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Re: Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC, et al.
C.A. No. 20405-NC
Date Submitted: November 5, 2004

Dear Counsel:

Plaintiff Penn Mart Supermarkets, Inc. ("Thriftway") operates a supermarket in the Penn Mart Shopping Center (the "Shopping Center"), near New Castle, Delaware, owned by Defendant New Castle Shopping LLC (the "Landlord"). Thriftway alleges that it is the beneficiary of covenants protecting it from

competition in the sale of food or the operation of a supermarket by other tenants. Defendant NWL of New Castle, Inc., a subsidiary of Defendant NWL Holdings, Inc. (collectively "NWL"), opened a discount store at the Shopping Center in 2003. That store sells a substantial quantity of food from a broad inventory. Thriftway brought this action to enjoin the competitive conduct of NWL as violative of its protective covenants and to recover damages. NWL has moved for summary judgment.[1]

I. BACKGROUND

Thriftway maintains a supermarket in the Shopping Center under a lease which it assumed in 1988.[2] Under that lease, Thriftway enjoys certain covenant protections binding upon the Landlord. Included among these protections is the following:

> In order to induce Tenant to enter into this Lease, Landlord agrees for itself, its successors and assigns . . . that none of the foregoing shall use, suffer, permit or consent to use or occupancy of (a) any part of the Entire Premises [the Shopping Center] . . . as a supermarket or for the sale of food or food products intended for off-premises consumption.[3]

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[1] The Landlord also moved for summary judgment. By bench ruling on November 5, 2004, the Landlord's motion was denied because it was unable to demonstrate that the material facts controlling its motion are not in dispute.
[2] The assumed lease (the "Thriftway Lease") was first executed in 1965 by Food Fair Stores, Inc. and a predecessor of the Landlord.
[3] Thriftway Lease ¶ 10.

Since Thriftway's assumption of the lease, various stores at the Shopping Center have sold food. Some of these sales were *de minimis*;[4] some were not.[5] Thriftway objected to some of these sales; most occurred without objection.[6]

In 1970, Ames entered into a lease (the "Ames Lease") for a unit in the Shopping Center which provided in part:

> Tenant [Ames] shall use the premises only for the operation of a general or discount department store, and for no other purpose. Thereafter, during the term of the Lease or any renewal or extension thereof, Tenant may occupy the premises for any lawful purpose, except the operation of a food supermarket if a food supermarket is then in operation in the shopping center and except for any use for which other premises in the shopping center are occupied pursuant to an exclusive right and use granted by the Landlord.[7]

Ames sold food at the Shopping Center; however, the scope and extent of its sales are unclear. Thriftway knew that Ames was selling food and did not object, but the extent of Thriftway's knowledge of Ames' sale of food is unclear.

In August 2001, Ames filed for bankruptcy in the Southern District of New York. The Ames store at the Shopping Center closed in November 2002. The

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[4] *De minimis* sales include the sale of food at stores such as Blockbuster and the Hong Kong Restaurant.

[5] For example, the Dollar Tree store—which Thriftway expressly consented to—has a relatively expansive selection of food.

[6] For example, Thriftway acquiesced in the sale of food by Dollar Tree. The Defendants argue that this is evidence of Thriftway's abandonment of its covenant rights because Thriftway consented to Dollar Tree's selling food without receiving consideration in return. However, an equally plausible—if not more likely—inference is that Thriftway pursued its rights and gave up some of its covenant protections for no consideration because it made the calculated decision that the benefit of having a Dollar Tree in the Shopping Center (*i.e.*, increased foot traffic) offset the harm (*i.e.*, a decrease in sales of competing goods).

[7] Ames Lease ¶ 8.

closing of an “anchor tenant” negatively affected the economic conditions at the Shopping Center for the other tenants.

On February 7, 2003, Ames sought approval of its plan to have NWL assume its lease with the Landlord.[8] On February 27, 2003, the Bankruptcy Court approved the proposed assignment through an order which provides in part:

> [N]otwithstanding any provision of the [Ames] Lease to the contrary . . . NWL may operate the Premises as a typical NWL department store, as same are currently operated, and none of the foregoing shall be deemed a breach or default of any provisions of the [Ames] Lease.[9]

When Thriftway learned that NWL would be opening a store at the Shopping Center, it objected to the Landlord and sought to invoke its protective covenants. Nevertheless, NWL commenced business at the Shopping Center on May 20, 2003, and, shortly thereafter, Thriftway filed its Verified Complaint for Injunctive Relief against the Landlord and NWL. On August 15, 2003, this Court denied Thriftway’s request for a preliminary injunction, in part because of the Bankruptcy Court Order, and stayed this matter to allow Thriftway to seek relief from the Bankruptcy Court. Thriftway appeared before the Bankruptcy Court on

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[8] It is unclear what the net effect of the “empty Ames”/NWL tradeoff is for Thriftway. While Thriftway clearly benefited, since there is not a complete correlation between the goods sold at Thriftway and those sold at NWL, from the increased foot traffic from having the NWL store occupied, it is reasonable to assume that it is harmed from the loss of sales of products which both Thriftway and NWL sell.

[9] *In re Ames Dept. Stores, Inc.*, Order Approving Assumption and Assignment of Lease for Store No. 27 Located in New Castle, Delaware (Bankr. S.D.N.Y. Feb. 27, 2003) (the “Bankruptcy Court Order”).

October 21, 2003. The Bankruptcy Court rejected Thriftway's efforts, but noted that the Delaware Courts "should deal with the matters of Delaware State law as they see fit."[10] The Bankruptcy Court also observed:

> I am making it clear that my order [the Bankruptcy Court Order] was not intended in any way to affect Penn Mart's [Thriftway's] rights under its own lease, that is, the Supermarket's [Thriftway's] Lease. Whatever rights Penn Mart [Thriftway] has in that regard are unaffected by the Assignment Approval [the Bankruptcy Court] Order. I also am making it clear that the Assignment Approval Order was permissive, not mandatory, except to the extent that it prohibited the landlord from complaining that [NWL] would be violating the Former Ames Lease by conducting operations in the manner that National Wholesale Liquidators ultimately has done.[11]

NWL currently operates a discount store at the Shopping Center. It sells from a comprehensive inventory of food items, but refrigerated products, such as meat and dairy, are not offered to its customers. With the exception of an allegation that the NWL at the Shopping Center actually sells less food than a typical NWL,[12] Thriftway does not dispute that NWL is operating as a typical NWL store.

II. CONTENTIONS

Thriftway first asserts a claim against NWL for breach of the Ames Lease, of which Thriftway claims to be a third-party beneficiary. Next, Thriftway claims

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[10] *In re Ames Dept. Stores, Inc.*, Transcript of Bench Ruling, at 87 (Oct. 21, 2003).
[11] *Id.* at 86.
[12] *See* Thriftway's Answering Br. in Resp. to the Mot. for Summ. J. filed by NWL at 17 (Oct. 25, 2004).

that NWL is tortiously interfering with its customer relations. Finally, Thriftway seeks injunctive relief against the ongoing competitive activities of NWL.

NWL has moved for summary judgment. NWL argues that it is not breaching the Ames Lease because the clear and unambiguous language of the Bankruptcy Court Order permits it to operate as a typical NWL store, which it is currently doing and has done in the past. Alternatively, NWL argues that, even if it is not acting within the Bankruptcy Court Order, it is not operating in a manner prohibited by the Ames Lease. Thriftway, in response, argues expressly that (1) the Bankruptcy Court Order cannot be read literally and that, when placed in context, NWL is violating the spirit of the order,[13] (2) NWL Holdings violated this order by improperly assigning the lease to NWL of New Castle,[14] (3) NWL is not required to sell food because "[a]n NWL store is no less an NWL store if it does not sell food,"[15] and (4) NWL has indeed breached its lease.

In addition, NWL moves for summary judgment on the ground that it cannot be tortiously interfering with Thriftway's business when it is operating in a fair and lawful manner in accordance with the Bankruptcy Court Order.

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[13] Thriftway hinted at this argument in its Answering Brief at Section I.A and more fully elaborated upon in oral argument on November 5, 2004.

[14] It is not clear whether Thriftway has abandoned this argument. In any event, I reject the notion that NWL Holdings, Inc. could not transfer its leasehold rights, as established by both the Ames Lease and the Bankruptcy Court Order, to an operating subsidiary (NWL of New Castle, Inc.), without losing the benefits conferred by the order.

[15] Thriftway's Answering Br., *supra* note 12 at 15.

Finally, as to Thriftway's efforts to obtain injunctive relief, NWL contends that it has breached no duty owed to Thriftway, that it had no notice of the Thriftway Lease,[16] and in any event, any harm suffered by Thriftway can be addressed through remedies available at law.

III. ANALYSIS

For the reasons set forth below, NWL's motion for summary judgment will be granted in part and denied in part.[17]

A. *Breach of the Ames Lease*

The Bankruptcy Court ordered, as part of the process of transferring the Ames Lease to NWL, that "NWL may operate the premises as a typical NWL department store, as same are currently operated, and none of the foregoing shall be deemed a breach or default of any provisions of the [Ames] Lease." The only

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[16] NWL had originally claimed that Thriftway could not assert a claim based on the Thriftway Lease because this claim did not appear in the Second Amended Complaint. *See, e.g.*, Reply Br. of Defendants NWL Holdings, Inc. and NWL of New Castle, Inc. in Supp. of their Mot. for Summ. J., at 8 n.7 (Oct. 29, 2004). However, at oral argument on November 5, 2004, NWL conceded that a plausible reading of paragraph 44 of Thriftway's Second Amended Complaint supports this claim. Thus, paragraph 44 adequately presents this claim.

[17] "Summary judgment should be granted if the moving party demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. . . . The facts must be viewed in the light most favorable to the non-moving party and the moving party has the burden of demonstrating that no material question of fact exists." *Salovaara v. SSP Advisers, L.P.*, 2003 WL 23190391, at *4 (Del. Ch. Dec. 22, 2003). Additionally, if a fact can give rise to multiple plausible inferences, for the purpose of summary judgment, the Court must take the plausible inference most favorable to the nonmoving party. *See*, *e.g.*, *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 936 (Del. 2004) ("Therefore, if reasonable people may draw different inferences from the undisputed facts, an ambiguity exists and summary judgment is inappropriate.").

allegation as to how NWL may be operating differently from a typical NWL store is Thriftway's contention that the NWL at the Shopping Center actually sells *less* food than a typical NWL. To hold NWL liable to Thriftway for breaching the Ames Lease, as addressed in the Bankruptcy Court Order, because it is not selling enough food, when selling more food will harm Thriftway more, if one accepts Thriftway's core allegation here, makes no sense. Simply put, NWL is operating within the Bankruptcy Court Order and not in violation of the lease.[18]

Thriftway argues that an NWL store need not sell food to be a typical NWL store. While this argument may be logically accurate, it is nonetheless irrelevant as it begs the question at hand. While the NWL at the Shopping Center is not required to sell food by the Bankruptcy Court Order, it is permitted to operate as a typical NWL. Thus, whether an NWL *must* sell food to be an NWL is not the issue. Instead, the relevant inquiry is whether NWL may be precluded from selling food in a manner authorized by the Bankruptcy Court. Because a typical NWL

[18] A Bankruptcy Court order that adversely impacts the rights of nonparties to the bankruptcy proceedings may seem harsh; however, it is clear that private contract rights may "take a back seat" to a Bankruptcy Court's decision. *See In re Martin Paint Stores*, 199 B.R. 258, 266 (Bankr. S.D.N.Y 1996) ("Nevertheless, when all of the other factors point toward permitting the assignment, the exclusivity provision in another tenant's lease cannot stand in the way. This would grant it a veto power over non-shopping center assignments in a manner that Congress never intended, and contravene the dual policies favoring assumption and assignment and disfavoring forfeiture.").

sells food in a manner similar to that of the NWL at the Shopping Center, it may do so without any violation of the Ames Lease.[19]

In addition, I do not take up Thriftway's invitation to supply a "context" to the Bankruptcy Court Order. I interpret the Bankruptcy Court order as plainly and unambiguously permitting NWL to operate as a typical NWL without breaching the Ames Lease.

Since the Bankruptcy Court Order permits the NWL at the Shopping Center to operate as a typical NWL regardless of the original terms of the Ames Lease that may otherwise prohibit the operation of a typical NWL, and since the NWL at the Shopping Center is operating as a typical NWL, NWL is entitled to summary judgment on Thriftway's claim that NWL is in violation of the Ames Lease.[20]

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[19] Additionally, Thriftway is correct that this Court "should look to the substance—not the label—of the activity sought to be restricted by the covenant." *Providence Square Associates, LLC v. G.D.F. Inc*., 211 F.3d 846, 851 (4th Cir. 2000). Just because NWL calls itself a discount department does not mean that it is a discount department store or that it is not operating a "supermarket" within a discount store. However, the record clearly shows that NWL is operating, in all material aspects, as a typical NWL.

[20] Since NWL's conduct under the Ames Lease is authorized by the Bankruptcy Court Order, I do not need to rule on NWL's argument, in the alternative, that it is not operating in violation of the original Ames Lease. However, this issue may be relevant to Thriftway's claim of tortious interference with contract, as it may be helpful in determining whether NWL operated in a "wrongful" manner. *See infra* Part III.C. The Ames Lease contained the following provision:

> Tenant shall use the premises only for the operation of a general or discount department store, and for no other purpose. Thereafter, during the term of the Lease or any renewal or extension thereof, Tenant may occupy the premises for any lawful purpose, except the operation of a food supermarket if a food supermarket is then in operation in the shopping center and except for any use for which other premises in the shopping center are occupied pursuant to an exclusive right and use granted by the Landlord.

B. *Injunctive Relief*

Thriftway presents a general claim for injunctive relief. The basis of its claim is not altogether clear. Indeed, NWL took the not unreasonable position during briefing of its summary judgment motion that Thriftway had not asserted a claim under the Thriftway Lease—only one under the Ames Lease. However, paragraph 44 of Thriftway's Second Amended Complaint may be read to include a claim under its lease as well. The only arguably pertinent portion of its brief in opposition to NWL's motion carries the heading, "NWL Has Breached Its Lease." Yet, within the text of that argument is the suggestion that NWL's conduct violated

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See text accompanying note 7. As is apparent, there are two "except" clauses and, thus, two relevant restrictions as to the ability of Ames, or a successor to Ames, to operate in the Shopping Center.

"Except clause #1" would leave NWL in violation of the Ames Lease if NWL is a "supermarket." Whether NWL is operating a "supermarket" ultimately is a disputed question of fact. Although Anthony Grisillo, an officer of Thriftway, conceded that NWL is not a "full-blown supermarket," he testified that it should be considered one in substance because it sells approximately 80% of the same items as Thriftway. A. Grisillo Dep., at 44. Regina Grisillo, another officer, agreed that a "full-service supermarket" would sell "meat, deli . . . ," items not sold by NWL. R. Grisillo Dep., at 36. The Thriftway Lease, however, speaks of a "supermarket," and not of a "full-service supermarket." Mr. Grisillo suggested reference to a dictionary definition. One definition of "supermarket" is: "[a] departmentalized self-service chain or independent retail market that sells food, convenience goods, and household merchandise arranged in open mass display." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2295 (1993). That definition is not as helpful as one might hope. In a literal sense, NWL might fall within the dictionary definition, but its inventory might fall outside of the common understanding of what one can purchase at a "supermarket." In any event, the question of whether NWL is a "supermarket" within the meaning of a lease now more than three decades old cannot be resolved on the present record. Nevertheless, the record does support the conclusion that NWL was reasonable in believing that it was entitled to operate at the Shopping Center in accordance with its prevailing business model and that it does not operate a "supermarket."

"Except clause #2" would prevent NWL, as Ames' successor, from operating in a manner that violates other tenants' protective covenants. This prohibition uses the term "other." Thus,

the Thriftway Lease, of which it had notice, and that it is entitled to injunctive relief. Against this backdrop, it is tempting to conclude that Thriftway has not fairly presented, and therefore has abandoned, any argument under the Thriftway Lease. The argument, however superficial, does require consideration.

If the terms of the Thriftway Lease bind NWL, then NWL is in violation of the lease because, indisputably, it sells food.[21] Under *Reeve v. Hawke*,[22] injunctive relief may be available to protect a tenant holding a covenant precluding the competitive business of a subsequent tenant if the subsequent tenant "has knowledge of the terms of the first lease. . . . Such notice may in certain cases be constructive rather than actual, particularly when the second lease is explicit as to the prohibited uses."[23] Here, there is nothing in the record to suggest that NWL had actual knowledge of the restrictions in the Thriftway Lease. However, the Ames Lease, of which it is charged with knowledge, does have limitations

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"except clause #2" applies to all the tenants of the Shopping Center, other than the supermarket (*i.e.*, Thriftway) (which is covered by "except clause #1").

[21] The Thriftway Lease protects against a competing use of the Shopping Center "as a supermarket or for the sale of food or food products intended for off-premises consumption." *See supra* text accompanying note 3. There is a substantial argument as to whether Thriftway, by its conduct, has waived or abandoned any rights under the covenant precluding the sale of food or operation of a "supermarket." That argument, however, depends upon disputed facts and the inferences that may be drawn from the facts and, accordingly, cannot be resolved in the summary judgment context.

[22] 136 A.2d 196 (Del. Ch. 1957).

[23] *Id.* at 201.

regarding a competing supermarket.[24] Whether the restrictions in the Ames Lease, which, of course, are more narrow than the restrictions in the Thriftway Lease, coupled with the duly recorded "Notice" of the Thriftway Lease, provided constructive notice of the type envisioned by *Reeve* is a question that is fairly subject to competing, reasonable inferences. Accordingly, for these reasons, summary judgment as to Thriftway's application for injunctive relief cannot be granted.[25]

C. *Tortious Interference with Contract*

In order to prove a claim of tortious interference with customer relations, the claimant must prove (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference which results in the termination of that expectancy; and (4) resulting damages.[26] However, "[a]ll of these factors must be considered 'in light of a defendant's privilege to compete or protect his business

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[24] NWL may have reasonably believed that it does not operate a "supermarket." Whether it operates a "supermarket" within the meaning of the Thriftway Lease presents a question of disputed fact. *See supra* note 20.

[25] NWL did not argue—in fairness, because it did not realize that it needed to—that the Bankruptcy Court Order approving the assignment of the Ames Lease may have resolved all of this by expressly authorizing the operation of a "typical NWL," regardless of the source of any restriction. I am reluctant to draw that conclusion on the present record, particularly in light of the Bankruptcy Court's comments to Thriftway's counsel to the effect that the Bankruptcy Court Order was not intended to affect Thriftway's rights under its own lease.

Also, to the extent that NWL may argue that Thriftway is not suffering harm of the nature that would support injunctive relief, that presents a question of fact.

[26] *See, e.g.*, *Vornado PS, L.L.C. v. Primestone Inv. Partners*, 821 A.2d 296 (Del. Ch. 2002).

interests in a fair and lawful manner.'"[27] Although the intentional interference with customer relations analysis involves an inquiry as to whether the alleged interferer's conduct was "wrongful," this Court must be careful not to interpret wrongful as equivalent to illegal, as there may be instances where an interferer's conduct is wrongful, but does not rise to the level of illegality.

Thriftway does not contend that NWL is operating illegally. Moreover, this is not a case where the behavior is wrongful but not illegal. To begin, as explained earlier, NWL is not in breach of the Ames Lease since it is acting under the Bankruptcy Court Order.[28] In addition, good-faith compliance with an unambiguous Bankruptcy Court Order cannot be wrongful for these purposes. With respect to any claim premised on the Thriftway Lease, Thriftway has not shown that NWL had actual knowledge of its provisions or that it would have been unreasonable—even if incorrect—to have concluded that it was not bound by its terms. NWL is selling competing products at, presumably, a lower price. Not only is this conduct reasonable and lawful, but it also is not wrongful and, thus, a claim for tortious interference with customer relations cannot survive.[29]

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[27] *Acierno v. Preit-Rubin, Inc.*, 199 F.R.D. 157, 165 (D. Del. 2001) (quoting *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1153 (Del. 1981)). *See also In re Frederick's of Hollywood, Inc.*, 1998 WL 398244, at *6 (Del. Ch. July 9, 1998) (holding that asserting one's contract rights, by itself, does not amount to wrongful interference).

[28] *See supra* Part III.A.

[29] I do not address other components of Thriftway's tortious interference claim, such as, for example, whether in the competitive business of food retailing, Thriftway has a sufficient expectation of future relationships with its current and potential customers.

IV. CONCLUSION

For the foregoing reasons, NWL's motion for summary judgment as to Thriftway's claims under the Ames Lease and for tortious interference with Thriftway's customer relations is granted. Otherwise, it is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC