STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF UNION	FILE NO. 07-CVS-3186
A-1 PAVEMENT MARKING, LLC, Plaintiff, vs. APMI CORPORATION, LINDA BLOUNT and GARY BLOUNT, Defendants.	**A-1 PAVEMENT MARKING, LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS**

INTRODUCTION

Defendants' response misses the point of Plaintiff's Motion entirely. Nowhere did Plaintiff A-1 Pavement Marking, LLC ("A-1") contend that Defendant could not assert all its claims for relief in one action. Rather, A-1's motion highlights how Defendants' own pleadings acknowledge that the Asset Purchase Agreement ("APA") as written and signed by the parties squarely supports A-1's position. For this reason, APMI Corporation ("APMI") necessarily must argue "mutual mistake" and seek a judicial reformation of Schedule 2.3 of the APA. What APMI cannot do in this or any other action, even if its "mutual mistake" contention were to be successful, is to retroactively transform conduct by A-1 that was and is entirely consistent with the terms of the APA into a "default." APMI has cited no authority authorizing a court following a judicial reformation of a contract on a mutual mistake theory, to reach back to characterize past conduct as a contractual "default." Moreover, APMI fails to recognize that Section 3.2 of the APA expressly permits A-1 to exercise its offset right in the event of a dispute over the parties' contractual obligations. Even if the outcome of this action is, as APMI

wishes, a judicial reformation of Schedule 2.3 APA, the express terms of the APA permitted A-1 to withhold note payments in the disputed amounts.

APMI is seeking to leverage a contract dispute over Schedule 2.3 that can be remedied by a monetary award to one side or the other into a threat to redraw the fundamental terms of the asset sale: to accelerate the Promissory Note, to erase Linda and Gary Blount's covenants not-to-compete, and to allow the Blounts to compete immediately with A-1. This outcome is without support in law or equity. APMI's claims seeking such an outcome should be dismissed.

I. DEFENDANTS COULD RECOVER MONEY DAMAGES BUT NOT HOLD A-1 IN DEFAULT OF THE APA EVEN IF THE COURT JUDUCIALLY REFORMS THE APA.

Defendants' procedural argument is beside the point. A-1 does not argue, as Defendants suggest, that if successful on their mutual mistake argument, Defendants would need to bring a second lawsuit to recover money damages for payments they have made to lenders. A-1 does contend that Defendants cannot state a claim that A-1's failure to pay for outstanding vehicle loans not included in existing Schedule 2.3, before or after any judicial reformation of the APA, constitutes a "default" of the APA, Promissory Note (the "Note"), or the Security Agreement. (Pl.'s Br. in Supp. Mot. to Dis. at 7.) Defendants, remorseful sellers of A-1, may not transform what is at most a $300,000 dispute into a retroactive acceleration of Note payments or relief from their bargained-for covenants-not-to-compete based on an *ex post facto* default.

a. Contract damages of less than $300,000 would make Defendants whole for the losses they allege.

Generally contract damages, as opposed to contractual "defaults," serve to place the injured party in the position the party would have been in had the contract been

performed. *Burrell v. Sparkkles Reconstruction Co.*, ____ N.C. App. ____, 657 S.E.2d 712, 716 (N.C. Ct. App. 2008). "Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of execution." *Lane v. Scarborough*, 284 N.C. 407, 407-08 (1973) (citing *Bowles v. Bowles*, 237 N.C. 462, 75 S.E.2d 413 (1953)). "It is well recognized that the object of … interpretation is to arrive at the intention of the parties as expressed in the contract … this intent is to be gathered from a perusal of the entire instrument." *Railroad v. Railroad*, 147 N.C. 382, 147 S.E. 185, 109-110 (1908).

It is undisputed in the pleadings that the parties intended at the time of execution to enter into an asset sale that would result in the sale of substantially all of the assets of Old A-1 to new A-1 in exchange for cash, the Note and valuable restraints including Gary and Linda Blount's covenants-not-to-compete. (V. Compl. ¶9; Def. Ans. ¶9.) Thus, the only contested issue regarding the parties' intent is whether there was a mutual mistake of fact regarding the Schedule 2.3. In other words which of Old A-1's vehicle loans, if any, did APMI intend for A-1 to assume? If Defendants persuade the factfinder that Schedule 2.3 was incorrectly due to a mutual mistake, the proper contract remedy is to award damages to put the parties where they would have been had the contract been performed. That can be accomplished by truing up the amounts paid by A-1 and APMI, respectively, on the disputed vehicle loans.

If Defendants' meet their burden of proof and persuasion as to mutual mistake and that argument carries the day, the Court would judicially reform only Schedule 2.3 of the APA to conform to the parties' intent and the vehicle loans would become A-1's responsibility. The APA and related documents, other than Schedule 2.3, would remain

in force exactly as written so as to give effect to the parties' intent at the time of execution.

b. A-1 cannot be in "default" of any of the agreements even after a judicial reformation of the APA.

The parties' dispute began after Gary Blount resigned as General Manager of A-1. It was then that A-1's owners discovered that A-1's funds had been used to make payments on vehicle loans not listed on Schedule 2.3. After attempts to resolve the situation informally failed, on November 2, 2007, A-1 notified APMI that it was exercising its rights under the Indemnification provision in APA Section 3.2(b). (V. Compl. ¶ 36; Defs' Answer ¶ 36.)[1]

Defendants admit that on November 8, APMI acknowledged receipt of the A-1's letter, and provided A-1 with a "Notice of Default" commencing the 10-day cure period provided for the by Note. (V. Compl. at ¶ 37; Def's Answer §¶ 37.) Notwithstanding Defendants' representations regarding the cure period, APMI's agents trespassed onto A-1's land that same night and converted A-1 vehicles and equipment. This trespass and conversion led to the filing of this suit.

A-1 brought suit in Union County and Judge Taylor issued TRO eight (8) days after A-1's letter, on November 13, 2007. The Order, *inter alia*, forced APMI to return A-1's equipment and vehicles and ordered to refrain from interfering with A-1's business. A-1 also made payment on the Note payment then due. Per the terms of the APA, the Note and the Security Agreement, this cured the only default A-1 has ever

[1] Defendants do not agree that APMI owes A-1 the amounts claimed, but do not contest that the letter was sent or what it said.

been notified of under the APA or the Note. Defendants have not issued any other "Notice of Default" to A-1. A Consent Preliminary Injunction was ordered December 10, 2007.

A-1's actions were entirely consistent with the Note. It states:

> In the event [that A-1] fails to make any payment becoming due hereunder on time, which default is not cured within ten (10) days after notice thereof … or breach of the APA by [A-1] … then in any such event [APMI] , at its option and its sole discretion, may declare the entire unpaid principal balance and accrued and unpaid interest on this Note to be immediately due an payable." (V. Compl., Ex. A, Tab 4.)

This provision must be read in conjunction with the Deferral of Payments and Indemnification provision of the APA (the "Indemnification" provision). Under Section 3.2(b) the APA, if A-1 has an outstanding claim (e.g. a claim for re-payment for on-going surreptitious payment of APMI's liabilities by A-1 at the direction of Gary Blount) then A-1 is entitled to withhold a Note payment in an amount equal to A-1's claim. (V. Compl. Ex. A, § 3.2(b)). Thus, the Indemnification provision in the APA provides a contractual mechanism for A-1 to offset "that portion of the Purchase Price (or payment under the Note …) otherwise payable at that time equal to the asserted claim." (V. Compl. Ex. A, § 3.2(b)). The APA further states that upon "final resolution of all such indemnification claim(s), any portion of the withheld payment not offset as allowed by the indemnification claim(s) shall be promptly paid by [A-1] in accordance with the terms of the Note." (V. Compl. Ex. A., § 3.2(b)).

To find that the alleged mutual mistake of the parties is a default under the APA, the Note or the Security Agreement, the Court would be put in the untenable position of reading the documents in an inconsistent manner. "To the extent possible … every word, phrase or term of a contract must be given effect. An interpretation which gives

effect to all provisions of the contract is preferred to one which renders a portion of the writing superfluous, useless or inexplicable. A court will interpret a contract in a manner that gives reasonable meaning to all of its provisions, if possible." *Williston on Contracts*, Third Edition, § 32:5.

For the Court to hold A-1 in default under the Note for breaching a judicially reformed APA, the Court would have to read portions of Section 3.2(b) out of the APA. Section 3.2(b) expressly permits A-1 to exercise its indemnification rights in the manner it did. For Section 3.2(b) to have any meaning it must be read in agreement with the Note. This means that A-1 may assert its indemnification rights without fear of being held in default, if all procedural safeguards set forth in the Note are followed, as they were here. The same would be true of a judicially reformed APA as the only portion being judicial reformed is the schedule of loans on the vehicles not currently set forth in Schedule 2.3.

The same is true with respect to the default provision in the Security Agreement. It provides:

> Upon [A-1's] default in the performance of any obligation or agreement herein or in the discharge of any liability to [APMI] … [APMI] shall have all of the rights and remedies of the Secured Party under the Uniform Commercial Code of North Carolina or other applicable laws which may be in effect at the time of the default. (V. Compl., Ex. A, Tab 9.)

Reading the default provision in the Security Agreement and the Indemnification provision of Section 3.2(b) of the APA so as to give meaning to both, A-1's exercise of its rights under the Indemnification provision cannot trigger a default under the Security Agreement.

A-1 has complied with the Indemnification provision and all of the provisions of the APA as written to date. If the court judicially reforms the APA, then A-1 will comply with the reformed APA. No default will have occurred unless A-1 fails to comply.

If the APA is judicially reformed to require A-1 to pay the vehicle loans, APMI will have a backward-looking, make-whole contract remedy for monies paid on these liabilities. It will not, however, be able to hold Plaintiff in default under the APA and related agreements, which would accelerate Note payments and relieve Defendants of their negotiated-for covenants-not-to-compete. Any contrary outcome would be inconsistent with the parties' intent on the day they executed their agreements.

Importantly, Defendants have not cited any case law or authority that would authorize the Court to retroactively declare a "default" based upon a judicial reformation of Schedule 2.3. Neither has Plaintiff's research uncovered such authority. To the contrary, all the cases relied upon by Defendants are insurance policy interpretation cases where a plaintiff was entitled to backward looking, make-whole payments under the terms of the policy, as reformed. None of the cases involved commercial note or contract "defaults" like those at issue here. Thus, Defendants' claims seeking to hold Defendant in default of the APA and related agreements, accelerate the Note, and cancel the non-competes are without basis in law or equity should be dismissed.

II. THE CASES CITED BY DEFENDANTS REGARDING THEIR UDTPA CLAIMS ARE INAPPOSITE TO THIS CASE.

The conduct alleged by Defendants in their Unfair and Deceptive Trade Practice ("UDTPA") counterclaim regarding Gary Blount's bonus is not "in or affecting

commerce," as is required by N.C. Gen. Stat. § 75.1. As noted recently by the North Carolina Court of Appeals:

> [T]here is a presumption against unfair and deceptive practice claims as between employers and employees …. Ordinarily, in such a context, the claimant must make a showing of business related conduct that is unlawful or of deceptive acts that affect commerce beyond the employment relationship …. The rationale behind this general rule is that pure employer-employee disputes are not sufficiently "in or affecting commerce" to satisfy the second element of a UDTPA claim.

Gress v. Rowboat Co, Inc., No. COA07-961, 2008 WL 2242548, * 2 (N.C. App, June 3, 2008.)

At all times relevant to his claim Gary Blount was only an employee of A-1 -- the General Manager -- until his voluntary resignation from that position in May 2007. (V. Comp. ¶¶ 21-23.) He did not own Old A-1, and he was neither buyer nor seller in the asset sale transaction at issue before the Court. In an attempt to meet his legal burden of proving that Mr. Blount's employee bonus "affect[s] commerce," he argues that A-1 "engaged in a practice of shifting expenses and income between it and at least one other company in an effort to, among other things, diminish Mr. Blount's bonus." (Def. Br. at 8.) This is not what Defendants pled, however.[2] Defendant Gary Blount's Third Counterclaim states: "Upon information and belief, Plaintiff failed to properly account for the income and expenses of A-1 Pavement Markings, LLC and has included expenses associated with other affiliated companies or has diverted income to affiliated companies which should have been attributed to A-1…." (Def. Answer Third Counterclaim, ¶ 13.).

[2] "If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C. Rule Civ. Pro. 12(c).

Defendants argue that because these alleged transfers between "affiliated companies … would arguably affect the Plaintiff's federal and state tax obligations and could, in theory, affect Plaintiff's representations to creditors" they are "in or affecting commerce." (Def. Br. at 9.) Defendants' brief then improperly relies upon and cites documents outside the pleadings for further support of its argument. (Def. Br. at 9.) This use of extrinsic evidence is improper under Rule 12(c) or 12(b)(6) motion and should be disregarded by the court. *See* fn. 2, *supra*. Nonetheless, even if the Court were to consider this improper evidence, Mr. Blount still does not meet his burden of proving the conduct allegedly constituting his claim "affect[s] commerce."

Mr. Blount contends that routine accounting practices between A-1 and a related company, with respect to assignment of income and expenses between companies that are both wholly owned by the Langevins, give him standing to bring an employment based UDTPA claim against his employer. Accepting Blount's allegations as true, they do not as a matter of law give rise to a cause of action under the UDTPA. For purposes of the UDTPA, actions of a company must have a commercial impact beyond the employee's relations with the Company in order to give rise to a claim. *Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 698 (2007).

A-1's accounting practices do not affect its customers, creditors, or vendors, and nowhere in Defendants' Answer and Counterclaims have Defendants pled that they do. At most, A-1's alleged accounting practices affect the tax liabilities of the affiliated companies, which is their intent and a generally accepted accounting practice. Where the accounting of expenses and liabilities between companies affect the net profits of A-1 and, accordingly, Mr. Blount's profitability-based bonus, that may constitute a simple

breach of contract, but it does not give rise to a claim under the UDTPA. *Hayes v. B & B Realty, LLC,* 179 N.C. App. 104, 112 (2006) (franchisee's claim for violation of profit-sharing agreement not a UDTPA claim); *Durling v. King*, 146 N.C.App. 483, 489, 554 S.E.2d 1, 4-5 (2001) (employer's withholding of commissions from employee was breach of contract but had no impact beyond parties' employment relationship and did not affect commerce resulting in no UDTPA claim). This Court has previously held that failure to pay taxes or violation of tax laws is does not necessarily "affect commerce" sufficiently to give rise to an UDTP claim. *Wake County v. Hotels.com, LP,* 2007 N.C.B.C. 45, ¶¶ 75-83.

To hold that accounting practices commonly used by related companies that collaborate to perform contracts gives rise to an UDTPA claim is to expand its scope and invite profitability bonus disputes framed not as breaches of contract, but as tort-like UDTPA cases with extra contractual treble damages and attorneys' fees remedies. Any employee whose bonus is based upon the profit of a company that has related companies, divisions or subsidiaries, could complain about his or her bonus in a UDTPA lawsuit. This is not the intent or purpose of the UDTPA, and courts have rejected such attempts repeatedly. Accordingly, Gary Blount's UDTPA claim based upon alleged under payment of his bonus should be dismissed as a matter of law.

III. CONCLUSION

For the reasons stated above, Defendants' Counterclaims for default related breach of the APA and Gary Blount's employment-based bonus claim under the UDTPA fail as a matter of law and should be dismissed as a matter of law.

This the16th day of June 2008.

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CERTIFICATE OF COMPLIANCE WITH N.C. BUS. CT. RULE 15.8

The undersigned hereby certifies that the foregoing document **A-1 PAVEMENT MARKING, LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS** has a word count of less than 3, 750 words which complies with North Carolina Business Court, Rule 15.8.

This the 16th day of June 2008.

_/s/ Amy R. Worley
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **A-1 PAVEMENT MARKING, LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS** was served upon each of the parties or, when represented, upon their attorney of record, electronically and by mailing a copy thereof, postage prepaid, addressed as follows:

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