**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| PACIFIC SUPREME SEAFOODS, LLC, and ELITE SEAFOOD, LTD., | ) | NO. 64813-6–I |
| | ) | DIVISION ONE |
| Respondents, | ) | |
| v. | ) | UNPUBLISHED OPINION |
| HQ SUSTAINABLE MARITIME MARKETING, INC.; and HQ SUSTAINABLE MARITIME INDUSTRIES, INC., | ) | |
| Appellants. | ) | FILED: May 9, 2011 |

Leach, A.C.J. — HQ Sustainable Maritime Marketing Inc. (HQ Marketing) and HQ Sustainable Maritime Industries Inc. (HQ Industries) appeal a summary judgment awarding damages to Pacific Supreme Seafoods LLC and Elite Seafood Ltd. for breach of an employment agreement. HQ Industries also challenges the denial of its motion to amend or vacate the judgment against it. We hold that the contract for transfer of goodwill is an enforceable contract, that HQ Marketing failed to establish a genuine issue of material fact with respect to its breach of that contract, and that HQ Industries failed to make any similar showing about whether it was an "alter ego" of HQ Marketing. Finding no error, we affirm.

FACTS

HQ Industries is a publicly held Delaware corporation with its principal place of business in Seattle. The company and its subsidiaries harvest, process, and sell farm-bred and ocean-harvested aquatic products, marine bioproducts, and health care products in North America, Europe, and Asia. HQ Marketing is a fully owned subsidiary of HQ Industries. It sells its parent company's fish products inside the United States. HQ Marketing is a New York corporation with its principal place of business in Seattle.

In 2006, Trond Ringstad went to work for HQ Marketing as executive vice president for sales and distribution. Before joining HQ Marketing, Ringstad was president and owner of Pacific Supreme Seafoods, a seafood trading business. HQ Marketing recruited Ringstad to implement its goal of expanding its distribution of tilapia, shrimp, and other seafood products inside the European Union and the United States.

According to the terms of the employment agreement, HQ Marketing agreed to pay Ringstad an adjustable annual base salary of $150,000. HQ Marketing also agreed to purchase certain goodwill. Specifically, under "Annex A" to the agreement, HQ Marketing agreed to purchase from Ringstad "the Goodwill which he has attached to Pacific Supreme Seafoods and to himself personally as well as to any other companies he owns or is associated with which trade in seafood products." For this, HQ Marketing agreed to pay Ringstad $550,000, with $150,000 to be paid "at the execution of the present agreement," another $100,000 to be paid "90 days from the execution" of the

agreement, and the balance of $300,000 to be paid "in shares calculated at 80 percent of the trading value as of February 24, 2006."

After signing the agreement, Ringstad delivered to HQ Marketing Pacific Supreme Seafoods' proprietary customer list, including pricing information, sales history, and contact names, phone numbers, and addresses for approximately 48 active customers. Ringstad also liquidated the remaining Pacific Supreme Seafoods' inventory and began working full time for HQ Marketing.

Ringstad failed to sell any fish in 2006. His sales for 2007, 2008, and 2009 fell far short of his annual target. Ringstad stopped working for HQ Marketing at the end of June 2009. The parties agree that HQ Marketing never paid Ringstad any money or shares for goodwill due under Annex A.

After leaving HQ Marketing, Ringstad assigned his interests in the employment agreement to Pacific Supreme Seafoods, which assigned an interest to Elite Seafood (collectively Pacific Supreme). Pacific Supreme commenced this action, alleging that HQ Marketing breached its contract with Ringstad by failing to pay the goodwill purchase price. Pacific Supreme named HQ Marketing and HQ Industries as codefendants on the basis that the two companies were "alter egos" of one another. In their amended answer, the defendants denied that HQ Industries was an "alter ego" of HQ Marketing, denied breach of contract, and pleaded a number of affirmative defenses.[1]

[1] Those defenses included failure to state a claim, arbitration, accord and satisfaction, waiver/estoppel, breach by assignor, failure of consideration, and illusory contract.

Pacific Supreme moved for summary judgment against both defendants. It asserted that the breach of contract claim "solely involve[d] interpreting the phrase 'at the execution of the present agreement'" under New York state law.[2] In opposition, HQ Marketing and HQ Industries alleged that a material issue of fact existed as to whether Ringstad delivered goodwill and performed under the agreement. The defendants also claimed that Pacific Supreme's interpretation of "goodwill" and "execute" rendered the contract illusory.

The trial court granted Pacific Supreme summary judgment against both defendants, awarding it the principal sum of $682,555 plus prejudgment interest and costs. HQ Industries moved under CR 60(a) and CR 60(b) to amend the judgment to run against HQ Marketing only or, in the alternative, to vacate the judgment pending resolution of the "alter ego" claim against HQ Industries. The trial court denied the motion. HQ Marketing and HQ Industries appeal.

STANDARD OF REVIEW

We review a summary judgment order de novo.[3] Summary judgment is proper if, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law.[4]

We review the denial of a motion to vacate under CR 60(a) and CR 60(b)

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[2] The employment agreement contains a choice of law provision stating that internal New York law governs all issues and disputes arising from it.

[3] Weden v. San Juan County, 135 Wn.2d 678, 689, 958 P.2d 273 (1998).

[4] CR 56(c); Torgerson v. N. Pac. Ins. Co., 109 Wn. App. 131, 136, 34 P.3d 830 (2001).

for an abuse of discretion.[5] "'Discretion is abused when it is exercised on untenable grounds or for untenable reasons.'"[6]

ANALYSIS

HQ Marketing contends that New York law requires that Pacific Supreme prove that Ringstad delivered the goodwill to establish HQ Marketing's breach of Annex A. Accordingly, HQ Marketing claims that evidence of Ringstad's poor sales figures, together with his failure to contact his former customers, raised a material issue of fact as to whether this delivery occurred. For the reasons that follow, we disagree.

As noted, New York state law governs this issue. Under New York law, the interpretation of a contract is a question of law where, as here, the parties' intent can be discerned from the four corners of the instrument.[7] New York courts define "goodwill" as "'the advantage or benefit'" a business receives from its "'constant or habitual customers.'"[8] It is "[h]aving a substantial client base" and "the probability of repeat patronage"[9] and the "mere chance that a

[5] Vance v. Offices of Thurston County Comm'rs, 117 Wn. App. 660, 671, 71 P.3d 680 (2003); Presidential Estates Apartment Assocs. v. Barrett, 129 Wn.2d 320, 325-26, 917 P.2d 100 (1996).

[6] Luckett v. Boeing Co., 98 Wn. App. 307, 309-10, 989 P.2d 1144 (1999) (quoting Lane v. Brown & Haley, 81 Wn. App. 102, 105, 912 P.2d 1040 (1996)).

[7] Nat'l Union Fire Ins. Co. v. Christopher Assocs., 257 A.D.2d 1, 7, 691 N.Y.S.2d 35 (1999) (interpretation of a contract is question of law (quoting Brewster Transit Mix Corp. v. McLean, 169 A.D.2d 1036, 1037, 565 N.Y.S.2d 316 (1991))).

[8] Dawson v. White & Case, 88 N.Y.2d 666, 671 n.2, 672 N.E.2d 589, 649 N.Y.S.2d 364 (1996) (quoting Spaulding v. Benenati, 57 N.Y.2d 418, 425 n.3, 442 N.E.2d 1244, 456 N.Y.S.2d 733 (1982)).

[9] Raskopf v. Raskopf, 167 Misc. 2d 1017, 1021, 641 N.Y.S.2d 993 (Sup. Ct. 1996).

preference which has usually been extended will continue."[10] Thus, when a vendor sells his goodwill, he sells only the expectancy of transacting with that clientele and makes "no assurance that the patronage . . . will continue."[11] No remedy exists for a purchaser who discovers an absence of customary trade connected to the goodwill unless the purchaser can show some fraudulent representation or suppression of a material fact.[12] These rules apply equally to the sale of goodwill affixed to a person or to a place of business.[13]

In addition, New York courts ordinarily do not "inquire into the adequacy of consideration supporting the parties' agreement since even the 'slightest consideration is sufficient to support the most onerous obligation.'"[14] And while New York courts "will not adopt an interpretation of a contract that would render the benefit bestowed by the contract illusory,"[15] goodwill, like other property

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[10] Johnson v. Friedhoff, 7 Misc. 484, 486, 27 N.Y.S. 982 (Ct. Com. Pl. 1894).

[11] Johnson, 7 Misc. at 486.

[12] Johnson, 7 Misc. at 486.

[13] HQ Marketing correctly notes that goodwill may in some cases "attach to an employee who maintains distinctly personal or professional relationships with customers." P.A. Bldg. Co. v. Elwyn D. Lieberman, Inc., 227 A.D.2d 277, 279, 642 N.Y.S.2d 300 (1996). But HQ Marketing cites no case in which a New York court has held that an obligation to capitalize on personal relationships inheres to the transfer of goodwill when it is attached to a person as opposed to a business. Because HQ Marketing cites no authority for that proposition, we assume it found none. State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). As a result, the fact that the goodwill attached to Ringstad as opposed to a storefront is immaterial for the purposes of this analysis.

[14] Rooney v. Tyson, 91 N.Y.2d 685, 701, 697 N.E.2d 571, 674 N.Y.S.2d 616 (1998) (internal quotation marks omitted) (quoting Mencher v. Weiss, 306 N.Y. 1, 8, 114 N.E.2d 177 (1953)).

[15] Quantum Maint. Corp. v. Mercy Coll., 8 Misc. 3d 885, 890, 798 N.Y.S.2d 652 (Sup. Ct. 2005).

rights, is subject to contract, transfer, lease, or mortgage.[16] It therefore follows that the opportunity for continued patronage provides sufficient consideration for an enforceable agreement.

As applied here, HQ Marketing bargained for an opportunity—not a guarantee—that Pacific Supreme Seafoods' customers and their business would follow Ringstad. Notably, nothing in Annex A conditioned payment for goodwill or the amount of payment upon Ringstad's sales performance. No language in the employment agreement or Annex A required that Ringstad directly contact his former customers or conditioned the payment for goodwill upon the amount of sales generated from the customer list. Rather, the employment agreement established a formula for calculating Ringstand's base salary based upon the "sales generated by the Seattle based Sales office" of HQ Marketing. Because New York courts enforce contracts as written,[17] we refuse to write into the parties' contract a provision they did not include. This means that Ringstad's poor sales performance and his alleged failure to sell to former Pacific Supreme Seafoods' customers did not excuse HQ Marketing's obligation to pay for goodwill as provided in Annex A.

HQ Marketing agreed to pay $150,000 "at the execution of the present

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[16] 62 N.Y. Jur. 2d Good Will § 14 (2010); see also Cholot v. Strohm, 235 A.D. 150, 155, 256 N.Y.S. 647 (1932) (goodwill may be subject of contract and sale (quoting Freeman v. Freeman, 86 A.D. 110, 113, 83 N.Y.S. 478 (1903))).

[17] See Shames v. Abel, 141 A.D.2d 531, 533-34, 529 N.Y.S.2d 344 (1988) (quoting Schmidt v. Magnetic Head Corp., 97 A.D.2d 151, 157, 468 N.Y.S.2d 649 (1983)).

agreement," an additional $100,000 90 days later, and $300,000 "payable in shares calculated at 80% of the trading value as of February 24, 2006." The parties signed the agreement on June 28, 2006. Because a contract is executed when it is reduced to writing, signed by the parties, and delivered,[18] HQ Marketing owed the initial payment on June 28 and the remaining payments 90 days later. The trial court properly determined that HQ Marketing's failure to make these payments constituted a breach of contract.

If Ringstad misrepresented the scope, value, and extent of his sales network, as HQ Marketing implies in its briefing before this court, its recourse was to allege fraudulent representation or suppression of a material fact as an affirmative defense. Because it did not do so, it may not raise these arguments here.[19]

In summary, the contract contains no provision conditioning payment for goodwill upon Ringstad contacting former customers or making sales to them. Therefore HQ Marketing failed to establish a material issue of fact regarding its contract liability by presenting evidence of these matters.

Next, HQ Industries contends the trial court abused its discretion in refusing to vacate the judgment against it under CR 60(a) or CR 60(b). Again, we disagree.

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[18] See Helvering v. Nw. Steel Rolling Mills, Inc., 311 U.S. 46, 49, 61 S. Ct. 109, 85 L. Ed. 29 (1940) ("The natural impression conveyed by the words 'written contract executed by the corporation' is that an explicit understanding has been reached, reduced to writing, signed and delivered.").

[19] See RAP 2.5(a).

HQ Industries sought relief under CR 60(a), claiming that the judgment reflected a clerical error. Pacific Supreme's complaint named both defendants and alleged that they were "alter egos" of one another. Pacific Supreme's motion for summary judgment also sought judgment against both defendants. New York law clearly defines the term "alter ego," i.e., "'[w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own.'"[20] When addressing this question, New York courts consider a number of factors, including

> "whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form . . . such that one of the corporations is a mere instrumentality, agent and alter ego of the other."[21]

The affidavits, declarations, and exhibits supporting Pacific Supreme's summary judgment motion show that HQ Industries and HQ Marketing had overlapping corporate officers (Norbert Sporns was chief executive officer of both companies), operated out of the same office (1511 Third Avenue, Suite 788, Seattle), and had overlapping purposes (HQ Industries produced, harvested, and sold fish products domestically and internationally while HQ Marketing specialized in selling fish products inside the United States). In

[20] John John, LLC v. Exit 63 Dev., LLC, 35 A.D.3d 540, 541, 826 N.Y.S.2d 657 (2006) (alteration in original) (quoting Austin Powder Co. v. McCullough, 216 A.D.2d 825, 827, 628 N.Y.S.2d 855 (1995)).

[21] John John, 35 A.D.3d at 541 (alteration in original) (quoting Island Seafood Co. v. Golub Corp., 303 A.D.2d 892, 893-94, 759 N.Y.S.2d 768 (2003)).

addition, HQ Marketing was a wholly owned subsidiary of HQ Industries and was, according to the 10-K filing, "dormant" in 2006, the year Sporns and Ringstad signed the employment agreement. With this evidence, Pacific Supreme met its burden of making a prima facie showing that HQ Industries was HQ Marketing's "alter ego."

Under CR 56(e), a response to summary judgment "must set forth specific facts showing that there is a genuine issue for trial. If [the nonmoving party] does not so respond, summary judgment, if appropriate, shall be entered against [that party]." Although HQ Industries opposed Pacific Supreme's summary judgment motion, its briefing did not respond to the "alter ego" allegation nor did it present evidence of facts that would create a genuine issue for the trier of fact. The trial court, therefore, did not err in entering judgment against it.

Thus, the trial court record demonstrates that the entry of judgment against HQ Industries was not a clerical error. The trial court granted the relief requested and supported by affirmative evidence. Nothing in the record supports HQ Industries' claim that the trial court intended to grant less than the full relief requested in the summary judgment motion before it.

HQ Industries also sought relief under CR 60(b), asserting that its counsel made a mistake. Apparently it claims that its counsel did not object to the form of judgment entered (against both defendants instead of HQ Marketing only) because "[h]e relied on his knowledge of the issues disputed by the parties, his understanding of which of those issues was before the trial court on summary

judgment, and the subsequent discussions related to prejudgment interest." This argument assumes that the trial court intended to deny the request for summary judgment against HQ Industries. We have already rejected this contention. Moreover, even in its motion to vacate, HQ Industries failed to present any evidence controverting the prima facie case presented by Pacific Supreme. The trial court did not abuse its discretion in denying the motion to vacate on the grounds presented.

We affirm the trial court.

Leach, A.C.J.

WE CONCUR:

Spearman, J.

Ann, J.