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Order on Cross Motions for Summary Judgment (CVI COMPANY, LTD.)

Alice D. Bonner
Superior Court of Fulton County

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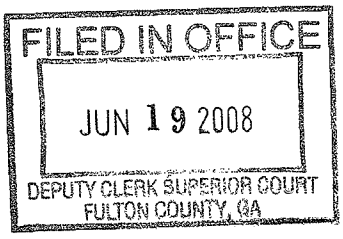
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA
BUSINESS DIVISION



CVI COMPANY, LTD., PFC VALLEY, INC., EOB COMPANY, J.L. BARTH COMPANY, H. HOLLIS RANKIN, III, MATTHEW CAMPBELL, JERRY L. BARTH, and EDWARD O. BARTH,	)	
Plaintiffs,	)	**Civil Action File No. 2007-CV-144012**
v.	)	
CT RESTAURANTS, LP, CHURCH'S TEXAS HOLDINGS, LLC, and CAJUN OPERATING COMPANY, d/b/a CHURCH'S CHICKEN®,	)	
Defendants.	)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Counsel appeared before the Court on May 21, 2008, to present oral argument on Plaintiffs' Motion for Summary Judgment, filed February 27, 2008, and Defendants' Cross Motion for Summary Judgment, filed April 14, 2008. After having reviewed the record of the case, the briefs submitted on the motions, and the arguments of Counsel, the Court finds as follows:

FACTS

This action arises from the January 8, 2007, Asset Purchase Agreement ("APA") between the Plaintiffs (collectively, "CVI") and the Defendants (collectively "Church's). CVI owned and operated ten (10) Popeyes restaurant franchises in Texas pursuant to CVI's franchise, guaranty, and development agreements with AFC Enterprises, Inc., d/b/a Popeyes Chicken & Biscuits ("Popeyes"). Church's is a competitor of Popeyes.

The Negotiations

On or about November, 2006, CVI and Church's entered into a series of negotiations whereby CVI would sell the assets of its ten (10) Popeyes restaurants to Church's.[1] During the negotiations Church's sent CVI a proposed letter of agreement on December 7, 2006, which CVI executed on December 11, 2006. In the letter of agreement CVI represented that it had unilateral authority for the transaction, and that neither Popeyes' authorization nor its consent was required to consummate the deal.[2] Additionally, CVI made certain representations and warranties that the sale would not conflict with or breach CVI's franchise or other agreements with Popeyes.[3] CVI also agreed to indemnify Church's from any losses Church's incurred resulting from CVI's breach of these representations and warranties.[4] Additionally, the letter agreement would survive the execution of the APA.[5]

Pursuant to the terms of the letter agreement, CVI and Church's executed the APA on December 28, 2006, thereby consummating the transaction, which closed on or

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1 Church's did not purchase the franchise agreements.

2 In §1 "Certain Representation, Confirmations and Warranties of Seller" CVI represented that "[T]he execution, delivery, and performance of each of the Seller Transaction Agreements by Seller will be authorized and approved by all necessary action on the part of CVI. . . and no consent, approval, authorization, or action by AFC Enterprises, Inc. is required in connection with the execution and delivery by CVI. . . or the consummation by CVI . . . of the transactions contemplated therein."

3 In §1, CVI also represented that the Transaction would not "conflict with, result in a breach of, or constitute a default under any franchise agreements to which CVI . . . is a party or by which it or any Restaurants' assets may be bound."

4 "3. Agreement of Seller to Indemnify Church's. CVI agree[s] to indemnify Church's from. . . all Losses . . . resulting from or based upon: (1) the breach of any of the representations and warranties of Seller set forth in Section 1;. . .".

5 "4. Effect. This Agreement constitutes a binding agreement between the parties and shall survive the

about January 9, 2007. As it did in the letter of agreement, CVI again made representations and warranties in the APA that CVI had full authority to enter into and to consummate the transaction without consent from Popeyes.[6] CVI also made representations and warranties that the transaction would not breach nor conflict with any agreements to which CVI was a party or by which any of the assets might be bound.[7]

Section 5 of the APA set forth the indemnity provisions whereby CVI would indemnify Church's. In pertinent part Section 5 provides:

> 5. Indemnification [8]
>
> For the purposes of this Article 5, the terms "Loss" and "Losses" shall mean any and all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, costs, and expenses including without limitation interest, penalties, and reasonable attorneys' and other professional fees and expenses.
>
> 5.1 Agreement of Seller to Indemnify Purchaser. Subject to the terms and conditions of this Article 5, Seller, General Partner and Shareholders, jointly and severally, hereby agree to indemnify, defend, and hold harmless Purchaser from, against and in respect of any and all Losses asserted against, relating to, imposed upon or incurred by Purchaser by reason of,

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execution of the Purchase Agreement. . . .".

6 In §3.2 "Authority" CVI represented it "has full power and authority to enter into this Agreement. . . and to consummate the Transactions contemplated hereby and thereby."

7 In § 3.3 "Execution and Delivery" CVI represented that "[N]o consent, approval, authorization, or action by any third party. . . is required in connection with the execution and delivery by Seller. . . or the consummation by Seller. . . Neither the execution and delivery by Seller, . . . nor the consummation by Seller. . . will. . . (iii) conflict with result in a breach of, or constitute a default under any . . . agreement or other instrument to which Seller. . . is a party or by which it or any of the Assets may be bound."

8 Section 5 also provided that CVI would indemnify Church's for (ii) the breach of any covenant or agreement made pursuant to the APA, and (iii) the Excluded Liabilities, and (v) liabilities arising from CVI's termination of CVI's employees. These provisions are not at issue here.

resulting from or based upon:

> (i) the **breach of any representation or warranty** of Seller General Partner of the Shareholders contained in or made Pursuant to this Agreement or any Seller Transaction Agreement; [emphasis added] [and]
>
> (iv) **any act by AFC Enterprises, Inc.** in connection with the Sale of the Business to Purchaser; and. . . [emphasis added.]

Section 6.5, "Escrow" provided that the parties would execute an escrow agreement whereby $250,000.00 of the sales proceeds would be placed in escrow "for 90 days following the completion of the closing of the transactions contemplated by the Asset Purchase Agreement to satisfy certain claims Purchaser may have against Seller. . . ." Section 2(b)(ii) of the escrow agreement provided that the escrow money would be disbursed to CVI *unless* within ninety (90) days after closing, Popeyes initiated a legal action against Church's regarding the Transaction. Section 9.6 "Integration of Agreement" provided that the APA, the letter of agreement, and the escrow agreement were integrated and superseded all other prior agreements.

The Popeyes Action

Subsequent to the consummation of the sale Church's closed all ten (10) of the former Popeyes restaurants and reopened six (6) of them as Church's restaurants. On or about February 28, 2007, Popeyes filed suit against CVI and Church's in State Court of Fulton County (the "Popeyes Action").[9] Popeyes alleges that CVI breached its franchise, guaranty, and development agreements and misappropriated trade

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secrets.[10] Popeyes also alleges that Church's induced CVI to breach these agreements, thereby tortiously interfering with Popeyes' business and contractual relations.

CVI's Action For Declaratory Judgment And Church's Counterclaim

On February 28, 2007, pursuant to the asset purchase documents, Church's notified CVI that it would seek indemnification for all losses incurred resulting from the Popeyes Action.[11] On July 2, 2007, CVI authorized the distribution of $8,875.00 from the escrow account to Church's "without waiver" in defense of the Popeyes Action. However, on December 13, 2007, CVI filed this action for declaratory judgment asserting that CVI was not obligated to indemnify Church's in any way as a result of the Popeyes Action, and that CVI was entitled to the balance of the escrow monies. Church's filed a counterclaim for breach of contract, indemnification, and fraud. It alleges that CVI willfully misrepresented that it had unilateral authority for the transaction, and that the transaction would not breach or conflict with CVI's franchise (or other) agreements with Popeyes. Pursuant to the indemnity provisions in the letter of agreement and the APA Church's claims that CVI is obligated to indemnify it for all losses it incurs as a result of the Popeyes Action.

On February 27, 2008, CVI filed its motion for summary judgment for declaratory

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9 AFC Enterprises, Inc. d/b/a Popeyes Chicken & Biscuit v. Cajun Operating Company d/b/a Church's Chicken, et al., Civil Action File No. 2007 EV 001961 (State Court of Fulton County, State of Georgia)

10 Popeyes alleges its franchise agreements with CVI allowed only the operation of the facilities as Popeyes restaurants and prohibited change of name, brand, and sale of franchises without express written consent of Popeyes; Popeyes also alleges it had the right of first refusal for a proposed sale of the ten (10) franchises.

11 In this communication, Church's stated it was seeking indemnification based on the APA § 5.1(iv.) On November 26, 2007, Church's sent correspondence to CVI stating it was seeking indemnification pursuant to § 5.1(iv) and § 5.1(i) of the APA.

relief urging this Court to rule that CVI has no indemnity obligation to Church's resulting from the Popeyes Action, and that the remaining $238.239.91 escrow money (now deposited in the registry of the Court) be released to CVI. Church's filed its response and cross motion for partial summary judgment on April 14, 2008, arguing that CVI is obligated to indemnify Church's for all of its losses arising out of the Popeyes Action, but moving this Court to rule on the narrow issue that Church's is obligated to indemnify CVI for its reasonable attorneys fees, costs and expenses in defending the Popeyes Action. Church's also moves the Court to rule that it is entitled to the escrow monies, and that CVI is obligated to pay any litigation expenses in excess of these funds.

STANDARD

To prevail on a motion for summary judgment, the movant must demonstrate that "there is no genuine issue of material facts, viewed in the light most favorable" to the non-movant, "to warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491 (1991), O.C.G.A. § 9-11-56(c). Construction of a contract is a matter of law for the court particularly where the terms are unambiguous. It is thus a matter peculiarly well suited for adjudication by summary judgment. Castellana v. Conyers Toyota, Inc., 200 Ga. App. 161, (1991). In determining the parties' respective motions, this Court has considered the indemnity provisions in §§ 5.1(i) and 5.1(iv) of the APA and the related provisions in the letter and escrow agreements.

Indemnity Liability Under The Asset Purchase Agreement § 5.1(iv)

CVI asserts it has no indemnity obligation to Church's pursuant to §5.1(iv) of the APA. It argues that the language of § 5.1(iv) *only* obligates CVI to indemnify Church's

for losses resulting from **an act by Popeyes** in connection with the Transaction, but not for **Church's own tortious acts** as alleged in the Popeyes Action. Therefore, CVI argues, the plain, unambiguous language of § 5.1(iv) does not obligate CVI to indemnify Church's for any claims arising from the Popeyes Action, including attorneys fees and litigation expenses.

CVI further argues that even if this Court finds a contractual basis for indemnity liability under § 5.1(iv) of the APA, allowing Church's to be indemnified for its own intentional tortious conduct is contrary to Georgia public policy. CVI admits there are no Georgia cases on point in regard to indemnification for intentional torts. It analogizes indemnity for intentional torts to indemnity for negligence and looks to Georgia as well as to other jurisdictions.[12] CVI argues that Georgia courts consistently have held that it is against public policy to indemnify a party for its own negligence in the absence of express language providing for this. *See* Service Merchandise Co., v. Hunter Fan Co., 274 Ga. App. 290, (2005). CVI also propounds the Hunter Court's reasoning that an indemnification contract must be strictly construed against the indemnitee. Finally, CVI cites to other jurisdictions for the proposition that it is would be contrary to Georgia's public policy to indemnify Church's for its own intentional tortious conduct.[13] Thus, even if this Court finds that the APA or other document requires CVI to indemnify Church's for its own intentional tortious conduct, such a

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12 Cornell v. Council of Unit Owners Hawaiian Village Condominiums Inc., 983 F. Supp. 640 (D. Md. 1997); City of Montgomery v. JYD Intern., Inc., 534, So.2d 592 (Ala. 1988); DeKalb County v. Lenowitz, 218 Ga. App. 884 (1996); Morris v. McDonald's Corp.,650 N.E.2d 1219 (Ind. App. 1995); Lake Cable Partners v. Interstate Power Co., 563 N.W. 2d 81 (Minn. App. 1997).

13 Equitex, Inc. v. Ungar, 60 P.3d 746 (Colo. Ap. 2002); Lincoln Logan Mut. Ins. Co., v. Fornshell, 722 N.E. 2d 239 (Ill. App. 4 Dist. 1999); Larson v. Van Horn, 313 N.W. 2d 288 (Mich. App. 1981); Biondi v. Beekman Hill House Apartment Corp., 257 A.D. 2d 76 (N.Y.A.D. 1 Dept. 1999); Solis v. Evins, 951 S.W. 2d 44 (Tex. App.

provision is void as a matter of Georgia's public policy. In the alternative, CVI moves this Court for a continuance to determine the reasonableness of Church's attorneys fees and litigation expenses.

Church's argues that the clear, unambiguous language of § 5.1(iv) expressly provides that CVI shall indemnify Church's for all losses – including reasonable attorneys fees, costs and expenses incurred by Church's resulting from "any act" by Popeyes in connection with the transaction. Under Georgia law, if an agreement contains unambiguous language, the court gives the language its plain meaning. *See* In re Lummus Dev. Corp., 85 F.3d 575, 577 (11th Cir. 1996). The Popeyes Action, Church's argues, clearly is "any act" by Popeyes, which is directly grounded upon, arises out of and relates to said transaction.[14]

Furthermore, Church's argues, the parties anticipated a lawsuit by Popeyes and provided an indemnity obligation for that very scenario as evidenced by § 5.1(iv) of the APA. In addition, the parties agreed that the monies in the escrow account could only be released to CVI *if* Popeyes did not file suit within ninety (90) days of the closing pursuant to the escrow agreement.[15] That agreement also provided that if Popeyes filed suit against Church's CVI would instruct the escrow agent to pay Church's pursuant to those claims, and on July 2, 2007, CVI authorized the escrow agent to pay Church's $8,875.00 for accrued attorneys fees and costs in defending the

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Corpus Christi 1997).

14 *See* Church's Cross Motion For Partial Summary Judgment, ¶22, page 8.

15 Section 9.6 of the APA integrated and incorporated the escrow agreement. Section 2(b)(ii) of the escrow agreement provided that the escrow money would be disbursed to CVI *unless* within ninety (90) days after the closing, Popeyes initiated a legal action against Church's regarding the transaction.

Popeyes Action. Church's concludes that there is no genuine issue of fact regarding CVI's obligation to pay for Church's attorneys' fees and costs in defending the Popeyes' Action. Church's further argues that a continuance is unnecessary because the Court should first determine CVI's liability for these expenses and then determine the reasonableness at a later date.[16]

Analysis Of The Indemnity Liability Under § 5.1(iv)

"The construction of a contract is a question of law for the court." O.C.G.A. § 13-2-1. Where the terms of a written contract are plain and unambiguous, the construction of that contract is a question of law for the Court rather than for the jury. Gilreath v. Argo, 135 Ga. App. 849, (1975). If the contract language is clear and unambiguous, the court enforces the contract according to its terms. Simpson v. Pendergast, 290 Ga. App. 293, (2008).

It is clear from the plain, unambiguous language of § 5.1(iv) that the parties expressly contracted for CVI to indemnify Church's for any losses, including attorneys fees and costs of litigation Church's might incur related to "any act by [Popeyes] in connection with the sale of the Business." Under "§ 5. Indemnification, the terms "'Loss,' and 'Losses' shall mean any . . . claims, . . . and causes of action . . . including . . . reasonable attorneys' and other professional fees and expenses." The Popeyes Action was a direct result of CVI's sale of its assets to Church's, and is "in connection with the sale of the Business." Thus the Court finds that the Popeyes Action is clearly

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16 Church's also states that there is a separate indemnity issue regarding CVI's obligation to indemnify Church's for CVI's alleged breaches of representations and warranties pursuant to the letter agreement and §

an "act" by Popeyes within the plain, unambiguous meaning of the words.

In interpreting all contracts, the court's fundamental goal is to find and give effect to the true intent of the parties, and where the contract terms are clear and unambiguous, the court looks to that alone to find the parties true intent. Southern Federal Sav. And Loan Ass'n. of Atlanta v. Lyle, 249 Ga. 284, (1982). "It is axiomatic that a contract should be construed by the court where the language is undisputed but the meaning of that language is in dispute." Board of Regents of University System of Georgia v. A.B. & E., Inc., 182 Ga. App. 671, 673, (1987). "In that case, if the words are plain and clear in their common usage even though the meaning is in dispute, it is the duty of the court to look to this language in order to effectuate the intent of the parties." Id. The language of the escrow agreement further shows the parties' intent to indemnify Church's for losses it might suffer as the result of litigation by Popeyes, because it expressly provides for monies to be held in escrow for the express purpose of defending Church's from a possible lawsuit by Popeyes.[17] Additionally, fact that CVI instructed escrow funds to be released to Church's to pay litigation expenses further demonstrates the parties' intent to indemnify Church's for a suit brought by Popeyes.

The Court is not persuaded by CVI's public policy argument. First, Church's claim for indemnification of its attorneys fees and litigation expenses arises from "an act" by Popeyes, not from Church's own actions, which have only been alleged and not

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5.1(i) of the APA. This indemnity issue will be discussed *infra.*

17 Section 2(b)(ii) stated that if within 90 days after the closing "AFC Enterprises, Inc [Popeyes] . . . initiates a lawsuit or any other legal action against Purchaser. . . with respect to the transactions contemplated by the Asset Purchase Agreement (a "Proceeding") then Purchaser shall instruct Escrow Agent to retain the Second Holdback Amount in escrow together with the Holdback Amount." Additionally, the word, "Proceeding" is encompassed by the broader term, "act."

proven to be tortious. Second, the negligence cases to which CVI cites all involve personal injury or severe property damage, not mere allegations of business torts.[18] O.C.G.A. §13-8-2 (b) specifically states that indemnity for negligence is against public policy in cases where bodily injury or property damage is caused by the indemnitee's negligence. Thus, Georgia's public policy against indemnifying a party for negligence absent an express provision applies mainly to cases dealing with bodily injury or property damage, and is not applicable in the case at bar.

Likewise, the cases from other jurisdictions to which CVI cites for the proposition that it is against public policy to indemnify a party for its intentional torts are no more persuasive. First, they have no precedential effect in Georgia, and more importantly, they all deal with egregious and/or criminal behavior by the indemnitee, not allegations of tortuous interference between competitors.[19]

In summary, the Court finds that § 5.1(iv) is not against Georgia's public policy. Accordingly, this Court finds that the clear language of the APA and escrow agreement require CVI to indemnify Church's for its reasonable attorneys fees, costs, and other litigation expenses incurred in defending the Popeyes Action.

Indemnification Liability Under § 5.1(i) Of The APA

Both the letter agreement and § 5.1(i) of the APA provide that CVI will indemnify

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18 Service Merchandise Co. v. Hunter Fan Co., 274 Ga. App. 290 (2005); Cornell v. Council of Unit Owners Hawaiian Village Condominiums Inc., F. Supp. 640 (D. Md. 1997)(dealing with bodily injury); City of Montgomery v. JYD Intern., Inc., 534, So.2d 592 (Ala. 1988)(regarding bodily injury); DeKalb County v. Lenowitz, 218 Ga. APP. 884 (1996)(dealing with continuing nuisance and damage to property); Morris v. McDonald's Corp.,650 N.E.2d 1219 (Ind. App. 1995)(dealing with bodily injury); Lake Cable Partners v. Interstate Power Co., 563 N.W. 2d 81 (Minn. App. 1997)(dealing with death).

19 Equitex, Inc. v. Ungar, 60 P.3d 746 (Colo. Ap. 2002)(dealing with criminal theft); (Lincoln Logan Mut. Ins. Co., v. Fornshell, 722 N.E. 2d 239 (Ill. App. 4 Dist. 1999)(dealing with murder); Larson v. Van Horn, 313 N.W. 2d 288 (Mich. App. 1981)(dealing with conversion of property).

Church's for its losses incurred as the result of CVI's "breach of any representation or warranty" CVI made in the APA, the letter agreement or the escrow agreement. CVI claims that the representations and warranties provided for in these documents only relate to CVI's ability to consummate and close the sale, that Church's received 100% of everything for which it contracted, and that Popeyes has not asserted any adverse claims against the assets Church's bought. CVI argues that it has not breached a representation or warranty and is under no obligation to indemnify Church's for its intentional tortious conduct, and is therefore entitled to summary judgment on this issue.

Church's argues that in addition to CVI's indemnity obligation pursuant to § 5.1(iv) of the APA and the escrow agreement, CVI is also obligated to indemnify it for any "losses" due to CVI's express breaches of the clear and unambiguous representations and warranties contained in the letter agreement and in §§ 3 and 5.1(i) of the APA. Church's alleges that CVI breached the representations and warranties that it had full authority to enter into the transaction, that it did not need Popeyes's consent, and that the transaction would not conflict with or breach CVI's franchise and other agreements with Popeyes. Church's claims that these breaches resulted in whatever potential liability it has to Popeyes.

Because no determination has been made in the Popeyes Action regarding whether Church's is liable to Popeyes, and so questions of fact remain as to whether Church's suffered any losses due to CVI's alleged breaches. Church's argues that any indemnity obligation arising under § 5.1(i) involves unresolved material issues of fact,

and that CVI's motion for summary judgment is premature and should be denied, pending final adjudication of the Popeyes' Action.

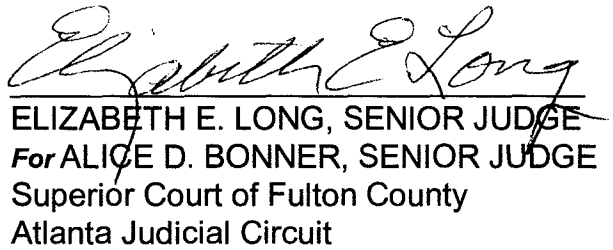
Analysis of § 5.1(i) Arguments

"The construction of a contract is a question of law for the court. Where any matter of fact is involved, the jury should find the fact." O.C.G.A. §13-2-1. Summary judgment is only appropriate when no genuine issues of material fact remain. Evans v. Sparkles Management LLC, 659 S.E. 2d 860, 861 (Ga. App. 2008). This Court finds that genuine issues of material fact remain regarding both: (1) whether CVI breached its representations and warranties in the letter agreement and in §§ 3.2 and 3.3 of the APA, resulting in liability under § 5.1(i); and (2) whether these alleged breaches resulted in any losses to Church's, including losses incurred pursuant to the Popeyes Action. Since neither issue has been adjudicated, the Court finds that these unresolved questions of material fact preclude the grant of summary judgment.

CONCLUSION

The Court hereby **GRANTS** Church's motion for partial summary judgment on the issue of reasonable attorneys fees, costs, and expenses of litigation in defending the Popeyes Action. The Court **DENIES** CVI's Motion For Summary Judgment. Counsel shall appear before this Court to present evidence and argument on the fees, costs, and expenses accrued and their reasonableness, at a later time. Church's shall contact the Court to schedule such hearing within thirty (30) days of the date of this Order.

SO ORDERED this 18 day of June, 2008.



ELIZABETH E. LONG, SENIOR JUDGE
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