

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

FRED POTOK, Individually and as Trustee	:	MARCH TERM, 2009
Of the FLOORgraphics, Inc. Minority	:	
Shareholder Trust,	:	NO. 03768
	:	
Plaintiff,	:	COMMERCE PROGRAM
	:	
v.	:	Control Nos. 12071119, 12071149
	:	
RICHARD G. REBH, GEORGE L. REBH,	:	
YVES ANIDJAR, MICHAEL DEVLIN,	:	
FLOORgraphics, INC., NEWS AMERICA	:	
MARKETING IN-STORE SERVICES, L.L.C.,	:	
NEWS AMERICA MARKETING IN-STORE	:	
L.L.C., and NEWS AMERICA MARKETING	:	
IN-STORE SERVICES, INC.,	:	
	:	
Defendants.	:	

DOCKETED
SEP 4 2012
C. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this 31st day of August, 2012, upon consideration of the Motion for Summary Judgment of News America Marketing In-Store Services, L.L.C. f/k/a News America Marketing In-Store Services, Inc. and News America Marketing In-Store L.L.C. (collectively “News America”), the Motion for Summary Judgment of Richard G. Rebh, George L. Rebh, Yves Anidjar, Michael Devlin, and Floorgraphics, Inc. (collectively “Floorgraphics”), the responses thereto, and all other matters of record, after hearing oral argument on the Motions, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

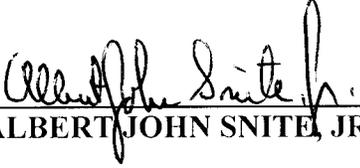
1. Floorgraphics’ Motion is **GRANTED** and **JUDGMENT** is **ENTERED** in favor of Floorgraphics and against News America on News America’s Cross-Claims; and

Potok Etal Vs Rebh Etal-ORDOP



2. News America's Motion is **DENIED**.

BY THE COURT:


ALBERT JOHN SNITE, JR., J.

variety of anti-competitive activities. In 2009, Floorgraphics' claims against News America went to trial. During the trial, News America and Floorgraphics agreed to resolve their differences as follows:

1. News America paid a total of (approximately) \$29.5 million:
 - a. \$13 million to Floorgraphics for its assets; and
 - b. Almost \$16.5 million to the Individual Defendants for their personal goodwill and non-compete and consulting agreements.
2. Floorgraphics' lawsuit against News America was dismissed.

As part of the transaction, News America and Floorgraphics entered into an Asset Purchase Agreement which contained the following terms:

THIS ASSET PURCHASE AGREEMENT (this "Agreement") is entered into as of March 10, 2009 by and between FLOORgraphics, Inc., a Pennsylvania corporation ("Seller") and News America Marketing In-Stores Services, LLC, a Delaware limited liability company ("Purchaser," and together with Seller, the "Parties")

* * *

1.4 Excluded Liabilities.

Notwithstanding anything to the contrary in this Agreement, Purchaser shall not assume or in any way be responsible for, and Seller shall remain obligated to, and shall, perform, satisfy and discharge, all Liabilities and obligations of Seller other than the Assumed Liabilities (collectively, the "Excluded Liabilities"). For the avoidance of doubt, Excluded Liabilities shall include, without limitation, **any and all Liabilities** directly attributable and allocable to Seller or its Affiliates **related to** the currently pending patent litigation in the Federal Court in the Eastern District of Texas to which both Seller and Purchaser are parties (including in connection with any of Seller's floor decals currently on floors) or **the lawsuit brought by Fred Potok** (collectively, the "Seller Lawsuits").

* * *

7.2 Indemnification by Seller.

Seller hereby agrees to reimburse, defend, indemnify and hold Purchaser and its directors, officers, employees, Affiliates (present and future), agents, attorneys, representatives, successors and permitted assigns (collectively, the "Purchaser Indemnified Parties") harmless from and against any and all **Losses based upon or resulting or arising from:**

- (a) any inaccuracy or breach of any of the representations or warranties made by Seller in this Agreement or in any certificate or other document (including any CPG Statement of Seller) delivered hereunder;
- (b) any breach of or failure to perform any covenant or agreement made by Seller in this Agreement or other document delivered hereunder;
- (c) the ownership or operation of the Purchased Assets prior to the Closing;
- (d) **the Excluded Assets or Excluded Liabilities**; or
- (e) the non-compliance by Seller with any Bulk Transfer Laws.¹

Fred Potok is a minority shareholder of Floorgraphics, and he claims to have founded the company. In February, 2008, he filed suit against Floorgraphics and the Individual Defendants claiming that they were trying to freeze him out by diluting his interests in the company, failing to pay him dividends, and terminating his employment, and that they were breaching their fiduciary duties to Floorgraphics by wasting and converting its assets. This case, which is colloquially called “Potok I,” is still being litigated.

Potok I was pending at the time Floorgraphics and News America entered into their Asset Purchase Agreement on March 10, 2009, and Potok I is clearly “the lawsuit brought by Fred Potok” referenced in that Agreement. As a result of that reference, Floorgraphics is obligated to indemnify News America for all losses, including attorneys’ fees, incurred by News America in connection with Potok I. The parties do not dispute this reading of the Agreement.

On March 23, 2009, Potok filed this action, which is colloquially called “Potok II”, against Floorgraphics, the Individual Defendants, and News America. In this action, Potok

¹ Asset Purchase Agreement, Introduction, ¶ 1.4, and ¶ 7.2 (emphasis added). The Agreement provides that it is to be “governed and construed in accordance with the Laws of the State of New York.” *Id.* ¶ 8.8. In New York, as in Pennsylvania, the terms of a contract are to be given their plain meaning. See Greenfield v. Philles Records, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 569 (2002) (“The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent. The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.”)

objects to the amount paid by News America for Floorgraphics' assets, and he objects to the allocation of the purchase price between Floorgraphics and the Individual Defendants. Potok asserted claims against News America for aiding and abetting breach of, and conspiracy to breach, the Individual Defendants' fiduciary duties in connection with the sale of Floorgraphics' assets to News America. This court dismissed all of Potok's claims against News America, but not before News America incurred significant attorneys' fees defending those claims.

In its Cross-Claims, News America seeks to have Floorgraphics indemnify it for the fees it incurred in Potok II pursuant to the provisions of the Asset Purchase Agreement. However, the Agreement provides indemnification only for "any and all Liabilities . . . related to . . . the lawsuit brought by Fred Potok." It does not provide for indemnification for "any and all lawsuits" brought by Potok, just the one. Potok I was the only Potok lawsuit that existed at the time the Agreement was entered into. It necessarily was the only one contemplated and intended by the parties, so it is the only one for which Floorgraphics must provide indemnification.

The claims raised in Potok II are significantly different than those raised in Potok I. Indeed, News America previously highlighted the differences between the two actions in its opposition to Potok's Motion to Consolidate them. The transactions or occurrences that give rise to Potok's claims in Potok I involve an alleged conspiracy by the Individual Defendants to freeze Potok out of Floorgraphics, beginning in 1997, escalating after 2004, and including:

1. Floorgraphics' failure to pay dividends in 2004, 2005 and 2006;
2. Floorgraphics' issuance of additional stock to the Individual Defendants in 2006;
3. Floorgraphics' termination of Potok's employment in 2006;
4. Floorgraphics' removal of Potok as a Director in 2007;
5. The Individual Defendants' slander of Potok in 2007;

6. The Individual Defendants' diversion of business from Floorgraphics to another company they owned between 2005-2007; and
7. The Individual Defendants' 8 year breach of an oral agreement to treat Potok equally.

The single transaction or occurrence that gives rise to Potok's claims in Potok II is the March, 2009 settlement of the lawsuit against News America and the related sale of Floorgraphics' assets to News America. The Potok II events are separate and apart from the Potok I events in which News America played no active role.² Therefore, Potok II cannot be viewed simply as a liability "related to" Potok I for which indemnification must be given.

Potok II arises out of, and is a liability related to, the very Agreement that contains the disputed indemnification provision. That Agreement certainly could have contained, but did not contain, an indemnification provision with respect to claims based on the Agreement itself. Instead, the parties chose to have Floorgraphics indemnify News America only for several of Floorgraphics' existing liabilities, including Potok I, which liability News America declined to assume upon purchase of Floorgraphics' assets. Nowhere in the Agreement did Floorgraphics agree to indemnify News America for its own wrongdoing, such as was (unsuccessfully) alleged against News America in Potok II.

Under the American Rule, Floorgraphics cannot be liable for News America's attorneys' fees unless it expressly agreed to pay them.³ The express indemnity provision in the Asset Purchase Agreement relates only to Potok I. There is no contractual provision requiring

² The Complaint in Potok I references the Floorgraphics' lawsuit against News America as an asset of Floorgraphics, but does not include any claims by Potok against News America.

³ See Mosaica Acad. Charter Sch. v. Commonwealth, 572 Pa. 191, 207, 813 A.2d 813, 822 (2002) ("The American Rule states that a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception.") See also U.S. Underwriters Ins. Co. v. City Club Hotel, LLC, 3 N.Y.3d 592, 59, 789 N.Y.S.2d 470, 472 (2004) ("It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule.")

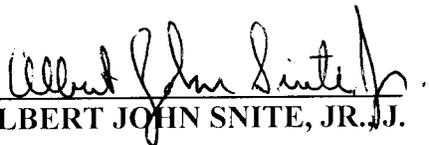
Floorgraphics or any of the Individual Defendants⁴ to pay News America's attorneys' fees incurred in Potok II. Therefore, News America cannot prevail on its Cross-Claim for contractual indemnification for the fees it incurred in this case.

Since News America has not been, and will never be, found liable to Potok in tort in this action, it cannot assert a claim for contribution against News America and the Individual Defendants.⁵ Likewise, its claim for common law indemnification fails.⁶

CONCLUSION

For all the foregoing reasons, Floorgraphics' and the Individual Defendants' Motion for Summary Judgment is granted and News America's Motion is denied.

BY THE COURT:


ALBERT JOHN SNITE, JR., J.

⁴ The Individual Defendants were not parties to the Asset Purchase Agreement, so its indemnification provisions do not bind them.

⁵ See 42 Pa. C. S. § 8324(b) ("A joint tort-feasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.")

⁶ See Vattimo v. Lower Bucks Hospital, Inc., 502 Pa. 241, 251, 465 A.2d 1231, 1236 (1983) ("The right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which inures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable.")