

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

JEROME BEAUFORD, ET. AL.,	:	July Term 1999
Plaintiffs,	:	
v.	:	No. 0394
TASTY BAKING COMPANY,	:	
Defendant.	:	Commerce Program
	:	
	:	2602 EDA 2006
	:	

OPINION

Plaintiffs Jerome Beauford¹, Edward Benz, William Flanigan, Joseph Ford, Tyrone Ford, Brade Harmon, Michael Gallagher and Phil Bucolo (“Plaintiffs”) instituted this class action to obtain money damages for themselves and all other non-incorporated distributors for the Tasty Baking Company, Inc. (“Tasty Baking”). Class Plaintiffs claim they were improperly required to pay an administrative fee from February 1998 to the present in claimed breach of their Distributor’s Agreement. On July 31, 2006 Tasty Baking’s motion for summary judgment was granted. It is from this order plaintiffs’ appeal.²

In 1986, Tasty Baking and some of its distributors entered into a Distributor’s Agreement (“Agreement”) wherein the distributors acquired exclusive distribution rights to sell Tasty Baking products to retail food stores, restaurants and other food outlets within defined geographic areas. The Agreement specifically identified the distributors as independent contractors. The Agreement afforded distributors rights such as the

¹ Mr. Beauford, the lead plaintiff, incorporated his business and never paid the disputed administrative fee of 0.7%. (Exhibit “2” to Tasty Baking’s Reply Memoranda –Beauford deposition p. 42-45, 49).

² Plaintiffs have also filed a separate notice of appeal regarding Judge Levin’s order dated March 30, 2000 sustaining preliminary objections.

opportunity to incorporate, sell or transfer their distribution rights and imposed obligations such as paying their own employment taxes and payments due under the Federal Insurance Contribution's Act ("FICA").

In November 1995, the Internal Revenue Service ("IRS") notified Tasty Baking that it intended to treat the distributors as employees for purposes of federal employment taxes. Tasty Baking appealed this proposed action. In December 1997, Tasty Baking and the IRS resolved all disputes. The IRS agreed not to disturb Tasty Baking's classification of distributors as independent contractors for the years 1990-1997 and Tasty Baking agreed to make a lump sum payment to the IRS and beginning January 1, 1998 to treat the unincorporated distributors as "statutory employees" for federal tax purposes.

Tasty Baking conducted a number of meetings with the distributors to explain the agreement with the IRS and announced that it would collect and remit the employment taxes on behalf of non-incorporated distributors in accordance with the terms of the Agreement with the IRS. Collecting and verifying the employment tax on behalf of the non-incorporated distributors increased Tasty Baking's cost of distribution. Accordingly Tasty Baking informed distributors who chose to remain unincorporated that an administrative fee of 0.7% of the distributor's net sales would be charged. On November 6, 1998, as a result of Tasty Baking's imposition of this administrative fee, the non-incorporated distributors instituted a class action lawsuit against Tasty Baking. Tasty Baking removed the action to federal court where it was dismissed for failure to state a claim.

On July 7, 1999, plaintiffs filed the present class action complaint alleging unjust enrichment based on Tasty Baking's alleged failure to pay employment taxes on plaintiffs' behalf and sought to enjoin Tasty Baking from charging non-incorporated distributors a 0.7% administrative fee. Tasty Baking filed preliminary objections to both counts in the complaint. On March 30, 2000, the Honorable Judge Levin sustained preliminary objections to the unjust enrichment claim on the ground that an express written contract existed between the parties and overruled the preliminary objection concerning injunctive relief.

On August, 2000, plaintiffs filed a Motion for Class Certification and motion for leave to amend the complaint to add a claim for breach of contract. The court denied plaintiffs' request for class certification but on November 16, 2000, granted plaintiffs' Petition to Amend the complaint. On November 28, 2000, class plaintiffs filed an amended complaint. Tasty Baking filed preliminary objections to the amended complaint seeking to dismiss the entire action. In response, plaintiffs withdrew the claim for injunctive relief. On June 28, 2001, the court overruled Tasty Baking's preliminary objections to the breach of contract claim.

On December 18, 2001, a Class Certification hearing was held before the Honorable Judge Levin. On January 14, 2002, Judge Levin granted plaintiffs' Motion for Class Certification and ordered that the certified class consist of "all unincorporated TastyKake distributors who, since February 7, 1998 to present, have paid or continue to pay 0.7% fee of their net sales each week..."

On January 29, 2002, the instant matter was transferred to the Commerce Case Management Program for the Court of Common Pleas of Philadelphia County. On May

26, 2006, Tasty Baking Company filed a motion for summary judgment on the remaining claim for breach of contract. Tasty Baking asserted that summary judgment was appropriate because the 0.7% administrative fee was permissible under the Agreement. In response, plaintiffs argued that summary judgment was improper because the Agreement is unconscionable as interpreted by Tasty Baking or in the alternative that the Agreement contains ambiguous and vague provisions creating genuine issues of material fact. On July 31, 2006, the court granted Tasty Baking's Motion for Summary Judgment and this appeal followed.

In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Summary judgment is proper only when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment.³

Section 3.3 of the Agreement states:

TERMS: Products will be sold to DISTRIBUTOR on terms and prices as established by TASTY from time to time. In the absence of market-wide change in distribution costs or methods TASTY agrees that the suggested resale price of the products which are being sold to DISTRIBUTORS on the date of this Agreement and if followed by DISTRIBUTOR, WILL ALWAYS RESULT IN AN AVERAGE GROSS MARGIN NOT LESS THAN THE sixteen and one-half percent (16.5%) average gross margin reflected in the price list in existence on the date of this Agreement.

³ Marks v. Tasman, 589 A.2d 205 (Pa. 1991).

This provision clearly gives Tasty Baking the right to impose the administrative fee.⁴

Plaintiffs claim that summary judgment is improper because the Distribution Agreement is a contract of adhesion and Section 3.3 is unconscionable. An adhesion contract is defined as a standard form contract prepared by one party, to be signed by the party in a weaker position who has little choice about the terms.⁵ Even if a contract is a one of adhesion is not per se unconscionable or unenforceable. To find a contractual provision unconscionable, the contractual terms must be unreasonably favorable to the drafter and the other party had no meaningful choice regarding acceptance of the provisions.⁶ A contract is not unconscionable simply because of a disparity in bargaining power. The issue of whether a contract is unconscionable is a question of law.

Plaintiffs have not presented any evidence which even suggests that the distributors were forced to enter into the Agreement or that the Agreement was not the subject of negotiation or that the distributors were not represented or advised by counsel. Moreover, plaintiffs failed to demonstrate that Section 3.3 of the Agreement is unconscionable.

Although Section 3.3 authorizes Tasty Baking to sell its products to distributors on terms and prices established by Tasty Baking, it is not unreasonably favorable to Tasty Baking. Section 3.3 obligates Tasty Baking to maintain a specific average gross margin for distributors when authorizing changes to terms and prices. Moreover, the administrative fee was not imposed on all distributors but only those distributors that remained unincorporated. In addition to whatever negotiations occurred prior to the

⁴ Plaintiffs failed to present any evidence that their average gross margin was affected.

⁵ Robson v. E.M.C. Ins. Cos., 785 A.2d 507, 510 (Pa. Super. 2001).

⁶ Todd Heller, Inc., v. United Parcel Service, Inc., 754 A.2d 689, 700 (Pa. Super. 2000).

contract being agreed upon, plaintiffs were given a specific choice concerning the administrative fee. Distributors could have become incorporated and entirely avoided the 0.7% assessment or remain unincorporated and pay the administrative fees. Class Plaintiffs chose to remain unincorporated and therefore became subject to the assessment.⁷

In the alternative, plaintiffs argue that Section 3.3 of the Agreement is ambiguous and creates a material issue of fact. When the terms of a written contract are clear, this Court must afford a construction in accord with plain meaning of the language used. Only if the language is ambiguous and the intentions of the parties cannot be reasonably ascertained from the language of the writing alone does the intent of the parties and the circumstances attending the execution of the contract become the subject of external proof.⁸ The court must construe the contract as written. The court may not modify the plain meaning of the words under the guise of interpretation.⁹ A contract is ambiguous only when a provision is reasonably susceptible to more than one meaning.¹⁰ A court may not distort the meaning of the language or resort to a strained contrivance to find an ambiguity.¹¹ If no ambiguities are found the interpretation of the contract as a question of law.¹²

⁷ Plaintiffs failed to present any evidence that their average gross margin was affected.

⁸ Osial v. Cook, 803 A.2d 209, 213-214 (Pa. Super. 2002).

⁹ In general, a clear and unambiguous contract provision must be given its plain meaning unless to do so would be contrary to a clearly expressed public policy which no one claims.

¹⁰ West Conshohocken Restaurant Assocs., Inc. v. Flanigan, 737 A.2d 1245, 1248 (Pa. Super. 1999).

¹¹ Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999).

¹² Lapio v. Robbins, 729 A.2d 1229, 1232 (Pa. Super. 1999).

Section 3.3 unequivocally permits Tasty Baking to sell products on terms it establishes as long as the economic terms guaranteeing an average gross margin of 16.5% are not disturbed.¹³ The contract contemplated periodic change to terms and prices with this limitation.¹⁴ The administrative fee involved herein is a term intended by the contract. By imposing the administrative fee Tasty Baking is neither amending nor modifying the Agreement. It is acting in accord with its rights set forth in the Agreement and verifying the limitation. The limitation placed upon Tasty Baking was its distributors' 16.5% average gross margin. In this regard, plaintiffs have presented no evidence to demonstrate that the average gross margin decreased. The imposition of the administrative fee did not reduce plaintiffs' average gross margin below 16.5%. Section 3.3 of the Agreement clearly permitted Tasty Baking to impose such a fee. Tasty Baking's motion for summary judgment was properly granted.

For the foregoing reasons, this court's order dated July 31, 2006 should be affirmed.

BY THE COURT,

MARK I. BERNSTEIN, J.

Date: December 13, 2006

¹³ Plaintiffs failed to present any evidence that their average gross margin was affected.

¹⁴ Not only does the clear language of the contract allow the imposition of the administrative fee but the course of performance between the parties demonstrates that the imposition of "fees" was understood to be a "term" under the contract. The record demonstrates that Tasty Baking charged a fee for the use of hand-held computers after the formation of the contract to distributors. (Beauford deposition page 29- Exhibit "2" to Tasty Baking's Reply Memoranda.).