AFFIRMED and Opinion Filed August 17, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01274-CV

THE SHOPS AT LEGACY (RPAI) L.P., AN ILLINOIS LIMITED PARTNERSHIP, Appellant
V.
DEL FRISCO'S GRILLE OF TEXAS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, AND DEL FRISCO'S RESTAURANT GROUP, INC., A DELAWARE CORPORATION, Appellees

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-03957-2018

MEMORANDUM OPINION

Before Justices Myers, Molberg, and Reichek
Opinion by Justice Reichek

The Shops at Legacy (RPAI) L.P. ("RPAI") appeals the trial court's summary judgment that it take nothing by its claims against Del Frisco's Grille of Texas, LLC ("DF Grille") and Del Frisco's Restaurant Group, Inc. (collectively "Del Frisco's"). In four issues, RPAI contends the trial court erred in granting Del Frisco's motion for summary judgment, denying RPAI's motion for summary judgment, and denying RPAI's objections to Del Frisco's summary judgment evidence. We affirm the trial court's judgment.

Background

RPAI is the owner/manager of The Shops at Legacy, a mixed-use commercial development located in Plano, Texas. Del Frisco's is a corporation that owns restaurant groups including DF Grille and Del Frisco's Double Eagle Steakhouse ("DF Steakhouse").

On October 20, 2014, RPAI and DF Grille entered into a lease agreement under which DF Grille leased space in The Shops at Legacy (the "Lease"). Section 21.1 of the Lease, entitled "Direction of Tenant's Energies," stated the following:

> Tenant acknowledges that Tenant's monetary contribution to Landlord (in the form of rentals), and Tenant's general contribution to commerce within the Project (also important in Landlord's determination to execute this Lease with Tenant) will be substantially reduced if during the term of this Lease, either Tenant or any person, firm, or corporation, directly or indirectly controlling, controlled by, or under common control with Tenant, directly or indirectly operates, manages, or has any interest in any commercial establishment as described below within five miles of the Project with (a) the same or similar Trade Name or (b) a concept that is the same as Tenant's permitted use in the Demised Premises as described in Section 1.1(t) ((a) or (b) a "Competing Business"). Accordingly, Tenant agrees that if during the term of this Lease either Tenant or any person, firm, or corporation, directly or indirectly controlling, controlled by, or under common control with Tenant . . . either directly or indirectly commences the operation of or manages a Competing Business within a straight-line radius of five miles of the Project (the "Restricted Area"), which Tenant acknowledges is a reasonable area for the purposes of this provision, then in such event, the rent payable by Tenant hereunder will be adjusted as follows:
>
> (a) for so long as the Competing Business is operating in the Restricted Area, the Minimum Guaranteed Rental will be one hundred ten percent (110%) of the amount stipulated in Section 1.1(n) of this Lease; and

> (b) for so long as the Competing Business is operating in the Restricted Area, the Percentage Rental will be computed as if the "gross sales" from the Demised Premises were one hundred twenty-five percent (125%) (increased to one hundred seventy-five percent (175%) if the other store is within a two (2) mile radius) of the gross sales required to be reported to Landlord under the terms of Article 5 of this Lease for the same period.
>
> The above adjustment in rental reflects the estimate of the parties as to the damages which Landlord would be likely to incur by reason of the diversion of business and customer traffic from the Demised Premises and Project to such other store within the Restricted Area, as a proximate result of the establishment of a Competing Business. This provision does not apply to any existing store presently being operated by Tenant as of the date hereof within the Restricted Area, provided there is no change in the location of such commercial establishment and provided the name or concept of such establishment is not changed to include "Del Frisco's."

The Lease defined Tenant's trade name as,

> . . . Del Frisco's Grille, or such other trade name used by Tenant and its Affiliates operating the same restaurant concept in a majority of its and their locations, provided, however, in no event shall Tenant operate a Del Frisco's Double Eagle Steak House at the Project . . .

According to Del Frisco's, the trade name definition originally included "any other trade name including 'Del Frisco's,'" but this language was struck as a result of negotiations between the parties. DF Grille began operating in The Shops at Legacy in June 2015.

On November 24, 2015, Del Frisco's signed a lease to open a DF Steakhouse in Legacy West, a newly developing retail complex less than two miles from The Shops at Legacy. On January 15, 2016, RPAI notified Del Frisco's that it had been made aware of the new lease and it would consider the opening of a DF Steakhouse

in Legacy West to be a "competing business" under section 21.1 of the Lease. RPAI further stated that it "reserve[d] its right to trigger the remedies available under Sections 21.1(a) and (b)."

Del Frisco's responded that it did not consider DF Steakhouse to be a competing business as defined in the Lease. It stated that, "[i]n addition to the distinct and differentiated tradenames," DF Grille was necessarily a different concept than DF Steakhouse because DF Grille was prohibited under the terms of the Lease from having steak sales exceed 20% of its gross sales. This term was specifically included in the Lease so that DF Grille would not compete with Bob's Steak & Chop House, a pre-existing tenant of The Shops at Legacy. RPAI replied that a competing business under the Lease was not limited to the same restaurant concept, but also covered businesses with the "same or similar trade names." Accordingly, RPAI stood by its position that the planned DF Steakhouse would be a competing business as defined by the Lease.

On May 1, 2017, RPAI advised Del Frisco's that, in anticipation of the DF Steakhouse opening in Legacy West, RPAI would be raising DF Grille's rental rate in accordance with section 21.1(a) and (b) of the Lease. Del Frisco's refused to pay the additional rent and, following a series of default notices collectively asserting Del Frisco's had failed to pay over $350,000 in additional rent due under section 21.1, RPAI filed this suit.

In its original petition, RPAI requested a declaratory judgment that Del Frisco's was in violation of the Lease by failing to pay accrued rent and sought damages for breach of contract. RPAI moved for a traditional summary judgment contending section 21.1 of the Lease clearly and unambiguously provided for the increase in rent because Del Frisco's opened a competing business less than two miles from DF Grille. RPAI argued that, regardless of whether DF Grille and DF Steakhouse had the same concept, they had similar trade names which rendered DF Steakhouse a competing business under the terms of the Lease. The trial court denied RPAI's motion.

Del Frisco's then filed its own motion for traditional summary judgment. In its motion, Del Frisco's contended RPAI's construction of the Lease was unreasonably broad. It generally argued (1) DF Steakhouse was not a "competing business" as defined by the lease, and (2) section 21.1 was an unenforceable liquidated damages provision. RPAI filed numerous objections to affidavit testimony filed by Del Frisco's in support of its argument that DF Grille and DF Steakhouse were not competing businesses. Following a hearing on RPAI's objections, most of which were overruled, the trial court granted summary judgment in favor of Del Frisco's. RPAI brought this appeal.

Analysis

In its first three issues, RPAI contends the trial court erred in granting Del Frisco's motion for summary judgment and denying RPAI's motion. We review an

order granting or denying a motion for summary judgment de novo. *Lujan v. Navistar*, 555 S.W.3d 79, 84 (Tex. 2018). To be entitled to a traditional summary judgment, the movant must show no genuine issues of material fact exist and it is entitled to judgment as a matter of law. *Id*. "Although the denial of summary judgment is not generally reviewable, we may review such a denial when both parties moved for summary judgment and the trial court granted one motion and denied the other." *Dallas Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 221 (Tex. App.—Dallas 2015, no pet.). In this case, the trial court's order did not specify the grounds for its summary judgment ruling. Accordingly, we must affirm if any of the theories presented to the trial court and preserved for appellate review are meritorious. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

I. Is Section 21.1 a Liquidated Damages Provision?

One of the grounds for summary judgment asserted by Del Frisco's was that section 21.1 is an unenforceable liquidated damages provision because it operates as an impermissible penalty. On appeal, RPAI argues the trial court could not properly grant summary judgment on that basis because section 21.1 is not a liquidated damages provision. Whether a contractual provision is a liquidated damages provision is a question of law for the court to decide. *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991); *GPA Holding, Inc. v. Baylor Health Care Sys.* 344 S.W.3d 467, 475 (Tex. App.—Dallas 2011, pet. denied). The term "liquidated damages"

ordinarily refers to an acceptable measure of damages that the parties stipulate in advance will be assessed in the event of a contract breach. *Flores v. Millenium Interests, Ltd.*, 185 S.W.3d 427, 431 (Tex. 2005). RPAI contends section 21.1 is not a damages provision, but merely an agreed rent adjustment. We do not find this argument persuasive.

First, RPAI's argument that section 21.1 is nothing more than an agreed rent adjustment is squarely contradicted by the language of the section itself. We presume parties intend what the words of their contracts say. *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 764 (Tex. 2018). We favor a construction that provides meaning to every provision and does not render any term of the contract meaningless. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005); *Killingsworth v. Hous. Auth. of City of Dallas*, 447 S.W.3d 480, 488 (Tex. App.—Dallas 2014, pet. denied).

Section 21.1 states that the rental increase triggered by the establishment of a competing business "reflects the estimate of the parties as to the damages which [RPAI] would be likely to incur . . . as a proximate result [of the competing business]." Interpreting the lease in the manner urged by RPAI would require us to ignore the section's clear language that the increased amounts paid under the Lease were intended as damages to compensate RPAI for anticipated losses to its business. Calling the damages a "rent adjustment" does not change the nature or purpose of the money RPAI was seeking to collect.

RPAI relies on two cases involving holdover tenant rent provisions to support its argument that section 21.1 is not a liquidated damages provision – *Khan v. Meknojiya*, No. 03-11-00580-CV, 2013 WL 3336874 (Tex. App.—Austin June 28, 2013, no pet.) (mem. op.) and *Meridien Hotels, Inc. v. LHO Fin. P'ship I, L.P.*, 255 S.W.3d 807 (Tex. App.—Dallas 2008, no pet.). In *Meridien Hotels*, this Court held that holdover rent charged at a higher rate than the rent paid during the term of the lease was not "punitive damages" because the lease did not state the increase was intended as a penalty. *Meridien Hotels*, 255 S.W.3d at 822. Instead, the language of the lease showed that the tenant agreed to an increase in the rental rate if it chose to extend its time occupying the leased premises. *Id*.

In *Khan,* the Austin court discussed our holding in *Meridien* and concluded the holdover rent at issue in that case was not liquidated damages because there was "no indication that the parties intended the amounts owed . . . as a means of forecasting damages in the event of a breach." *Khan*, 2013 WL 3336874, at *3. Unlike the lease provisions at issue in *Khan* and *Meridien*, section 21.1 explicitly states it is intended as a means of forecasting damages. Moreover, although section 21.1 speaks in terms of rent, the provision does not concern Del Frisco's occupation or use of the leased premises. In *Khan* and *Meridien*, the tenant received extended use of the leased premises beyond the term of the lease in exchange for payment of increased rent. In contrast, Del Frisco's receives no additional benefit from RPAI in return for the payments demanded under section 21.1 beyond what it was already

entitled to receive under the Lease. Accordingly, *Khan* and *Meridien* are inapposite to the lease provision at issue here.

RPAI next argues that section 21.1 cannot be considered a liquidated damages provision because Del Frisco's establishment of a competing business did not constitute a breach of the lease, but was instead a permitted action that gave rise to the rent adjustment. According to RPAI, liquidated damages must, by definition, be triggered by a breach of the contract. *See Flores*, 185 S.W.3d at 431. Like RPAI's use of the term "rent adjustment" as a substitute for damages, we conclude this argument is an attempt to elevate semantics over substance.

The Texas Supreme Court has recognized there is no meaningful difference between a provision expressly prohibiting competition and a provision that imposes damages for engaging in competition. *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 385–86 (Tex. 1991); *RE/MAX Int'l, Inc. v. Trendsetter Realty, LLC*, 655 F.Supp. 2d 679, 719 (S.D. Tex. 2009). Both are clearly intended to inhibit competitive conduct. *Haass*, 818 S.W.2d 385–86.[1] The fact that section 21.1 does not characterize the establishment of a competing business as a breach does not change the function of the provision. Establishing a competing business as defined by section 21.1 triggers a claim for damages. Thus, the conduct is treated in the

[1] We express no opinion on whether section 21.1 is a proper restraint on competition.

same manner as if it were a violation of the contract's terms. This is sufficient to fit section 21.1 within the definition of a liquidated damages provision.

Finally, RPAI argues that section 21.1 is a restricted use provision as permitted in *Schnitzer v. Southwest Shoe Corp.*, 364 S.W.2d 373 (Tex. 1963). In *Schnitzer*, the supreme court discussed an exception to anti-trust laws under which a landlord could properly limit the type of business a tenant conducts in the leased premises. *Id*. at 374–75. A landlord may also, by use of a reasonably limited covenant, agree in a lease that other properties he controls will not be used by persons in competition with his tenant. *See City Prods. Corp. v. Berman*, 610 S.W.2d 446, 448 (Tex. 1980); *Neiman-Marcus Co. v. Hexter*, 412 S.W.2d 915 (Tex. App.—Dallas 1967, writ ref'd n.r.e.). Section 21.1 cannot be considered a permissible restricted use provision because, as discussed above, it has nothing to do with Del Frisco's use of the leased premises. Nor does it concern any premises under RPAI's control. The conduct RPAI seeks to restrict is Del Frisco's use of premises unrelated to RPAI. Accordingly, *Schnitzer* does not apply. *See Schnitzer* 364 S.W.2d at 375 (exception applies only to agreement with party who is owner, lessor, or otherwise has control of premises sought to be restricted); *Berman*, 610 S.W.2d at 449 (noncompetition agreement may be upheld as to owner, lessor, or one in control of premises when incidental to lawful lease of premises).

We conclude section 21.1 is a liquidated damages provision. Having reached this conclusion, we must now decide if the provision is enforceable against Del Frisco's.

II. Is Section 21.1 Enforceable?

Although parties are free to contract with respect to damages, this freedom is tempered by the "universal rule" that damages are limited to "just compensation for the loss or damage actually sustained." *Atrium Med. Ctr., LP v. Houston Red C LLC*, 595 S.W.3d 188, 192 (Tex. 2020). A damages provision that violates the rule of just compensation functions as a penalty and is unenforceable. *Id*. Provisions that apply the same measure of damages regardless of the magnitude of the breach are facially unreasonable and constitute an impermissible penalty as a matter of law. *Stewart v. Basey*, 245 S.W.2d 484, 672 (Tex. 1952); *Bethel v. Butler Drilling Co.*, 635 S.W.2d 834, 837 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). Even in cases where the alleged breach is material, a "one size fits all" liquidated damages provision will not be enforced. *Bunker v. Standhagen*, No. 03-14-00510-CV, 2017 WL 876374, at *7 (Tex. App.—Austin Mar. 3, 2017, no pet.) (mem. op.).

Section 21.1 defines a "competing business" as any business with *either* the same or a similar trade name as DF Grille *or* a concept that is the same as DF Grille's permitted use of the leased premises. Based on this disjunctive definition, RPAI contends that any business using a name similar to DF Grille would trigger the rent increase regardless of the type of business it conducts. RPAI's reading of section

21.1 is supported by the plain language of the provision. Unfortunately for RPAI, this language also renders the provision unenforceable on its face.

As written, section 21.1 provides RPAI with the same measure of damages regardless of whether the "competing business" would divert customers from the leased premises. For example, Del Frisco's could open a Del Frisco's Grille Supplies within the restricted area selling outdoor grills and grilling accessories. Although it is unlikely such a business would attract customers looking to dine in a restaurant, Del Frisco's would still be liable for the same rate of damages as if it did. Indeed, given that section 21.1(b) calculates RPAI's damages by raising the percentage rental payment based on DF Grille's gross sales, the less impact the competing business has on the restaurant's sales, the more damages DF Grille would be required to pay. Where a minor breach of the lease results in payments disproportionate to any actual damage the landlord may suffer, the provision amounts to a penalty rather than one for permissible liquidated damages. *Mayfield v. Hicks*, 575 S.W.2d 571, 575 (Tex. App.—Dallas 1978, writ ref'd n.r.e.).

That section 21.1 operates as an impermissible penalty is supported by Del Frisco's summary judgment evidence showing that sales at DF Grille (and similar restaurants in The Shops at Legacy) were unaffected by the opening of DF Steakhouse in Legacy West.[2] RPAI failed to produce any contrary evidence showing

[2] This evidence was not the subject of RPAI's objections.

it suffered actual damages as a result of the establishment of the steakhouse, let alone damages approximating the over $350,000 it claimed it was entitled to receive under section 21.1.[3] When there is an "unbridgeable discrepancy" between a liquidated damages provision as written and the reality of its application, the provision cannot be enforced. *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 72 (Tex. 2014).

Based on the foregoing, we conclude section 21.1 is unenforceable as a penalty. Because we have resolved this issue in favor of Del Frisco's, it is unnecessary for us to address RPAI's other arguments and issues. We affirm the trial court's judgment.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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[3] Although sales at DF Grille declined in 2017, the decline did not begin until several months after DF Steakhouse opened. Del Frisco's evidence showed that the drop in sales at DF Grille, and at similar restaurants in The Shops at Legacy, was attributable to the later opening of other, more comparable restaurants in Legacy West rather than DF Steakhouse.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THE SHOPS AT LEGACY (RPAI) L.P., AN ILLINOIS LIMITED PARTNERSHIP, Appellant	On Appeal from the 416th Judicial District Court, Collin County, Texas Trial Court Cause No. 416-03957-2018.
No. 05-19-01274-CV V.	Opinion delivered by Justice Reichek. Justices Myers and Molberg participating.
DEL FRISCO'S GRILLE OF TEXAS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, AND DEL FRISCO'S RESTAURANT GROUP, INC., A DELAWARE CORPORATION, Appellees	

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees DEL FRISCO'S GRILLE OF TEXAS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, AND DEL FRISCO'S RESTAURANT GROUP, INC., A DELAWARE CORPORATION recover their costs of this appeal from appellant THE SHOPS AT LEGACY (RPAI) L.P., AN ILLINOIS LIMITED PARTNERSHIP.

Judgment entered August 17, 2020