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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation,

Plaintiffs,

v.

WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation; and DOES 1-10

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921-DFM

Hon. Douglas F. McCormick

REPLY IN SUPPORT OF WINDERMERE REAL ESTATE SERVICES COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: April 3, 2018
Time: 10:00 a.m.
Courtroom: 6B

Table of Contents

I. INTRODUCTION 1

II. WSC's MOTION SHOULD BE GRANTED 3

A. Plaintiffs Have Failed To Establish A Genuine Issue For Trial 3

B. The Court Should Disregard Plaintiffs' "Constructive Termination" Argument 3

1. Plaintiffs' Are Judicially Estopped From Asserting Their "Constructive Termination" Theory 3

2. Plaintiffs' Novel "Constructive Termination" Theory Is Not Supported By California Law 5

3. Plaintiffs' "Constructive Termination" Theory Is Not Supported By Admissible Evidence 6

C. WSC's Motion Does Not Contend That Section 4.2 Governs All Damages For Breach Of The ARA 9

D. Plaintiffs' Proposed Interpretation of the ARA Is Contrary To Its Terms And Does Not Create Ambiguity 10

III. CONCLUSION 12

Table of Authorities

Cases

Bank Melli Iran v. Pahlavi, 58 F3d 1406 (9th Cir. 1995) 7

Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179 (9th Cir. 1988)..... 6

Cline v. The Industrial Maintenance Engineering & Contracting Co., 200 F.3d 1223 (9th Cir. 2000) 4

FTC v. Neovi, Inc., 604 F.3d 1150 (9th Cir. 2010) 8

Groppi v. Barham, 157 F. App'x. 10 (9th Cir. 2005)..... 7

Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055 (9th Cir. 2012)..... 8

International Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401 (9th Cir. 1985)..... 11

Krishan v. McDonnell Douglas Corp., 873 F.Supp. 345 (C.D. Cal. 1994) 10

Lewis v. Philip Morris Inc., 355 F.3d 515 (6th Cir. 2004)..... 8

Los Angeles News Service v. CBS Broadcasting, Inc., 305 F.3d 924 (9th Cir. 2002)..... 7

Marshall on Behalf of Marshall v. East Carroll Parish Hosp. Service Dist., 134 F.3d 319 (5th Cir. 1998) 7

National Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496 (9th Cir. 1997) 8

Orr v. Bank of America, 285 F.3d 764 (9th Cir. 2002) 6

Religious Technology Center v. Scott, 869 F.2d 1306 (9th Cir. 1989) 5

SEC v. Phan, 500 F.3d 895 (9th Cir. 2007)..... 8

Federal Rules of Civil Procedure

Fed. R. Civ. P. 56(c)(4)..... 7

Fed. R. Civ. Proc. 56(e) 6

I. INTRODUCTION

Defendant and Counterclaimant Windermere Real Estate Services Company's ("WSC") motion for partial summary judgment addressed one discrete issue: the interpretation of an unambiguous provision in one of the parties' contracts – Section 4.2 of the *Windermere Real Estate Services Company Area Representation Agreement for the State of California* ("ARA"). Because this provision is not ambiguous, the Court can interpret it as a matter of law. Thus, using the plain meaning of the ARA's terms, the Court should rule that the calculation of damages under the ARA's provision governing termination without cause cannot include future revenues.[1] Instead, that calculation can only include revenue actually received by Plaintiff Counter-Defendant Windermere Services Southern California, Inc. ("WSSC") in the 12 months preceding the termination of the ARA from franchisees other than Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion & Deville Fine Homes SoCal, Inc., ("B&D SoCal").[2] In supporting of its motion, WSC relied on six uncontroverted facts.

Plaintiffs' opposition does not materially dispute any of the facts supporting WSC's motion. Instead, Plaintiffs seek to reframe the issue in the motion with their novel contention that the damages limitation in Section 4.2 does not apply because of WSC's alleged prior breaches of the ARA constituted a "constructive termination" that agreement. However, Plaintiffs' novel theory directly contradicts the allegations in Plaintiffs' complaint. Therefore, Plaintiffs are judicially estopped from relying on this contradictory theory to defeat WSC's motion.

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[1] As set forth in the moving papers, and not relevant for purposes of this motion, WSC maintains that it properly terminated the ARA for cause, in which case WSSC would be entitled nothing. (*See* Document No. 31, FAC ¶ 25, Ex. B, p. 4, § 4.1 (c), p. 5, § 4.2.)

[2] WSSC, B&D Fine Homes, and B&D SoCal are referred to collectively herein as "Plaintiffs."

In addition, WSSC failed to cite to a single case that mentions, let alone recognizes, constructive termination as a means for terminating a contract. The reason for this is obvious: in California, "constructive termination" only applies in the employment context.

Further, Plaintiffs' argument that the ARA was constructively terminated is based solely on the declaration of one of their principals, Joseph Deville. However, as established by the evidentiary objections filed herewith, the "facts" set forth in this declaration are largely inadmissible. The Court granted WSC's prior motion for summary judgment due in part to its conclusion that another declaration from Mr. Deville was largely inadmissible. (Document No. 66.) The same result is warranted here.

Finally, Plaintiffs argue that the ARA cannot be interpreted as WSC contends. But Plaintiffs' proposed interpretations are untenable – the contract clearly does not say what they contend. Moreover, the fact that Plaintiffs have asserted these alternative interpretations does not render the ARA ambiguous. Instead, a plain reading of the ARA establishes that it must be interpreted as WSC contends.[3]

For these reasons, and for the reasons set forth in WSC's moving papers, WSC's motion should be granted in its entirety.

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[3] Plaintiffs also argued that WSC's motion should be denied due to WSC's failure to meet and confer as required by Local Rule 7-3. However, the Court already addressed this contention at the status conference held on February 26, 2018 when it relayed to the parties that no additional meet and confer efforts were necessary. Moreover, this motion is somewhat unique in that the parties have already briefed their respective positions on the interpretation of Section 4.2 of the ARA in the context of WSC's Daubert Motion *In Limine* to Exclude Plaintiffs' Expert Peter Wrobel. (*See* Document Nos. 103, 103-1, 114, 119.) The primary difference between that motion and the present motion is the standards employed to determine the motions.

II. WSC'S MOTION SHOULD BE GRANTED

A. Plaintiffs Have Failed To Establish A Genuine Issue For Trial

As noted above, WSC's motion is based on six uncontroverted facts. Plaintiffs do not dispute any of the first five uncontroverted facts. (Document No. 157-3.) Although Plaintiffs purport to dispute the sixth fact, the matters set forth in their separate statement do not create a dispute.

WSC's sixth fact provides: "Following termination of the ARA on September 30, 2015, Bennion & Deville Fine Homes Inc. and Bennion & Deville Fine Homes SoCal Inc. did not remain with or affiliate with WSC." This fact goes to whether the calculation of the Termination Obligation can include franchise fees received from B&D Fine Homes or B&D SoCal. Plaintiffs contend that the fact is disputed because "WSC engaged in a series of conduct during 2014 that resulted in the constructive termination of the ARA long before September 30, 2015." Plaintiffs argue in their opposition that the ARA was constructively terminated by WSC in 2014. Thus, Plaintiffs contend that because B&D Fine Homes or B&D SoCal remained as franchisees until September 30, 2015, "it is necessary for any revenue of B&D Fine Homes and B&D SoCal to be considered when calculating the fair market value under Section 4.2." (*See* Document No. 157, p. 19, ll. 4-20.) This does not create a genuine issue for trial. Therefore, WSC's proposed finding that the Termination Obligation be interpreted to not include revenues from B&D Fine Homes and B&D SoCal is entirely proper.

B. The Court Should Disregard Plaintiffs' "Constructive Termination" Argument

1. Plaintiffs' Are Judicially Estopped From Asserting Their "Constructive Termination" Theory

Under Heading B of the Opposition, Plaintiffs set forth their argument that "WSC's Constructive Termination of the ARA Did Not Trigger The Termination Obligation At Section 4.2." This argument directly contradicts the allegations in Plaintiff's First Amended Complaint that "WSC's conduct constituted a constructive

termination of the Area Representation Agreement, without cause, subjecting WSC to comply with the buyout provision of Section 4.2." (Doc. No. 31, ¶ 33.) In fact, Plaintiffs have previously asserted in a number of different ways that WSC was obligated to pay WSSC pursuant to Section 4.2, regardless of whether Plaintiffs were alleging that the ARA was constructively terminated or terminated without cause:

- **WSC Breached The Termination Provision Of The Area Representation Agreement**. [Document No. 1, § K.]
- By exercising its rights under Paragraph 4.1 of the Area Representation Agreement, WSC was terminating the agreement without cause, and therefore triggering Section 4.2 requiring WSC to make termination payments to Windermere SoCal in an "amount equal to the fair market value of the Terminated Party's interest in the Agreement." (*Id*. at ¶ 86.)
- WSC has breached Section 4.2 of the Area Representation Agreement by failing to pay Windermere SoCal the required termination fee. (*Id*. at ¶ 91.)
- WSC breached the Area Representation Agreement by failing to comply with the following requirements: …. c. Section 4.2, for failing to pay Windermere SoCal the termination fee – i.e. the fair market value of its interest in the Area Representation Agreement – following termination without cause. (*Id*. at ¶ 122.)
- WSC's termination of the Area Representation Agreement without cause, obligated WSC to pay Bennion and Deville the fair market value of their interest in the Area Representation Agreement pursuant to Section 4.2 of that agreement. WSC's failure to pay this amount constitutes a breach of Section 4.2. (Document No. 31, ¶ 118.)
- WSC breached the Area Representation Agreement by failing to comply with the following requirements: …. e. Section 4.2, for failing to pay Services SoCal the termination fee – i.e. the fair market value of its interest in the Area Representation Agreement – following termination without cause. (*Id*. at ¶ 163.)

In light of these allegations, Plaintiffs are judicially estopped from not arguing that Section 4.2 does not apply because the ARA was constructively terminated.

A party cannot "contradict their earlier allegations in an effort to survive summary judgment." *Cline v. The Industrial Maintenance Engineering & Contracting Co*., 200 F.3d 1223, 1232 (9th Cir. 2000). This is known as

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judicial estoppel. The Ninth Circuit in *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990) set forth the principles underlying judicial estoppel:

> The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. The policies underlying preclusion of inconsistent positions are general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings. Judicial estoppel is intended to protect against a litigant playing "fast and loose with the courts." Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.
>
> ... Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one.

Id. at 1037 quoting dissent in *Religious Technology Center v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989) [internal citations and quotations omitted].

Plaintiffs previously took the position that WSC was required to pay the Termination Obligation in Section 4.2 regardless of whether the ARA was constructively terminated or terminated without cause. Therefore, Plaintiffs are judicially estopped from now arguing that WSC's alleged constructive termination did not trigger the Termination Obligation at Section 4.2. As a result, Plaintiffs' new, novel argument regarding constructive termination must be ignored and does not preclude summary judgment.

2. Plaintiffs' Novel "Constructive Termination" Theory Is Not Supported By California Law

Plaintiffs contend that the ARA was "constructively terminated" due to WSC's prior breaches of that agreement. However, Plaintiffs have failed to cite to a single California case or authority that recognizes "constructive termination" as a basis for a contract's termination. In fact, no such authority exists. A Westlaw search of "constructive termination" in California produces 192 results. A search of "constructively terminated" produces 101 results, some of which are duplicative of the initial search. None of the results for either search recognizes "constructive

termination" as anything other than an employment claim.[4] Therefore, Plaintiffs' novel constructive termination theory does not preclude the Court from interpreting Section 4.2 of the ARA as a matter of law.

3. Plaintiffs' "Constructive Termination" Theory Is Not Supported By Admissible Evidence

As set forth above, Plaintiffs admitted all but one of the facts identified in WSC's separate statement. Plaintiffs did not dispute the remaining fact in any material way. However, Plaintiffs have attempted to add additional facts through the self-serving declaration from Mr. Deville. That declaration is almost entirely inadmissible. Because the Court can only consider admissible evidence when ruling on motions for partial summary judgment, Mr. Deville's declaration cannot create a genuine issue of material fact that would warrant the denial of WSC's motion.

A trial court can only consider admissible evidence in ruling on a motion for summary judgment and may properly grant summary judgment when the non-moving party fails to support its opposition with admissible evidence. *See* Fed. R. Civ. Proc. 56(e); *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002); *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). In *Orr*, the Ninth Circuit affirmed a district court's decision to exclude, at summary judgment, evidence offered by the non-moving party on the grounds that the evidence was improperly authenticated and constituted hearsay. *See Orr*, 285 F.3d at 771 (affirming the entry of summary judgment against plaintiff based on the district court's finding "that most of the evidence submitted by Orr in support of her opposition to BOA's motion for summary judgment was inadmissible due to inadequate authentication and hearsay"); *see also Los Angeles News Service v. CBS*

[4] Although *California ARCO Distributors, Inc. v. Atlantic Richfield Co*. (1984) Cal.App.3d 349 involved a claim by the plaintiffs that a franchise had been constructively terminated, the court did not address the merits of that claim. Instead, the court only addressed whether those claims were preempted by the Petroleum Marketing Practices Act.

Broadcasting, Inc., 305 F.3d 924, 935-36 (9th Cir. 2002) (holding that the district court did not abuse its discretion in excluding hearsay evidence and evidence that violated the best evidence rule in deciding a summary judgment motion), amended and superseded on other grounds, 313 F.3d 1093 (9th Cir.2002); *Groppi v. Barham*, 157 F. App'x. 10, 11-12 (9th Cir. 2005) ("The district court did not abuse its discretion in applying the best evidence rule to exclude Dr. Martin Keusten's declaration because Groppi failed to provide the records upon which the declaration was based and failed otherwise to explain their absence.")

To be considered by the Court, declarations or affidavits submitted in conjunction with a summary judgment motion must: (1) be made on personal knowledge; (2) set forth facts that would be admissible in evidence (i.e., no inadmissible hearsay or opinions); and (3) show the affiant or declarant is competent to testify to the matters stated. Fed. R. Civ. P. 56(c)(4). The Deville Decl. states that the "statements made in this declaration are based upon my personal knowledge, and if called as a witness, I could testify competently thereto." (Docket No. 60 ¶ 2.) Such statements alone, however, are insufficient to establish personal knowledge and competency. That must be shown by the facts stated: i.e., the declaration must establish that the matters are known to the declarant personally, as distinguished from matters of opinion or matters based upon hearsay. *Bank Melli Iran v. Pahlavi*, 58 F3d 1406, 1412 (9th Cir. 1995) (declarations "on information and belief" entitled to no weight where declarant lacks personal knowledge). In fact, the Deville Decl. contradicts the general statement of personal knowledge on several occasions when he declares that he "understand[s] from counsel" and "my employees and I are prepared to testify that… ."

Similarly, evidentiary facts are required to support or oppose a summary judgment motion. Conclusory statements are not sufficient. *Marshall on Behalf of Marshall v. East Carroll Parish Hosp. Service Dist.,* 134 F.3d 319, 324 (5th Cir. 1998); *Lewis v. Philip Morris Inc.,* 355 F.3d 515, 533 (6th Cir. 2004) (non-movant

must point to "more than mere speculation, conjecture or fantasy"); *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997) ("Conclusory allegations of collusion, without factual support, are insufficient to defeat summary judgment").

A court need not find a genuine issue of fact where the non-moving party's "self-serving" presentation puts forward "nothing more than a few bald, uncorroborated, and conclusory assertions rather than evidence." *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159 (9th Cir. 2010). Specifically, a court may "disregard a self-serving declaration for purposes of summary judgment" when the declaration states "facts beyond the declarant's personal knowledge and "provide[s] no indication how [the declarant] knows [these facts] to be true." *SEC v. Phan*, 500 F.3d 895, 910 (9th Cir. 2007) (quotations omitted); *see also Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1063 (9th Cir. 2012) (declarations "must be made with personal knowledge; declarations not based on personal knowledge are inadmissible and cannot raise a genuine issue of material fact").

As detailed in WSC's Evidentiary Objections to the Declaration of Joseph R. Deville, filed concurrently herewith, the majority of the numbered paragraphs in the declaration are inadmissible and should not be considered for purposes of the present motion. These paragraphs lack foundation, contain improper and argumentative conclusions without the supporting foundational facts, contain inadmissible hearsay, fail to authenticate the attached exhibits, and attempt to provide improper secondary evidence. The Court previously rejected a declaration from Mr. Deville suffering from the same deficiencies (Document No. 66), and the same outcome is appropriate here.

Because the objectionable declaration from Mr. Deville is the only "evidence" submitted by Plaintiffs in support of their constructive theory claim, that claim cannot provide a basis to deny WSC's motion.

C. WSC's Motion Does Not Contend That Section 4.2 Governs All Damages For Breach Of The ARA

Plaintiffs argue that Section 4.2 does not govern WSSC's damages for any breaches of the ARA prior to its termination. WSC's motion does not argue otherwise. As clearly set forth in the moving papers and herein, WSC's motion only seeks summary judgment regarding the proper interpretation of the unambiguous Section 4.2.

However, to the extent Plaintiffs argue that the calculation of the Termination Obligation should include consideration of revenue WSSC might have received but for WSC's alleged breaches that precluded WSSC from selling new franchises, that argument is contrary to the clear provisions of the ARA.[5] As set forth in the moving papers, the parties' contract only allowed consideration of revenue actually received by WSSC for the twelve months preceding the termination of the Agreement. (Document No. 154-2, SSUMF No. 4; Document No. 154-4, Ex. 1, p. 5, § 4.2.) In addition, Section 4.4 of the ARA states: "Except as specifically provided herein neither party will owe any obligation to the other following termination of the Agreement, except for final accounting and settlement of any previously accrued license fees, and excluding any accrued claim for damages and associated attorneys' fees and costs, or otherwise arising by law." (Document No. 154-2, SSUMF No. 5; Document No. 154-4, Ex. 1, p. 6, § 4.4.) Thus, while WSC's motion does not seek a ruling that WSSC cannot seek to recover damages for breach of the ARA, the parties' expressly agreed to prohibit consideration of revenue WSSC might have received but for WSC's alleged breach of the ARA when calculating the Termination Obligation.

[5] Plaintiffs argue that WSC engaged in illegal conduct to depress the fair market value of WSSC's interest in the ARA. However, even if Plaintiffs' allegation were true, WSC's conduct would only constitute a breach of the ARA. There is nothing illegal about that.

D. Plaintiffs' Proposed Interpretation of the ARA Is Contrary To Its Terms And Does Not Create Ambiguity

Finally, Plaintiffs set forth their own proposed interpretation of the ARA and argue that WSC's interpretation is flawed. However, a reading of the ARA reveals that Plaintiffs' proposed interpretation is the one that is flawed.

"The test is whether the words are 'reasonably susceptible' to more than one construction or interpretation. Summary judgment is proper where the words in question are not reasonably susceptible to the interpretation offered by the party claiming ambiguity." *Krishan v. McDonnell Douglas Corp*., 873 F.Supp. 345, 352 (C.D. Cal. 1994) (internal citations omitted). Here, the provisions of Section 4.2 are not susceptible to Plaintiffs' proposed interpretation.

First, Plaintiffs argue that future revenues can be included in calculating the Termination Obligation because Section 4.2 expressly contemplates that future revenues will be included in calculating fair market value because the appraisers must consider only those revenues from licensees that "remain with or affiliate with the Terminating Party." Plaintiffs conclude that this language inevitably requires the consideration of non-speculative revenues going forward. Plaintiffs' argument is a non-sequitur.

The fact that the ARA only allows for inclusion of the revenues actually received from franchisees that remain with the Terminating Party in the future does not mean that the appraisers can consider future revenues from those franchisees. To the contrary – the ARA is clear that only "gross revenues ***received*** under the Transaction ***during the twelve months preceding the termination date***" can be considered. (Document No. 154-2, SSUMF No. 4; Document No. 154-4, Ex. 1, p. 5, § 4.2 [emphasis added].) Moreover, the ARA states that the "fair market value of the Terminated Party's interest," or "Termination Obligation," is to be determined "[ ] ***without consideration of speculative factors including, specifically, future revenue***." (Document No. 154-2, SSUMF No. 3; Document No. 154-4,

Ex. 1, p. 5, § 4.2 [emphasis added].) This language clearly and expressly precludes consideration of future revenues.

Second, Plaintiffs argue that Section 4.3 of the ARA shows that future revenues can be considered if they are non-speculative because that provision uses similar language regarding licensees "existing at the termination date and remaining with or affiliating with the Terminating Party." This is a non-sequitur for the same reasons as Plaintiffs' first argument. Further, Section 4.3, entitled "Payment," deals with how the Termination Obligation is to be paid. It has nothing to do with how the Termination Obligation is calculated. (*See* Document No. 154-4, Ex. 1, pp. 5-6, § 4.3.)

Third, Plaintiffs argue that although Section 4.2 requires the appraiser to look at gross revenues received during the twelve months preceding termination, "it does not preclude the appraisers from looking at other information that would also aid in their fair market evaluation." (Document No. 157, pp. 19-20.) But WSC is not contending that the appraisers cannot consider "other information." Rather, the motion only asks the Court to find that under the ARA, (1) future revenues cannot be considered when determining the Termination Obligation; and (2) only revenue actually received by WSSC from licensees other than B&D Fine Homes and B&D SoCal in the 12 months preceding termination of the ARA can be considered in determining the Termination Obligation.

Finally, the fact that the parties do not agree on the proper interpretation of Section 4.2 does not preclude the Court from interpreting the contract as a matter of law. Summary judgment is appropriate where, as here, the contract terms are clear and unambiguous, even if the parties disagree as to their meaning. *See International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1406 (9th Cir. 1985). As set forth in the moving papers, the provision at issue is clear and unambiguous. The fact that Plaintiffs have put forth alternative interpretations does not preclude the

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Court from finding that the ARA is not susceptible to those alternative interpretations.

III. CONCLUSION

For the foregoing reasons, and for those set forth in the moving papers, WSC respectfully requests that its motion for partial summary judgment be granted in its entirety.

DATED: March 20, 2018 PEREZ VAUGHN & FEASBY, Inc.

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