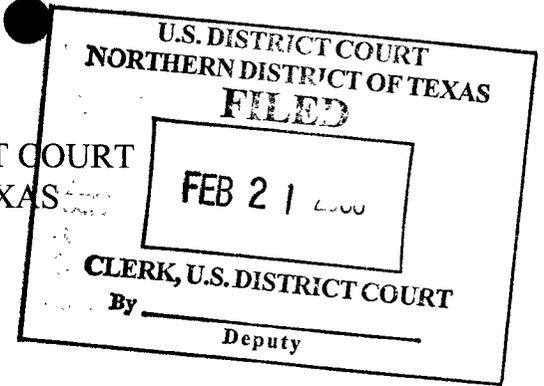


ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



RAMADA FRANCHISE SYSTEMS, INC. §
Plaintiff, §
v. §
JACBOCART, INC., JOY M. CART, §
and CHACKO JACOB, §
Defendants. §

Civil Action No. 3:01-CV-0306-N

ORDER

Before the Court is Plaintiff's Motion for Summary Judgment. For the reasons stated below, that motion is GRANTED.

I. FACTUAL BACKGROUND

This case involves a contract dispute between plaintiff Ramada Franchise Systems, Inc. ("RFS") and defendants Jacobcart Inc. ("Jacobcart"), Joy M. Cart and Chacko Jacob, Jacobcart's owners. On September 17, 1999, RFS and Jacobcart entered into a license agreement (the "License Agreement") involving the operation of a 100 room hotel in Denison, Texas. Cart and Jacob signed a Guaranty agreeing that all of Jacobcart's obligations under the License Agreement would be timely paid and performed. See Plaintiff's App. p. 48.

Under the License Agreement, Jacobcart agreed to operate a Ramada hotel for 15 years during which time it would be permitted to use the Ramada trade names and service

marks (the “Ramada Marks”) as part of RFS’s franchise system. In addition, the License Agreement required Jacobcart to: (1) make renovations to the facility, (2) maintain certain scores on quality assurance inspections, (3) pay periodic payments to RFS for royalties and other fees (the “Recurring Fees”), (4) prepare and submit monthly reports to RFS, (5) maintain accurate financial records and (6) allow RFS to audit and examine the records.

The License Agreement contained various provisions regarding breach of the agreement. Section 11.2 of the agreement states that RFS can terminate the License Agreement for various reasons including Jacobcart’s: (1) failure to pay RFS any amount due under the agreement; (2) failure to remedy any breach of its obligations under the agreement within 30 days after receiving written notice of the breach; and (3) receipt of two or more notices of default of the agreement in any one year period, whether or not the default was cured. According to its terms, if the License Agreement was breached, RFS could recover liquidated damages in accordance with the formula specified in the agreement. In addition, Jacobcart would lose all rights to use Ramada Marks in the event of a breach. Finally, the parties agreed that the non-prevailing party would pay all costs and expenses and reasonable attorney’s fees incurred while enforcing the License Agreement.

From December of 1999 to October of 2000, RFS had several problems with Jacobcart’s performance under the License Agreement. First, in December, 1999, May, 2000 and August, 2000, Jacobcart’s facility failed quality inspections. After each inspection RFS gave Jacobcart written notice of the failed inspection and told Jacobcart that if the defaults were not cured within 30 days, it would breach the License Agreement. Second, in

July, 2000, RFS notified Jacobcart that: (1) it was in default of its financial obligations under the License Agreement because it failed to file its required monthly franchise reports three times; (2) it owed RFS approximately \$12,600; and (3) it had 10 days to cure the default. Finally, on October 2, 2000, RFS sent Jacobcart a letter announcing it was terminating the License Agreement and advising Jacobcart that it must immediately stop using Ramada Marks. In addition, the letter advised Jacobcart that it was required to: (1) pay RFS \$200,000 in liquidated damages for premature termination of the contract, (2) de-identify its facility within 10 days of receipt of the letter, and (3) pay RFS outstanding Recurring Fees.

Jacobcart continued to use Ramada Marks and failed to pay the liquidated damages and Recurring Fees. Accordingly, RFS filed suit with this Court seeking damages and injunctive relief. RFS has moved for summary judgement.

II. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law.” A “genuine” dispute about a material fact exists if the evidence is such that a reasonable jury could find for the non-moving party. *Alton v. Texas A&M Univ.*, 168 F.3d 196 (5th Cir. 1999). The Court will consider the evidence is the light most favorable to the non-movant, but the non-movant cannot rely on mere allegations in the pleadings. *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170 (5th Cir. 2000). The non-movant must respond to the motion for

summary judgement by setting forth specific facts indicating that there is a genuine issue for trial. *Id.* After the non-movant has had the chance to raise a genuine fact issue, “if no reasonable juror could find for the non-movant, summary judgment will be granted.” *Id.*

III. DISCUSSION

A. *Liquidated Damages*

Paragraph 12.1 of the License Agreement requires Jacobcart to pay RFS liquidated damages in the amount of \$2,000 multiplied by the number of guest rooms at the facility, which in this case is 100, within thirty days of the termination of the agreement. If Jacobcart breaches or prematurely terminates the License Agreement, RFS is thus entitled to \$200,000 in liquidated damages. *See* Plaintiff’s App. p. 21. Jacobcart argues that the liquidated damages provision of the License Agreement is unenforceable because it constitutes a penalty.

Under New Jersey law,¹ liquidated damages provisions are upheld when the set amount of damages is a reasonable forecast of just compensation for the harm caused by the breach and when that harm is very difficult or impossible to estimate. *Wasserman’s Inc. v. Township of Middletown*, 137 N.J. 238, 645 A.2d 100, 106-107 (1994). Difficulty in

¹ The License Agreement contains a New Jersey choice of law provision in section 17.5. Because this is a diversity case, this court is obligated to apply the choice of law rules of the forum state, Texas. *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308 (5th Cir. 2000). Under Texas contract law, as long as the transaction bears a reasonable relation to the state specified in the contractual choice-of-law provision, that state’s laws apply to the case. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990). In the instant case, RFS’s principal place of business is New Jersey, so the contract bears a reasonable relation to New Jersey. Accordingly, New Jersey law governs this contract.

assessing damages is an element of determining the reasonableness of a liquidated damages clause; thus, the more difficult the damages are to estimate, the more likely the court will uphold the provision as reasonable. *Id.* at 107. New Jersey courts presume liquidated damages clauses are reasonable, so the party challenging the clause bears the burden of proving that the clause is unreasonable. *Id.* at 108. The party challenging the liquidated damages clause must establish that its application would constitute a penalty. *Id.* In addition, the enforceability of a liquidated damages clause is a question of law for the court. *Naporano Assocs., L.P. v. B & P Builders*, 309 N.J. Super. 166, 706 A.2d 1123, 1127 (App. Div. 1998).

This Court finds that the liquidated damages provision in the instant case is reasonable and is enforceable as a matter of law for several reasons. First, damages from breach or early termination of the License Agreement were difficult to estimate when the agreement was drafted because of vast variations in the travel industry. From changing seasons to special events to increased competition, it is virtually impossible to predict a hotel's occupancy over an extended period of time. Along the same lines, because the License Agreement covered a fifteen-year period, it was difficult to predict Jacobcart's income that far into the future. Finally, New Jersey law presumes liquidated damages provisions are enforceable, and the party challenging the provision must prove that it is unreasonable and should not be enforced. Jacobcart did not meet this burden. Jacobcart missed its chance to contest the enforceability of the liquidated damages provision; the enforceability of a liquidated damages provision is an affirmative defense that must be pled, and Jacobcart missed the deadline to protest the

validity of the provision.² Therefore, the liquidated damages provision of the License Agreement is enforceable as a matter of law.

B. Recurring Fees

RFS also argues that Jacobcart failed to pay certain Recurring Fees that it was required to pay under the License Agreement. RFS claims that Jacobcart owes \$23,371.02 in past due Recurring Fees plus interest. Jacobcart does not deny that it owes RFS the fees; however, it disagrees with RFS about the amount owed, claiming that only \$16,786.94 is due. In its reply brief, RFS agrees to accept the amount of money Jacobcart believes it owes RFS, \$16,786.94, plus the contractual interest rate of 1.5 percent monthly starting on October 2000. Because RFS waives its claim for the larger figure and no other fact issue regarding the Recurring Fees exists, judgment as a matter of law is appropriate regarding the payment of Recurring Fees in the amount admitted by Jacobcart.

C. Jacob & Cart's Personal Guaranty

This Court finds that Jacob and Cart are personally liable for Jacobcart's financial commitments under the License Agreement because they both signed a Guaranty to that effect. *See* Plaintiff's App. p. 48. Under the Guaranty, Jacob and Cart agreed that upon Jacobcart's default under the License Agreement, they would "immediately make each payment and perform, or cause Licensee [Jacobcart] to perform, each unpaid or unperformed

² The deadline for the parties to amend pleadings was July 1, 2002. After the expiration of that deadline, the defendants can no longer raise an affirmative defense. *See* FED. RULE CIV. PROC. 8(c). The defendants moved for leave to amend their pleadings, but because the motion was untimely, it was denied.

obligation of Licensee under the Agreement.” *Id.* Because Jacob and Cart do not deny the existence of the Guaranty or argue that it is somehow invalid, they fail to raise a fact issue regarding its application. Therefore, RFS is entitled to judgment as a matter of law regarding the Guaranty claim. Jacob and Cart are liable for all of Jacobcart’s liabilities to RFS, including liquidated damages, Recurring Fees and attorney’s fees.

D. Attorney’s Fees

Under New Jersey law, legal fees may be recovered in a breach of contract action if the contract so provides. *Papalexiou v. Tower West Condo.*, 167 N.J. Super. 516, 401 A.2d 280, 287 (Ch. Div. 1979). Allowing recovery under a voluntary agreement between the parties is considered part of the reasonable and necessary expense of the litigant. *Id.* New Jersey has no public policy that prevails over the enforcement of a contract between private parties. *Id.*

This Court finds that section 17.4 of the License Agreement pertaining to attorney’s fees is enforceable and that Jacob and Cart’s personal Guaranty also covers this portion of the contract. Section 17.4 states, in relevant part, that the prevailing party in a dispute involving the License Agreement is entitled to “all costs and expenses, including reasonable attorney’s fees, incurred by the prevailing party to enforce this Agreement or collect amounts owed under this Agreement.” *See* Plaintiff’s App. p. 26. RFS is the prevailing party in this case. The Guaranty, discussed previously, also bound Jacob and Cart to pay Jacobcart’s liability for attorney’s fees. *See* Plaintiff’s App. p. 48. Jacobcart, Jacob and Cart did not respond to RFS’s request for attorney’s fees and therefore failed to raise a fact issue

regarding its application. Accordingly, judgment as a matter of law is appropriate regarding RFS's claim for attorney's fees.

IV. CONCLUSION

Ultimately, Jacobcart and its owners Jacob and Cart are liable for Jacobcart's breach of the License Agreement. Because the defendants failed to challenge the enforceability of the liquidated damages provision within the permissible time constraints, and they failed to raise a fact issue regarding the applicability of the Recurring Fees, attorney's fees and Guaranty, judgment as a matter of law for RFS is appropriate. Because the Court finds that the liquidated damages provision is enforceable and because no reasonable juror could find for Jacobcart, RFS's Motion for Summary Judgment is GRANTED.

SIGNED this 21 day of February, 2003.



David C. Godbey
United States District Judge