IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DAVID DUBUQUE and DEBORAH DUBUQUE, AUTOMOTIVE CUSTOM SERVICE, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 03C-10-209 MMJ
GERALD A. TAYLOR, SHERRY A. TAYLOR and JERRY TAYLOR'S RACING TRANSMISSIONS, WILLIAM H. TAYLOR, III, individually and as agent for SUSQUEHANNA CORPORATION, a Delaware corporation,	)	
Defendants.	)	

MEMORANDUM OPINION

Following Non-Jury Trial

Submitted: July 9, 2007
Decided: October 1, 2007

Joseph J. Longobardi, III, Esquire, Longobardi Law Office, Wilmington, Delaware, Attorney for Plaintiffs

John S. Grady, Esquire, Grady & Hampton, LLC, Dover, Delaware, Attorney for Defendants Gerald A. Taylor, Sherry A. Taylor and Jerry Taylor's Racing Transmissions

Gary A. Bryde, Esquire, Law Officer of Gary A. Bryde, P.A., Hockessin, Delaware, Attorney for Defendants Susquehanna Corporation and William H. Taylor, III

Plaintiffs David Dubuque and Automotive Custom Service, Inc. are the purchasers of a transmission business known as Goodeal Discount Transmissions of Dover, Inc. ("Goodeal"). Plaintiff Deborah Dubuque is married to David Dubuque. Defendants Gerald A. Taylor and Sherry A. Taylor are the sellers of the business. Jerry Taylor's Racing Transmissions is a separate business operated by Gerald Taylor. William H. Taylor, II (not related to Mr. and Mrs. Taylor) was the broker for the sale. William Taylor is employed by Susquehanna Corporation.

Plaintiffs allege that the sellers breached their contract by failing to disclose that the business was a franchise. Plaintiffs also claim breaches of contractual warranties and fraudulent misrepresentation. Gerald and Sherry Taylor have asserted a cross-claim for indemnification against William Taylor. William Taylor and Susquehanna Corporation claim entitlement to indemnification from Gerald and Sherry Taylor.

Breach of Contract and Parole Evidence

It is undisputed that the franchise was not mentioned in the Offer to Purchase (in all of its revised forms), Addendum to the Offer, Covenant Not to Compete, Corporate Resolution, Bill of Sale, or in any of the documents relating to financing the transaction. The Goodeal profit and loss statement, which was provided to the buyer prior to closing, contains a line item entitled "Franchise

Fees." David and Deborah Dubuque testified that they contacted their accountant and were informed that the reference was to Delaware franchise taxes.

The Offer to Purchase and addenda ("Agreement") contain representations and warranties. These include warranties that all equipment will be in good working order, that the seller has "good and marketable title to the Business and its assets," and that seller had no knowledge of any liabilities or obligations of any nature "which relate to, or could adversely affect the assets being transferred." Paragraph 7.05 of the Agreement provides: "This document contains the entire understanding of the parties and there are no oral agreements, understandings, or representations relied upon by the parties. Any modifications must be in writing and signed by all parties."

The Corporate Resolution dated November 8, 2000, signed by Gerald and Sherry Taylor states:

> RESOLVED, that this corporation sell to David Dubuque all assets of the aforesaid Gooddeal (sic) Discount Transmissions of Dover, Inc., for the purchase price of $450,000.00.
>
> FURTHER RESOLVED, that the aforesaid Gooddeal (sic) Discount Transmissions of Dover, Inc., does hereby transfer, and relinquish all further claims of the name Gooddeal (sic) Discount Transmissions of Dover, and authorizes and directs its President to change its corporate name releasing and transferring the name Gooddeal (sic) Discount Transmissions of Dover as part of the asset sale to David Dubuque.

Plaintiffs claim that they first became aware Goodeal was a franchise following closing. David Dubuque testified that the franchise owner called and subsequently appeared at the business and confronted David Dubuque. Dubuque testified that the franchise owner wanted $18,000 in unpaid franchise fees and $200.00 per week in the future. The heated conversation between David Dubuque and the franchise owner was observed by Deborah Dubuque and an employee.

Gerald and Sherry Taylor claim that they had discussed the franchise with plaintiffs prior to closing. William Taylor testified that he provided a Business Offering Portfolio to the Dubuques as part of the deal negotiations. The Business Offering Portfolio refers to Goodeal as "a transmission service and repair business franchised under Goodeal Discount Transmissions." The Portfolio also contains a paragraph entitled "Franchise Facts."

Obviously, this evidence is diametrically opposed on the issue of whether plaintiffs had notice prior to closing that the business was a franchise. The first issue to be resolved by the Court is whether the parole evidence rule applies to exclude evidence of additional terms to a written contract.

> Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language. When the provisions in controversy are fairly susceptible of different interpretations or may have two or more

> different meanings, there is ambiguity. Then the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.[1]

In considering the Agreement and other closing documents, the Court finds no ambiguity. The Offer to Purchase contains a clear integration clause. All closing documents are entirely devoid of any mention of the business as a franchise. The Agreement warrants transfer of good and marketable title. The "Business" is defined: "known as Jerry Taylor's Goodeal Discount Transmissions of Dover, Inc." The Corporate Resolution authorizes transfer of the name "Gooddeal [sic] Discount Transmissions of Dover as part of the asset sale to David Dubuque."

There is no dispute that in the absence of a franchise agreement, the Goodeal name cannot be used by the purchasers of the business. The franchise agreement between sellers and the franchise owner prohibits transfer of the franchise without agreement of the franchise owner. A franchise agreement was not part of the closing documents and was never entered into between buyers and the franchise owner.

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[1] *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.,* 702 A.2d 1228, 1232-33 (Del. 1997).

Therefore, the Court finds that the Offer to Purchase and other closing documents fail to transfer to buyers a substantial asset of the business - the right to use the name Goodeal Discount Transmissions. This failure is a breach of contract and breach of warranties by sellers. Because the written agreements do not and, more importantly, cannot transfer to buyers the right to use the name Goodeal, the written agreements are unambiguous. The parol evidence rule applies to prohibit the Court's consideration of extrinsic evidence for the purpose of contract interpretation.

Elements of Damages

The second salient issue is what damages were proximately caused by defendants' breaches of contract and warranties.

Change of Business Location. Throughout negotiations and at the time of closing, all parties contemplated that the business would have to be relocated. Therefore, no damages flow from the location change.

Zoning Issues. In connection with the change of location, certain zoning problems arose. The Court finds that there is no evidence of defendants' concealment of these problems. The documentary evidence and testimony do not indicate that defendants assumed responsibility to investigate any zoning issues.

Therefore, plaintiffs had a co-equal duty to deal with zoning and are not entitled to damages on this issue.

Moving and Fit-out Expenses. The Court already has determined that the parole evidence rule applies with regard to interpretation of the sale documents. The Agreement is silent on which party is responsible for moving expenses and the cost of preparing the new location to open the business. After considering the testimony of all witnesses, the Court finds that the terms of responsibility for moving and fit-out expenses were not sufficiently specific to be enforceable as a separate oral contract.

"800" Number. Defendants represented to plaintiffs that the 1-800 phone number was only used for Jerry Taylor's Racing Transmissions, which is a separate business operated by Gerald Taylor. During trial, it was not disputed that the 1-800 number was used for the retail Goodeal business to some extent. Therefore, plaintiffs suffered some loss as a result of the inability to continue to use the 1-800 number.

Goodeal Name and Franchise. When considered along with the loss of the ability to use the 1-800 number, as well as the change in location, the continued use of the Goodeal name was particularly important to ensure continuation of the business. Plaintiffs agreed to purchase Goodeal Discount Transmissions of Dover,

Inc. Plaintiffs did not get what they bargained for. Instead they ended up with a transmission business without an established name. Because plaintiffs were prohibited from using the Goodeal name in the absence of transfer of the franchise, plaintiffs are entitled to damages for loss of use of the Goodeal name.

Covenant Not to Compete. Gerald and Sherry Taylor agreed:

> ...[T]hat for $10,000, which is a part of the purchase price of said business, I/we will not engage in any manner a similar business within a radius of fifty (50) miles of Dover, Delaware, for a period of ten (10) years, with the exception of Jerry Taylor's Racing Transmissions, which does work exclusively with racing vehicles. Sellers and Buyer agree that Sellers may also work in competitors' shops within the stated 50 mile radius of Dover, Delaware, so long as Sellers do not have an ownership interest of such business with the exception of Jerry Taylor's Racing Transmissions.

By the terms of the Covenant, the Taylors are free to continue to work in the retail transmission business so long as they do not have any ownership interest. Such an agreement does not adequately protect plaintiffs' interests. Customers have relationships with and loyalty to people, while actual ownership ordinarily is transparent to the consumer. It appears that the Covenant (to which plaintiffs agreed) is practically worthless for the purpose of preventing competition from the Taylors. Nevertheless, the Court finds that the Taylors have not breached the terms of the Covenant.

The witnesses testified as to circumstances in which Sherry Taylor gave business cards to plaintiffs' customers following the sale of the business. The Court found both Mrs. Taylor and Mrs. Dubuque credible concerning their interpretations of what occurred. Therefore, plaintiffs have not met their burden of proving that the provision of business cards was a breach of any agreement.

Measure of Damages

Plaintiffs suffered damages proximately cause by: loss of use of the Goodeal name; loss of use of the 1-800 number, to the extent it was not used solely for the racing transmission business; and Gerald and Sherry Taylor's failure to sell the business as warranted, because the Taylors were unable to transfer the franchise without the franchise owner's agreement.

Addendum Number 1 to the Offer to Purchase lists the total sales price as $450,000. "Intangibles, goodwill, and covenant not to compete" are listed as $315,755. The Court finds that as a result of the breaches of contract and warranties, buyers lost one-half of the goodwill of the business, i.e., $158,878. This amount is 35% of the total purchase price. Buyers executed a note payable to sellers as part of the purchase price in the amount of $83,000. Thirty-five percent of $83,000 is $29,050. Offsetting $29,050 from $157,878, the total amount of

damages suffered by plaintiffs is $128,828. The Court finds that there is not sufficient specific evidence to justify any other damages.

The various closing documents are not consistent in listing the parties. Having reviewed all relevant evidence, the Court finds that the parties to the contract are purchasers David Dubuque and Automotive Custom Service, Inc., and sellers Gerald A. Taylor and Sherry Taylor. Liability is joint and several as to Gerald A. Taylor and Sherry Taylor.

Fraudulent Misrepresentation

Plaintiffs have alleged that defendants engaged in fraudulent misrepresentation by concealing that Goodeal was a franchise. Plaintiffs have the burden of proving, by a preponderance of the evidence, the following five elements:

> [T]hat (1) the defendant falsely represented or omitted facts that the defendant has a duty to disclose, (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth, (3) the defendant intended to induce the plaintiff to act or refrain from acting, (4) the plaintiff acted in justifiable reliance on the representation, and (5) the plaintiff was injured by its reliance.[2]

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[2]*DCV Holdings, Inc. v. ConAgra, Inc.,* 889 A.2d 954, 958 (Del. 2005); *Stephenson v. Capano Development, Inc.,* 462 A.2d 1069, (Del. 1983); *Iacono v. Barici,* 2006 WL 3844208, at *2 (Del. Super.).

The testimony on all five elements was hotly disputed. It appeared to the Court that all witnesses testified truthfully according to their varying perceptions of the relevant events. Clearly, the perception of certain (or perhaps all) witnesses was inaccurate, at least in part. Therefore, the Court must decide the issue on the basis of objective evidence, and what testimony is consistent with those facts. In other words, which story best fits together.

The evidence supports plaintiffs' position that they genuinely did not know about the franchise before closing. There was a heated confrontation between David Dubuque and the franchise owner shortly after the closing. There was no evidence, as there should have been, that the documents referring to the franchise were actually transmitted to plaintiffs prior to closing. The lender testified that the closing documents would have mentioned the franchise had the lender been aware. There are significant discrepancies between the testimony of the closing attorney and the franchise owner.

Nevertheless, the Court finds that there was no clear motive for defendants to conceal the existence of the franchise. Even assuming that plaintiffs did not know about the franchise before closing, plaintiffs still must prove affirmative fraudulent concealment. Plaintiffs have failed to demonstrate that the franchise was intentionally concealed by defendants prior to closing.

Therefore, the Court finds no fraudulent misrepresentation by defendants.

Defendant s William H. Taylor, II and Susquehanna Corporation

Defendant William H. Taylor, II was acting at all times as the agent of Susquehanna. There is no basis for Mr. Taylor's personal liability. Therefore, all claims and cross-claims against William H. Taylor, II are hereby dismissed.

Having found insufficient evidence of fraudulent misrepresentation, the only remaining claim is breach of contract. Susquehanna corporation is not a party to the contract in dispute. Susquehanna was the broker. Susquehanna did not draft the closing documents. The sellers were represented by counsel. Therefore, all claims and cross-claims against Susquehanna Corporation are hereby dismissed.

Plaintiff Deborah Dubuque

Plaintiffs failed to meet their burden of proving fraudulent misrepresentation. Deborah Dubuque was not a party to the contract in dispute. Therefore, Deborah Dubuque has no cause of action against any of defendants. Deborah Dubuque is hereby dismissed as a party to this action.

Defendant Jerry Taylor's Racing Transmissions

Defendant Jerry Taylor's Racing Transmissions was not a party to the sale of the business. There was no evidence of fraudulent misrepresentation by this

defendant. Therefore, all claims and cross-claims against Jerry Taylor's Racing Transmissions are hereby dismissed.

CONCLUSION

Plaintiff Deborah Dubuque is hereby **DISMISSED AS A PARTY TO THIS ACTION.** All claims and cross-claims against defendant s William H. Taylor, II, Susquehanna Corporation, and Jerry Taylor's Racing Transmissions are hereby **DISMISSED.**

Plaintiffs have failed to prove fraudulent misrepresentation. The Court finds in favor of defendants on the issue of fraudulent misrepresentation.

The Court finds in favor of plaintiffs David Dubuque and Dubuque Automotive Custom Service, Inc., on the breach of contract claims. Damages in the amount of $128,828 are hereby awarded jointly and severally against defendants Gerald A. Taylor and Sherry A. Taylor.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston

oc: Prothonotary