ORANEE TAMPIRA	*	**NO. 2002-CA-0904**
VERSUS	*	**COURT OF APPEAL**
ALLEY ONE, LLC, CIELO MARTINEZ, CURVES FOR WOMEN INT'L, INC., XYZ INSURANCE COMPANY,	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-10359, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge

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Judge Steven R. Plotkin

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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer, Judge Terri F. Love)

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REVERSED AND REMANDED

Plaintiff Oranee Tampira appeals a trial court judgment granting a motion for summary judgment filed by the defendants Alley One, LLC, Cielo Martinez, Curves for Women International, Inc., ("Curves") and XYZ Insurance Company dismissing her suit. Due to an incomplete record and numerous contested material facts, we reverse the trial court's granting of summary judgment and remand this case for further proceedings, consistent with this opinion.

Ms. Tampira brought this suit for a breach of contract involving a sale and transfer of an existing franchise. Alley One, LLC and its managing member, Cielo Martinez, ("Defendants"), obtained a franchise from Curves on July 7, 1997 to operate a Curves franchise women's health club in La Place, Louisiana. The franchise agreement between Alley One and Curves provided that the franchise rights could not be transferred without Curves prior written consent and a $2,000 transfer fee.

On July 2, 1999, Ms. Tampira and Alley One, LLC signed an agreement to purchase in which Ms. Tampira agreed to purchase from the

Defendants the Curves franchise for the price of $20,000. The Agreement stated in relevant part that "Property sold and purchased subject to all contained in said franchise agreement for the sum of Twenty Thousand and no/100 ($20,000.00) dollars." In return for the price paid by the buyer the contract stated that the seller was to furnish merchantable title. The Agreement stated that "The seller shall deliver to purchaser a merchantable title, and his inability to deliver such title within the time stipulated herein shall render this contract null and void, reserving unto purchaser the right to demand the return of the deposit."

Pursuant to the contract, Ms. Tampira paid a $10,000 deposit upon signing the Purchase Agreement and agreed to pay the remainder at the closing. The Defendants agreed to pay the $2,000 franchise transfer fee, but no time limit was specified for payment of that sum to Curves for the franchise transfer. The agreement stated that the "All costs and fees for preparation of all necessary documentation and fees to be paid by seller and purchaser equally. Seller to pay $2,000.00 franchise transfer fee."

On July 7, 1999 the Defendants received a faxed document entitled "Resale Procedure" from Curves. This document listed all the requirements

that Curves placed upon the seller and the buyer of the franchise in order for a valid franchise transfer to take place.

On July 8, 1999, the parties closed the sale by signing and executing the Cash Sale of Movables ("Cash Sale") contract. At the signing of this Cash Sale contract, the Plaintiff paid the remaining $10,000 purchase price. The Plaintiff was also obligated to pay half of the transactional fees incurred during the sale, as well as $1,598.61 in prorated rents, insurance and security deposit. The parties entered into a handwritten agreement on the second page of the Cash Sale contract allowing Ms. Tampira six months to pay that sum. The Defendants' attorney, Mr. Perilloux sent the signed Purchase Agreement and Case Sale contracts to Curves on July 9,1999.

On July 10 1999, the Appellant contacted Curves. She discovered at this time that the $2,000 transfer fee had not been paid. The next day she stopped payment on the second $10,000 check and sent a telegram to Curves stating that she was rescinding the franchise transfer contract because she concluded that the Appellee/Sellers had misled her, and had materially breached both the Purchase Agreement and the Cash Sale contract.

In July 2000, the Plaintiff filed a Petition for Breach of Contract in the Civil District Court for the Parish of Orleans seeking a rescission of the sale agreement, return of the sale agreement, return of the $10,000 deposit, incidental expenses, court expenses and attorney's fees. Following discovery, the Defendants filed a motion for summary judgment. The Plaintiff filed a motion in Opposition and a Motion for Summary Judgment. On December 12, 2001 the trial court granted the Defendant's Motion for Summary Judgment on the basis that Ms. Tampira breached the contract by canceling the franchise transfer agreement.

The Appellate Court standard of review of summary judgments is *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Bell v. Touro Infirmary, Inc.*, 785 So.2d 926, 929 (La. App. 4 Cir. 2001). If there is no genuine issue as to material fact, the mover is entitled to judgment as a matter of law. *Shelton v. Standard/700 Associates*, 01-0587, p.5 (La. 10/16/01); 798 So.2d 60, 65. Both the evidence and all inferences drawn from the evidence must be construed in favor of any party opposing the motion, and all doubt must be resolved in his favor. *Louisiana Gaming v. Calegan*, 99-2306, p.4 (La. App. 4 Cir. 4/18/01); 786 So.2d 159,162. Louisiana Code of Civil Procedure

article 966(B), which controls motions for summary judgment provides in part:

> The judgment sought shall be rendered forthwith 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 material fact, and that mover is entitled to judgment as a matter of law.

This appeal involves a factual dispute concerning the performance required by the Defendants, specifically whether the purchaser was to receive title to the property and the transfer of the franchise. The parties validly executed the Purchase Agreement and Ms. Tampira complied with her obligations pursuant to it. The Purchase Agreement contains clauses that imply that the buyer would receive title to the property, any improvements, equipment and the transfer of the Curves franchise upon the execution of the Sales Contract. Further, the seller was to pay the transfer fee of $2,000 but the agreement was silent as to any conditions or time limits for the transfer agreement to occur.

The Purchase Agreement and the Sales Contract were separated by only a week. Due to this short period of time, the Defendants assert that the franchise transfer agreement was subject to a suspensive condition, the

required approval of the franchisor, Curves. The Defendants received a fax from Curves on July 7, 1999, setting forth the procedure to transfer the franchise, which specifically stated in bold type that "Per franchise agreement Curves International has the final approval of buyer and the sale will not be final until all documents have been fully executed and received in our office." Although the seller received this fax, there is no evidence in the record that the buyer knew of this condition or accepted it prior to the act of sale. Ms. Tampira contends that because the Defendants did not inform her of this condition that they had made bad faith misrepresentations in order to expedite the sale.

The Sales Contract transfers the franchise to the buyer and then refers to the terms and conditions listed in the original franchise agreement between the Defendants and Curves completed on July 7, 1997. The sales contract stated that the "Seller does hereby sell, transfer and deliver unto Purchaser, all of the assets, franchise rights and business of Curves for Women." It then alluded to the earlier agreement between the Defendants and Curves by stating that "Any and all right of seller contained in that certain franchise agreement between Curves International, Inc., and Seller dated July 7, 1997." There is nothing in the record, however, to indicate

whether or not the buyer knew or should have known that there was a time delay in acquiring the franchise. This material dispute of fact relates to the factual question of what the parties understood surrounding the sale and franchise transfer.

The trial court erred in concluding that Ms. Tampira, contacted the franchisor for the purpose of canceling the franchise transfer. That fact does not resolve the basic dispute of which party if any breached any of the contracts in this case. Because the Defendants drafted the contracts but did not include any statement about the required third party approval or any suspensive condition within the four corners of the document, a material dispute remains as to the interpretation of the contacts and as to whether the buyer was even aware of the suspensive condition.

The Defendants contend that this Court must consider the common requirements for sale of a franchise and construe the contract to achieve its purposes. The Defendants cite La. C.C. Art 2054 in order to support this contention. It states,

> When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the

> contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.

The Defendants ask the Court to "consider common requirements for sale of a franchise" and "construe the contract to achieve its purposes."

The Plaintiff implores the Court to read the Purchase Agreement as it was written. She asserts that since the terms of the document are clear and unambiguous no further inquiry is needed. Ms. Tampira points to a number of cases and statutes for the proposition that when the words of a contract are clear and do not lead to absurd consequences, no further interpretation of the parties' intent should be made. See La. C.C. art. 2045-2047; *Amend v. McCade,* 95-0316, p.7 (La. 12/1/95); 664 So.2d 1183, 1187; *McCory v. Terminix Service Co.*, 609 So.2d 883, 885 (La. App. 4 Cir. 1992); *Campbell v. Melton,* 01-2578 (La. 5/14/02).

Because this case contains a material dispute of facts, we are unable to render a decision based on the incomplete record. Therefore, we reverse the trial court's granting of summary judgment and remand this case back to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED