FRANCHISE TRENDS

Franchisor Competency, Video 4

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Romper Room Franchisor Sent to Time Out by Federal Court

Romper Room Inc., v. Winmark Corp., 2014 WL 5106887 (W.D. Wis., Oct. 10, 2014).

The United States District Court for the Western District of Wisconsin recently enjoined a franchisor from terminating its agreement with a franchisee, when it found that termination would mean the loss of the franchisee's sole source of income, potentially leading to insolvency and loss of the franchisee's ongoing business. The federal court in this case appeared to go the extra-mile to avoid an inequitable result.

The claim arose after a local newspaper publicized Plaintiff franchisee's felony fraud conviction. In the article, Plaintiff's franchise relationship with the Franchisor, Defendant Winmark, was highlighted. The article stated that Plaintiff operated two Once Upon a Child ("OUAC") franchise stores, which sold secondhand children's clothes and toys. After viewing the publication, Defendant Winmark sent the franchisee a notice to terminate its franchise agreement after a 90-day notice-and-cure period. In the notice, Winmark cited multiple agreement provisions allowing its termination, such as: "The franchisor may, at its option, terminate this agreement as provided

Franchise Law – Franchise Discrimination 1:2 - Jeff Goldstein: Franchise Lawyer

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Franchise Law: Fraud and Good Faith in Franchise Law

Franchise Law – Franchisees' Franchise Termination Damages

herein, if the franchisee... [is] convicted of a charge of violating any law which adversely impacts the reputation of the franchisee business or... is involved in any act or conduct which materially impairs the good will associated with the name 'Once Upon a Child.'"

Twenty days before the notice period expired, Plaintiff commenced this action, alleging in part that Defendant's attempt to terminate the franchise violated the Wisconsin Fair Dealership Law ("WFDL") because Winmark failed to establish "good cause" for termination. Further, Plaintiff sought to enjoin Winmark from terminating the agreement during pendency of the suit.

Considering whether to grant the franchisee's requested injunction, the Court analyzed the claim two distinct phases - a threshold phase and a balancing phase. Siding with Plaintiff, the Court concluded the threshold phase was satisfied because Plaintiff would suffer irreparable harm absent and injunction, had no other legal remedy, and had "some" likelihood of success at trial. The Court observed that Plaintiff's losses would be irreparable because it would suffer unquantifiable losses absent an injunction, such as loss of goodwill from customers and employees if its OUAC stores were temporarily closed.

In addition, the Court concluded that the unquantifiable losses "alone mean[t] that [Plaintiff] [would] have no adequate remedy at law" because the only meaningful remedy available "is the one the [Plaintiff] sought in the form of a preliminary injunction." In final satisfaction of the "threshold phase," the Court concluded that "Plaintiff ha[d] demonstrated some likelihood of success on the merits," because the impact of Plaintiff's conviction on the reputation of Defendant's business was murky. Finally, the Court stated that "[u]pon balancing the nature and degree of Plaintiffs' injury and likelihood of prevailing at trial against the injury to Winmark," the balance "clearly falls in favor of the Plaintiff. Accordingly, the Court granted the franchisee and injunction prohibiting the termination.

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Regardless of Retaliatory Motive, Popeye's Franchisee Has No "Right to Grow"

Kenneth John LeCompte, et ux. v. AFC Enterprises, Inc., Court of Appeal of Louisiana, Third Circuit, ¶15,386, (Oct. 1, 2014)

The refusal by the franchisor of Popeye's chicken restaurants (AFC Enterprises) to "grow with" an existing Popeye's franchisee by granting additional franchises or approving the transfer of existing

Federal Court Drives Final Nail in Dunkin' Franchisee's Coffin

Dunkin Donuts Franchising, LLC v. Claudia I, LLC, and Claudia I, LLC v. Spring Hill Realty Inc., 2014 WL 5353724 (E.D. Pa., Oct. 20, 2014).

After a long and litigious period, the United States District Court for the Eastern District of Pennsylvania granted Dunkin' a permanent injunction against franchisee Claudia on October 20, 2014. This case is a prototypical example of what can happen when a franchisor loses trust, faith and patience with an underperforming franchisee. In this regard, it is important to note that the franchisee in this case also tightened the legal noose around its neck by unhelpfully focusing its attention and resources on relatively minor infractions of the franchisor and landlord rather than the most detrimental and objectionable franchisor conduct. This left Dunkin' in the driver's seat from the time of the execution of the franchise agreement through the final decision of the Court.

The saga began in 2009 when Claudia and Dunkin' signed a franchise agreement for a store at the Spring Hill property. Although other Dunkin' franchises in the area were experiencing an upward sales trend, Claudia's store was consistently underperforming. Claudia blamed its poor performance on excessive rent, CAM overcharges, and poor facilities upkeep by Spring Hill. Claudia stopped paying rent and Dunkin' terminated the franchise agreement in April 2012. Dunkin' filed suit seeking rent and an injunction, alleging that Claudia was infringing its trademarks by continuing to operate an unauthorized franchise. The Court granted Dunkin's request for a preliminary injunction in May 2013, shutting down the store.

Claudia filed several counterclaims against Dunkin' for breach of the franchise agreement, as well as a third party complaint against Spring Hill for breach of the lease and sublease. Dunkin' and Spring Hill asked for indemnity against each other. The Court found in

franchises was not an unfair or deceptive practice in violation of the Louisiana Unfair Trade Practices Act. A state district court's dismissal of the franchisee's claims was affirmed by the reviewing court.

In Louisiana, a cause of action for unfair trade practices is governed by the provisions of the Louisiana Unfair Trade Practices Act (LUTPA). In particular, Section 51:1404(A) of the LUTPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Interestingly, as the Court explained, this legislation is "broadly and subjectively stated and does not specify particular violations." The Court noted that "What constitutes an unfair trade practice is determined by the courts on a case-by-case basis."

In moving for summary judgment of the franchisee's claims, AFC argued that there was never a Development Agreement entered into between itself and Plaintiff. Whereas a franchise agreement allows a franchisee to operate only at a particular location, a development agreement gives the franchisee the right to acquire and operate additional franchises in addition to the particular franchise covered by the franchise agreement. Without such a development agreement, AFC contended it was not obligated to allow Plaintiff to acquire additional franchises.

Plaintiff did not dispute the lack of a Development Agreement in this case, but instead argued that the franchisor's refusal to allow the franchisee to grow was an unfair trade practice because it was allegedly based on intentional retribution by AFC against Plaintiff for prior litigation between the parties. Unfortunately for the franchisor, however, the Court noted that the franchisee had "provided no facts in the petition to support the claim of intentional retribution."

The Court also rejected the Plaintiff's argument that AFC had acknowledged below that it intentionally retaliated against Plaintiff for the prior litigation between the parties. The Court concluded that this argument was incorrect, pointing out that AFC only asserted "it would not matter *if* the decision was in part motivated by a desire to punish the LeComptes for their prior litigation so long as there was also a sound business reason for the decision." Thus, "No admission was made by AFC that its decision was motivated by a desire to punish Plaintiffs."

The district court, in ruling for the franchisor, stated that the granting of a franchise is a privilege, not a right, and it is generally understood that "the franchisor reserves to itself the sole power to grant new franchises or to open new outlets as company stores." The Court concluded that "The courts have accepted the proposition that a franchisor has the right to unilaterally select those with whom they choose to engage in business."

favor of Dunkin' when reviewing the merits and granted a permanent injunction. The Court held that neither any defect in the premises nor the management of the shopping center would suffice to explain the extent of problems with Claudia's performance. In particular, the Court "fail[ed] to see how the various disputes Claudia I had with Dunkin' and Spring Hill would support a legal right to stop paying franchise fees or rent."

The Court was further "impressed by Dunkin's efforts to renegotiate a lower rent" with Claudia and found that Claudia's "intense focus" on minor problems affected the success of the venture. Part of Dunkin's breach of the franchise agreement claim was that Claudia violated the lease by failing to remodel the store on time; Claudia asserted that Dunkin' allowed the remodel to be postponed. The Court found this fact to be immaterial, as "Claudia breached its contract in more important respects besides the remodel."

In balancing the equities, the Court held that granting the permanent injunction would not result in greater harm to Claudia than Dunkin' would suffer without the injunction, as the franchise had been closed for months and thus would not impose a new hardship on Claudia. Furthermore, the court found that the terminated franchise agreement, the invalidated sublease, and the restrictive covenant prevented Claudia from operating a Dunkin' Donuts at Spring Hill: "A permanent injunction prohibiting Claudia I from doing something it cannot do anyway is not an undue burden to Claudia I." In addition to granting the permanent injunction, the Court held that the non-compete covenant between Claudia and Dunkin' was enforceable. Finally, the Court found in favor of Spring Hill and Dunkin' on Claudia's cross and counterclaims.

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Auto Franchisor GM Not Liable For Negligence of Dealer Franchisee

Coalson v. General Motors Co., 2014 WL 540854 (N.J. Super. Ct. App, Oct. 29, 2014).

The New Jersey Court of Appeals recent affirmation of a trial court's grant of summary judgment was a victory for franchisors in the State. The Plaintiff in the case, Ronald Coalson, suffered severe injuries when a coworker accidentally ran him over with a snow removal truck on their employer's dealership. The employer, Pellgrino, was an authorized dealer of GM vehicles under terms of a Dealer Sales and Service Agreement with GM. The Coalsons filed a civil complaint against Pellegrino, as well as GM.

Plaintiff alleged GM was liable for the negligent acts of Pellegrino and its employee, the truck driver, by virtue of GM's obligations under the dealership agreement, as well as under a theory of vicarious liability. After discovery, GM moved for summary judgment claiming that neither it nor Pelligrino intended to create an agency relationship, and that it could not be held vicariously liable because it did not direct the day-to-day activities of the dealership. Despite GM's claims, the Court observed that the agreement itself and other franchise documents, "demonstrate[ed] that GM ha[d] authority over limited aspects of the dealership's business operations."

Ultimately, however, the Court nevertheless concluded that "the agreement makes clear that neither the dealership nor GM intend[ed] to be the 'agent or legal representative of the other for any purpose.'" To support its finding, the Court cited a dealership agreement provision that stated that Pelligrino "is solely responsible for all expenditures, liabilities and obligations incurred or assumed by [the dealership] for the establishment and conduct of its operations." Further, the Court noted that the dealership lease and municipal code supported its conclusion that GM had no duty or obligation with respect to "snow removal activities." The lease agreement for the dealership required Pellegrino to " keep and maintain [the property].... free from... snow and ice."

The lease also delineated that Pellegrino warranted to comply with all municipal ordinances and laws, one of which required the tenant of the property to remove all snow and ice ten hours following a snowfall. Based on the dealership agreement, lease and municipal law, the Court sided with GM and ultimately granted summary judgment finding no intent to create an agency relationship.

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Goldstein Law Firm Senior Helpers Franchisee Client Wins Injunction

Transcript of Oral Ruling, *SH Franchising, LLC. V. Peterson Home Help LLC.*, No. Civ. 39053, (Md. Cir.Ct., August 7, 2014)

A Circuit Court in Maryland recently ruled in favor of Goldstein Law Firm franchisee client Defendant Peterson Home Help PHH, LLC in the face of a suit by its franchisor, Senior Helpers, which sought an injunction to shut down the franchise after termination. In the Judge's oral ruling, he discussed the four "balancing factors" of injunctive relief. The Court first discussed the likelihood of the Plaintiff prevailing at trial. It stated that "it [was] at least arguable that a fact-finder could conclude that the reasons for termination were not justified given the contracts between the parties and their relationship and the defendant's payment for the relationship."

But the Court also significantly noted that the franchisor Plaintiff may have been "heavy-handed" by making representations "that documents to terminate were ready to go" and failing to "realize that there was a substantial amount of money paid [by Defendant Franchisee] for this franchise." According to the Court, these factors tended to render Defendant "powerless," and place "all chits [in] the plaintiff's pocket." As an additional consideration, the Court implied that the parties' "written agreement" may have been altered by their "course of conduct." Thus, "chang[ing] [their] relationship and duties to each other." For instance, the Court pondered whether the parties written "standards were lowered in practice, [and] not enforced."

The Court next balanced the injuries that would result to the franchisee Defendant by granting the injunction, against the harm that would result to Plaintiff by refusing to grant its request. The Judge found that if the injunction were not granted, the Defendant's business could "perhaps go out of business - but [would] certainly be substantially impacted, to say the least," hindering future growth and causing irreparable harm. In turning to the Plaintiff, the Court noted that it was "virtually [a] national business" that will "not suffer great harm proportionately." Further, the Court disregarded Plaintiff's argument that granting the injunction would send a "free ticket" message to franchisees looking to get "a free ticket out the door" because the injunctive hearing alone would alert franchisees that "there ain't no free ticket for franchisees, because [Plaintiff] can fight."

Finally, the Court discussed the public policy surrounding its decision. It noted that Defendant's senior clients were "vulnerable people in need of care." In addition, it stated that even though there is a the dealership lease and municipal code supported its conclusion that GM had no duty or obligation with respect to "snow removal activities." The lease agreement for the dealership required Pellegrino to " keep and maintain [the property].... free from... snow and ice."

The lease also delineated that Pellegrino warranted to comply with all municipal ordinances and laws, one of which required the tenant of the property to remove all snow and ice ten hours following a snowfall. Based on the dealership agreement, lease and municipal law, the Court sided with GM and ultimately granted summary judgment finding no intent to create an agency relationship.

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public interest in enforcing agreements, "there is also a public interest in having a fuller airing of the evidence in front of a fact-finder." In sum, the Court noted that however strong Plaintiff's case might be later at a full trial, it appears to be "very much subject to real life defenses." Ultimately, the Court stated that it "cannot say [that] these factors tip in favor of plaintiff," and denied the injunction.

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