STATE OF MICHIGAN

COURT OF APPEALS

PATRICK M. VERDERESE,

Plaintiff/Counter-defendant-Appellant,

v

Q LUBE, INC.,

Defendant/Counter-plaintiff-Appellee.

UNPUBLISHED
May 26, 1998

No. 199084
Ingham Circuit Court
LC No. 95-081332-CK

Before: O'Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this breach of contract action arising from a franchise agreement. We affirm in part, reverse in part, and remand for further proceedings.

Defendant Q Lube is the successor in interest of McQuik's Oilube, Inc. (McQuik's), formerly an Indiana corporation in the business of owning, operating, and franchising automotive oil lubrication centers under the trade name McQuik's Oilube. In early May 1988, plaintiff began discussions with McQuik regarding the purchase of a McQuik's Oilube franchise. Plaintiff obtained and acknowledged in writing receiving a McQuik's offering circular that, in compliance with Federal Trade Commission rules, explained the terms of the franchise agreement to potential franchisees. On July 20, 1988, plaintiff and defendant entered into a franchise reservation agreement and plaintiff made a $7,500 deposit toward the franchise purchase.

McQuik's commenced negotiations to merge with Quaker State Corporation in the fall of 1988, and the merger became effective May 26, 1989. A newly formed and wholly owned subsidiary of Quaker State, also named McQuik's Oilube, Inc., (QS McQuik's), was formed to accomplish the acquisition, and McQuik's (Indiana) was merged into QS McQuik's, a Delaware corporation. At the time Quaker State acquired McQuik's, Quaker State wholly owned a subsidiary, Minit-Lube, Inc., that was in the business of conducting fast oilube businesses and had a number of fast oilube centers competing with McQuik's in Michigan.

Plaintiff signed a franchise agreement on December 13, 1989 to operate a McQuik's franchise in Jackson, Michigan. Plaintiff's McQuik's franchise was the third and final McQuik's franchise sold in Michigan. The first was located in East Lansing and the second in Westland. There were no additional McQuik's franchises sold in Michigan after Quaker State acquired McQuik's, and no company-owned McQuik's stores were established in Michigan thereafter.

Minit-Lube, Inc. changed its name to Q Lube, Inc., in November, 1993. Effective January 1, 1996, QS McQuik's merged with Q Lube, Inc., and QS McQuik's ceased to exist, and its contractual rights and obligations were assigned to Q Lube, Inc.

Plaintiff's first amended complaint, filed May 7, 1996, sought a declaratory judgment that McQuik's and Q Lube's abandonment of the McQuik's Oilube System and conversion of that system to the Q Lube system constituted a material breach of the franchise agreement, and damages. The amended complaint alleged that in its Michigan Franchise Offering Circular, McQuik's estimated that there would be fifty McQuik's franchises in Michigan when the McQuik's system was developed. Plaintiff alleged that, through the franchise agreement, McQuik's represented and acknowledged that:

> a. By becoming a franchisee, Plaintiff would be part of the "McQuik's Oilube System";
>
> * * *
>
> c. Each McQuik's Oilube Center (including Plaintiff's) in the McQuik's Oilube System was dependent on the others in that system to establish and maintain the goodwill necessary for a successful operation.

Count II of plaintiff's amended complaint alleged that as of the effective date of the merger, May 26, 1989, Quaker State Corporation had established, owned and operated approximately twenty-five quick oil lube centers in Michigan, operating under the name Minit-Lube. The complaint alleged that after the merger, Quaker State attempted to persuade McQuik's franchisees to convert to Minit-Lube franchises, and that due in part to opposition by McQuik's franchisees, Quaker State abandoned that effort. The complaint further alleged that after the merger, Quaker State knew that placing additional McQuik's franchises in Michigan would create competition with Quaker States' Minit-Lube centers.

Plaintiff alleged that in October 1995, McQuik's franchisees were notified that they would be compelled to convert to Q Lube franchisees, and that in February 1996, Q Lube informed McQuik's franchisees of changes to the conversion program, including changes in contractual obligations of McQuik's franchisees that included: being required to incur substantial expense associated with changing the trademark and trade dress of the franchise; or, if the franchisees did not consent to the conversion, the franchise could continue to exist as a McQuik's even though the rest of the system had converted to the Q Lube name, and franchisees would still be required to contribute royalties and advertising fees to a franchise system which no longer existed; and at the expiration of the franchise agreement there would be no renewable rights, even though the original franchise agreement provided for automatic renewal.

Plaintiff's amended complaint alleged that McQuik's did not reserve the contractual right to merge McQuik's Oilube, Inc., including all franchisees, into and with a competing franchise system, and the merger of McQuik's into a competing oilube system breached plaintiff's franchise agreement and destroyed all goodwill associated with McQuik's franchise system. Plaintiff alleged that from at least May 1989, McQuik's had done nothing to promote the public's use of the McQuik's franchise system or to increase the size of that franchise system in Michigan, contrary to the parties' agreement, because QS McQuik's and Quaker State were working on a corporate strategy through which McQuik's would cease to exist.

Plaintiff further alleged that express and implied in the franchise agreement was McQuik's obligation to act in good faith toward plaintiff. Plaintiff alleged that McQuik's breached § 10.6 of the franchise agreement by failing in good faith to determine that its assignee, Q Lube, Inc., would be willing and able to assume McQuik's obligations under the franchise agreement. Plaintiff alleged that McQuik's further materially breached the contractual commitments and implicit obligations of good faith toward plaintiff:

> [42.]
>
> a. Through a decision to abandon Michigan as a state in which to establish a system of franchise operations; and
>
> b. Through a decision making the determination to abandon the use of the mark "McQuik's Oilube" in connection with all company-owned and franchised McQuik's Oilube stores through assigning the McQuik's franchise system to a competing chain of oilube stores.

Defendant's motion for summary disposition argued that it had no contractual obligation to sell more franchises in Michigan, or establish a system of franchise operations in Michigan, or to prevent the assignment of the name and mark of McQuik's Oilube. Defendant argued that the Offering Circular, which stated that the total number of franchises to be sold in Michigan was estimated to be fifty, made clear that it was not the franchise agreement and should not be relied on exclusively. Defendant argued that the franchise agreement contained an integration clause that was valid and enforceable, and that because the contract was unambiguous, no implied obligation could arise from it.

The circuit court concluded that the franchise agreement was unambiguous and no parol evidence would be considered. The court noted that the agreement itself set forth the parties' obligations and contained an integration clause specifying that the contract set forth the parties' entire agreement. The circuit court found, without elaboration, that no genuine issue of material fact remained that any of the agreement's provisions had been breached. This appeal ensued.

I

Plaintiff first argues that the circuit court erred when it refused to consider evidence beyond the four corners of the franchise agreement to aid in determining the franchisor's obligations under the

agreement and whether the franchisor had breached that agreement. Essentially, plaintiff argues that the sale to him of a geographically isolated "orphan" store, which was not a part of a functional franchise system, breached the franchise agreement, and that the term "McQuik's Oilube [franchise] system" was ambiguous.

We review the circuit court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A genuine issue of material fact exists under MCR 2.116(C)(10) when the kind of record that might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ. *Skinner v Square D Co,* 445 Mich 153, 162; 516 NW2d 475 (1994).

Where a contract is clear and unambiguous, parol evidence cannot be admitted to vary it. *In re Skotzke Estate*, 216 Mich App 247, 251; 548 NW2d 695 (1996). However, parol evidence may be admitted to aid in interpreting ambiguous terms in a written contract. *Keller v Paulos Land Co,* 5 Mich App 246, 256; 146 NW2d 93 (1966), aff'd 381 Mich 355 (1968).

Plaintiff maintains that although no provision in the franchise agreement specifically describes the number of franchises that would comprise the franchise system, when read in its entirety, the franchise agreement represented McQuik's contractual commitment to sell a business opportunity to plaintiff that would commonly be recognized in commerce as a "franchise," and contemplated development by the franchisor of a system of independent franchises operating under the common name "McQuik's Oilube", or a good faith attempt to create such a system. Plaintiff argues that defendant's Offering Circular, which stated that "[t]he total number of franchises to be sold or granted in Michigan is estimated to be fifty (50) franchises", and further stated, in bold print, that "This offering circular and all contracts or agreements should be read carefully in their entirety for an understanding of all rights and obligations of both the franchisor and franchisee," should be admitted to explain the term "franchise system" used in the contract.

In support of his response to defendant's motion, plaintiff submitted the affidavit of Francine Lafontaine, Associate Professor of Business Economics at the University of Michigan School of Business, in which she opined that plaintiff's Jackson franchise was not a part of a functional franchise system. Plaintiff argues that Professor Lafontaine's affidavit established that the franchise agreement was subject to more than one reasonable interpretation as to whether McQuik's delivered a business opportunity that would ordinarily be understood in commerce as a franchise.

Plaintiff argues that when interpreting franchise agreements, parol evidence of representations or statements made during negotiations has been allowed in order to give meaning to the franchise agreement, citing *TCBY Systems, Inc., v RSP Co, Inc*, 33 F3d 925 (CA 8, 1994), and *Scott-Douglas Corp v Greyhound Corp,* 304 A2d 309 (Del Superior Ct, 1973). However, in these cases, the courts first determined that certain contract terms were ambiguous. Here, we agree with the trial court that the contract was not ambiguous. The contract contained an integration clause and did not obligate defendant to sell more franchises or open more stores in Michigan. [1]

II

Plaintiff next argues that a genuine issue of material fact remained whether defendant breached express and implied obligations of good faith and fair dealing when it failed to adequately promote and advertise the franchise and when it assigned its obligations to an assignee who was not willing and able to assume the franchisor's obligations under the franchise agreement.

Michigan courts will recognize an action for breach of an implied covenant of good faith and fair dealing where a party makes the manner of its performance a matter of its own discretion. *Paradata Computer Networks, Inc v Telebit Corp*, 830 F Supp 1001, 1005 (ED Mich, 1993), citing *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975). See also Mantese & Newman, *Still Keeping the Faith: The Duty of Good Faith Revisited*, 76 Mich B J 1190 (November 1997), and cases cited in Garner, *The Implied Covenant of Good Faith in Franchising: A Model for Discretion*, 20 Okla City U L Rev 305, 321-325. However, when interpreting a contract, the obligation of good faith cannot be employed to override express contract terms. *General Aviation, Inc, v Cessna Aircraft Co,* 703 F Supp 637, 643 (WD Mich, 1988), rev'd in part on other grounds 915 F2d 1038 (CA 6, 1990). Nor may a court use the implied covenant of good faith as a tool for rewriting the parties' agreement based on unspecified notions of fairness. *Id.* at 644. The purpose of the implied covenant of good faith is to enable enforcement of contract terms in a manner consistent with the parties' reasonable expectations. *Id.* at 644.

Plaintiff cites certain provisions in the franchise agreement, including:

> Section 3.11. Promotion of McQuik's Oilube Centers.
>
> Franchisor agrees to promote McQuik's Oilube Centers and the use of those centers by members of the public through such advertising and public relations as Franchisor, in its discretion, determines to be suitable and appropriate.

and

> Section 5.3. The Fund. Franchisor may, in its discretion, establish a national advertising fund (the "Fund"). Franchisee shall contribute to the fund …. The Fund shall be maintained and administered by the Franchisor as follows:
>
> > (a) Franchisor shall direct all advertising programs, with sole discretion over the approval of agencies, spokespersons, creative concepts, materials and media used in such programs and the placement and allocation thereof. Franchisee agrees and acknowledges that the Fund is intended to maximize general pubic recognition and acceptance of the mark "McQuik's Oilube" for the benefit of the McQuik's Oilube System and that Franchisor and its designees undertake no obligation in administering the Fund to make expenditures for Franchisee which are equivalent or proportionate to its contribution, or to insure that any

particular franchisee benefits directly or pro rata from the placement of advertising.

* * *

(c) Franchisee agrees that the Fund may be used to meet any and all costs of maintaining, administering, directing and preparing advertising (including without limitation, the cost of preparing and conducting television, radio, magazine and newspaper advertising campaigns and other public relation activities; employing advertising agencies to assist therein; and providing promotional brochures and other marketing materials to franchisees in the system). All sums paid by Franchisee to the Fund shall be maintained in a separate account from the other funds of Franchisor and shall not be used to defray any of Franchisor's general operating expenses, except for such reasonable administrative and overhead, if any, as the Franchisor may incur in activities reasonably related to the administration or direction of the Fund and advertising programs, including, without implied limitation, conducting market research, preparing marketing and advertising materials, and collecting an accounting for assessments for the Fund.

These provisions leave the manner of performance to the franchisor's discretion, thus a covenant of good faith and fair dealing is implied. *Burkhardt, supra*.

Plaintiff established that McQuik's Oilube, Inc., failed to secure its own trademark with the United States Patent and Trademark Office and that the Michigan Attorney General had issued a cease and desist order requiring it to register in Michigan before selling additional franchises in this state. As McQuik's recognized in its merger documents, the loss of its trademark and its non-registration in Michigan would make it very difficult for McQuik's to adequately promote its franchises in Michigan.[2] Defendant admitted that subsequent to the merger in April 1989 it did not pursue further expansion and sales of McQuik's franchises, and that in January, 1990, Quaker State, through its Minit-Lube subsidiary, entered into a management agreement with QS McQuik's pursuant to which Minit-Lube became the general manager of all business affairs of McQuik's, including approval of any new prospective franchisees of McQuik's.

Defendant admitted in response to plaintiff's requests for admission that McQuik's advised its franchisees by letter dated December 21, 1989 that QS McQuik's had determined "to continue operating as McQuik's indefinitely," and that at an April 1990 franchise meeting, defendant advised franchisees of QS McQuik's decision "to continue to operate and grow as McQuik's." However, plaintiff also attached defendant's responses to plaintiff's requests for admission, in which defendant admitted that from at least 1987 and at all relevant times, Quaker State had a corporate plan to grow its market share in the automobile fast oilube business by acquiring regional fast-lube businesses having company-owned or franchise stores, with the intent that at some point all the acquired stores would be converted to a single name, to be chosen by Quaker State, and that the names under consideration

were Q Lube and Minit-Lube. Defendant admitted that Quaker State never considered adopting the name McQuik's Oilube.

This evidence created a genuine issue of material fact regarding breach of the implied covenant of good faith and fair dealing. Reasonable minds could conclude that defendant failed to promote McQuik's Oilube Centers and the use of those centers by members of the public through advertising and public relations in Michigan, [3] and failed to allocate Fund dollars to the placement of advertising in Michigan, not because it deemed such promotion unsuitable or inappropriate in the good faith exercise of its discretion, but because it either concluded that the McQuik's Oilube system could not be effectively advanced in Michigan due to the difficulties described above and that the McQuik's system should be abandoned in favor of Minit-Lube or Q Lube, or it was pursuing a corporate policy that did not contemplate the maximization of "general public recognition and acceptance of the mark 'McQuik's Oilube' for the benefit of the McQuik's Oilube System" but, rather, the conversion of McQuik's Oilube centers into Minit-lube or Q Lube centers.

Plaintiff also argues that a genuine issue of material fact remained whether defendant breached the agreement by assigning its trademark and contractual obligations. Plaintiff asserted that the assignee intended to abandon the McQuik's tradename in violation of the franchise agreement and that the assignee was not ready, willing, and able to assume the obligations of the agreement, thus violating provision 10.6 of the franchise agreement, which provides:

> Franchisor shall have the right to transfer or assign all or any part of its rights or obligation under this Agreement to any person or legal entity. In the event of any such transfer or assignment, Franchisor shall notify Franchisee of the transfer or assignment. However, *no assignment shall be made except to an assignee who, in good faith judgment of Franchisor, is willing and able to assume Franchisor's obligations under this agreement*. [Emphasis added.]

Defendant offered the affidavit of one of its corporate officers, who stated that in the good-faith judgment of defendant's predecessor in interest, defendant was willing and able to assume the obligations under the franchise agreement. Defendant contends that plaintiff offered no evidence to rebut this claim and thus created no genuine issue of material fact. We disagree. Plaintiff offered the documentation accompanying the merger, discussed above, which noted the loss of the McQuik's trademark in September 1988 and its ramifications. The merger documents established that it was known that this could adversely affect franchisee relationships and inhibit the growth of the McQuik's tradename. The merger documents acknowledged that the process of reregistering the trademark would be long and costly in light of likely opposition by McDonald's. Further, defendant admitted that it did not pursue further expansion and sales of McQuik's franchises subsequent to the merger, and that from at least 1987 Quaker State had a corporate plan to grow its market share by acquiring regional fast-lube businesses with the intent of converting them to Q-Lube or Minit-Lube centers.

The circuit court's grant of summary disposition was in error because a genuine issue of material fact remained on the issue whether defendant's predecessor in interest in good faith assigned its obligations under the contract to a willing and able assignee where it and its assignee were aware that

the loss of its trademark counseled against any serious effort to promote McQuik's Oilube centers and the use of those centers by the members of the public through advertising and public relations.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Richard A. Bandstra

[1] Many of plaintiff's allegations regarding the Offering Circular and the trademark appear to complain of misrepresentations, although plaintiff did not plead misrepresentation in his first amended complaint, and only asserted it in his answer and affirmative defenses to defendant's counterclaim. Plaintiff characterized defendant's conduct as demonstrating a lack of good faith, and did not seek leave to amend his complaint to allege misrepresentation when the court granted defendant's motion for summary disposition.

[2] Plaintiff presented documents from the McQuik's-Quaker State merger that stated in pertinent part:

> (e) In all of its Franchise Offering Circulars for Prospective Franchisees and at all relevant times, McQuik's Oilube, Inc. disclosed under Section XIII of such Offering Circulars that:
>
> (i) There were no presently effective determinations of the United States Patent Office, any state trademark administrator or any court, nor was there any pending interference, opposition, cancellation proceeding or material litigation involving McQuik's trademarks, service marks, trade names, logo types or other commercial symbols which would be relevant to their use in the various states in which McQuik's sold franchises;
>
> (ii) McQuik's trademark "McQuik's Oilube" was then currently registered on the Principal Register of the United States Patent Office.
>
> However, as a result of the failure of McQuik's Oilube, Inc. to timely file the Section 8 and Section 15 Affidavits of Continued Use, **the registration of the mark "McQuik's Oilube" was lost during September 1988.** Accordingly, the loss of the registration of the mark "McQuik's Oilube" which was not discovered until after December 31, 1988 **could have material adverse effects upon and material adverse changes in the relationship between McQuik's and its franchisees, including, in particular, franchisees who purchased a franchise after the date upon which the registration of the mark "McQuik's Oilube" was effectively terminated.** The loss of the registration of the use of this mark **can also be expected to limit and inhibit the expansion of the use of that mark in commerce in market**

> **areas currently not serviced by any McQuik's Oilube Center**. Although McQuik's Oilube, Inc., based upon advice from its trademark attorneys, believes that the mark can be successfully re-registered, such re-registration process will likely be lengthy and costly, and opposition from McDonald's corporation can be expected. It is also possible that existing franchisees of McQuik's Oilube, Inc. might claim that McQuik's Oilube, Inc. had a duty to continue the registration of the trademark license to them under the various franchise agreements, which duty was breached by the failure of McQuik's Oilube, Inc. to keep the registration of the trademark in effect. Finally, loss of the registration of the trademark has resulted in the loss of the advantages accorded to 'incontestable' marks under the Lanham Act.

[3] Regarding section 5.3 pertaining to the advertising fund, defendant asserted at argument that the the national advertising fund was never intended to "place" national advertising, but was intended to produce advertising materials for franchisees, who could then place the ads in their respective local markets. However, the language of the provision is at least ambiguous in that regard, where the contract uses the word "placement" in relation to "advertising programs" and refers to "preparing and conducting television, radio, magazine and newspaper advertising campaigns and other public relations activities."