance with the provisions of this Lease.

{¶ 13} "3.2 Determination of Rent.

{¶ 14} "3.2.1 Subject to adjustment in accordance with the provisions of this Lease, the Minimum Rent for the initial Term shall be $240,000. Minimum Rent shall be payable in arrears on the day of each month which corresponds with the Rent Commencement Date in equal monthly installments of $4,000. For example, if the Rent Commencement Date is January 3, 2002, the first installment of Minimum Rent shall be due February 3, 2002, and subsequent installments of Minimum Rent shall be due on the third day of each calendar month thereafter

{¶ 15} "3.2.2 Subject to adjustment in accordance with the provisions of this Lease, the Percentage Rent for the initial Term shall be determined in accordance with the Net Sales of the Tenant at the Store for each Lease Year, in accordance with the following schedule:

{¶ 16} "Net Sales up to $600,000 per year 8%

{¶ 17} "Net Sales from $600,001 to $1,200,000 10%

{¶ 18} "Net Sales over $1,200,000 12%

{¶ 19} "Percentage Rent shall be computed as follows: Net Sales year-to-date for each Lease Year shall be multiplied at the end of each month by the above percentages as applicable, and from the product thereof shall be subtracted the sum of the Rents (Minimum Rent and Percentage Rent) paid year-to-date for such Lease Year * * *."

{¶ 20} Plaintiff argues that it paid minimum rent and then followed the formula under 3.2.2 to determine the amount of percentage rent required. Defendant argues that Plaintiff was required to pay both minimum rent in addition to percentage rent and that Plaintiff failed to pay the minimum rent for the entire 10 year term of the lease.

{¶ 21} Plaintiff never paid the dual rent during the entire 10 year term of the lease including the renewal. At no time did Defendant ever raise the issue of unpaid rent. Such an issue was only raised after a liability decision in favor of Plaintiff.

{¶ 22} The construction of a written contract is a matter of law. *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Id.*, at paragraph two of the syllabus. The cardinal purpose of judicial examination of any written instrument is to ascertain and give effect to the intent of the parties. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51 (1989). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus.

{¶ 23} "A court is not required to go beyond the plain language of an agreement to determine the parties' rights and obligations if a contract is clear and unambiguous." *Cuthbert v. Trucklease Corp.*, 10th Dist. No. 03AP-662, 2004-Ohio-4417, ¶ 21. "If no ambiguity appears on the face of the instrument, parol evidence cannot be considered in an effort to demonstrate such an ambiguity." *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638 (1992).

{¶ 24} The Court finds that the lease agreement is not clear and unambiguous. It appears Defendant agrees with this finding. *See* Exhibit 14. Therefore, the Court will look to parol evidence to determine the intent of the parties. Plaintiff's owner, Rebecca Williams, testified that she spoke with Wanda Overlin, Defendant's Dean of students,

regarding the rent provision in the lease agreement. According to Ms. Williams, Ms. Overlin instructed Plaintiff to pay the minimum rent up to the percentages and explained that the minimum rent acted as a floor. Additionally, at no point during the term of the 10 year lease did Defendant claim that Plaintiff was incorrectly calculating its rent. Indeed, Defendant performed an audit of Plaintiff's sales during the first five-year lease period. Additionally, in an October 2007 internal BGSU email, Mary Edgington, Director of the student union, expressed satisfaction with the manner in which Plaintiff had been calculating rent. *See* Exhibit 14.

{¶ 25} Defendant believes that the rent provision in the lease agreement is clear and unambiguous and that the word "and" in the rent provision rather than the word "plus" can be construed as two different rents. However, by following the formula as shown by calculating the rent on a monthly basis, the rent due produces a negative number, as Mr. Libbert acknowledged. Additionally, an argument can be made that Defendant's conduct amounted to an estoppel and that the parties' continuing course of dealing manifested an intent to have the contract interpreted the way Defendant agreed in Exhibit 14. *State ex rel. Cities Service Oil Co. v. Orteca*, 63 Ohio St.2d 295 (1980). Accordingly, Defendant has failed to prove its counterclaim by a preponderance of the evidence. Therefore judgment shall be entered in favor of Plaintiff on Defendant's counterclaim.

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DALE A. CRAWFORD
Judge

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JUDGMENT ENTRY

{¶ 26} This case was tried to the Court on the issues of Plaintiff's damages and Defendant's counterclaim. The Court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of Plaintiff in the amount of $459,963. Judgment is also rendered in favor of Plaintiff on Defendant's counterclaim. Court costs are assessed against Defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
DALE A. CRAWFORD
Judge

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