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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation,

Plaintiffs,

v.

WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation; and DOES 1-10

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921 R (KKx)

Hon. Manuel L. Real

OPPOSITION TO THE B&D PARTIES' MOTION IN LIMINE TO PRECLUDE WSC FROM INTRODUCING EVIDENCE OF BREACH BY SERVICES SOCAL NOT IDENTIFIED IN THE NOTICE OF TERMINATION

[Motion in Limine # 1]

Date: May 1, 2017
Time: 10:00 a.m.
Courtroom: 880

Complaint Filed: September 17, 2015

I. INTRODUCTION

Plaintiff Windermere Services Southern California, Inc. ("WSSC") is seeking nearly $2.6 million in damages stemming from defendant Windermere Real Estate Services Company's ("WSC") alleged failure to pay a termination fee when it terminated the Area Representation Agreement (the "Agreement"). Section 4.2 of the Agreement states that no termination fee is required if the terminated party received reasonable notice and an opportunity to cure prior to termination. Importantly, Section 4.2, unlike other sections in the Agreement, does not require written notice of material breaches. Instead, it only requires reasonable notice.

It is undisputed that on February 26, 2015, WSC provided written notice of WSSC's failure to collect and remit franchise and other fees, which was a material breach of the Agreement. In addition, WSC also notified WSSC of several other material breaches in the months leading up to its termination of the Agreement. Because WSC is not required to pay a fee for terminating the Agreement if it provided WSSC reasonable notice and an opportunity to cure, all evidence regarding notices WSC provided to WSSC of its breaches is relevant. This evidence is relevant regardless of whether the reasons for termination were identified in the February 2015 termination letter.

II. FACTUAL BACKGROUND

Through B&D Fine Homes, Inc. ("B&D Fine Homes"), Counter-Defendants Robert Bennion and Joseph Deville became Windermere franchisees in the Coachella Valley in 2001. Three years later, Bennion and Deville founded WSSC and became WSC's area representative in Southern California. In 2011, Bennion and Deville founded Bennion & Deville Fine Homes SoCal, Inc. ("B&D Fine Homes SoCal") and became Windermere franchisees in the San Diego area.

The scope of WSSC's duties as the area representative were codified in the Agreement. (Document No. 85-1 Deville Decl., Ex. A.) As the area representative, WSSC was responsible for, among other things, collecting fees owed by WSC

franchisees in its area, monitoring licensees in the region to ensure compliance with WSC guidelines, coordinating advertising and public relations efforts, and providing prompt, courteous and efficient service to members of the Windermere system. (*Id*. at § 3.) WSSC agreed to make its "best efforts" to fulfill its responsibilities as area representative. (*Id*. at § 2.) In exchange for these obligations, WSSC was entitled to retain 50% of all initial and continuing license fees it collected from WSC's franchisees in Southern California. (*Id*. at § 10.)

As time went on, it became clear that WSSC was not performing its obligations under the Agreement. WSSC was not collecting license and other fees from its affiliated B&D Fine Homes and B&D Fine Homes SoCal. In addition, WSSC competed with the very franchisees it was supposed to be servicing for agents and listings, failed and refused to work with WSC to solve technology problems in the region, and did not assist other WSC franchisees in the region to understand the services WSC offered to all its franchisees. (Feasby Decl., ¶ 3, Ex. A, Teather Dep. pp. 40-41, 47-49, 134-138, 174-175, and 230-233.)

Section 4 of the Agreement governs termination. (Document No. 85-1 Deville Decl., Ex. A, § 4.) Pursuant to that section, the Agreement could be terminated in four ways: a) at any time by mutual written agreement of the parties; b) by either party upon 180 days written notice; c) by either party on 90 days written notice if the termination is for cause based upon a material breach of the agreement and not cured within 90 days; and d) by either party without prior notice in the event of a bankruptcy or other outcomes not relevant to the present dispute. (*Id*. at § 4.1, emphasis added.) If the Agreement is terminated without cause on 180 days written notice pursuant to Section 4.1(b), the terminated party will be paid "an amount equal to the fair market value of the Terminated Party's interest in the Agreement (the "Termination Obligation"), in accordance with the provisions of [the] Agreement." (*Id*. at § 4.2.) Section 4.2 explains specifically how the Termination Obligation is to be calculated. Finally, Section 4.2 states "[t]here will be no

Termination Obligation if the termination by the Terminating Party is made in good faith based upon the material breach of the obligations of the Terminated party under this Agreement continuing after reasonable notice and opportunity to cure." (*Id*. at § 4.2, emphasis added.)

Throughout 2014, WSC gave WSSC reasonable notice and an opportunity to cure several material breaches of the Agreement. (Feasby Decl. Ex. A, Teather Dep. pp. 40-41, 47-49, 134-138, 174-175, 188-190, and 230-233.) In October 2014, Mike Teather, WSC's Senior Vice President – Client Services, met with Bennion and Deville to address some of these concerns. (Feasby Decl. Ex. A, Teather Dep. pp. 188-190.)

On January 28, 2015, counsel for WSC sent written notice to WSSC that WSC was terminating the Agreement without cause pursuant to Section 4.1(b). (Document No. 85-1, Deville Decl., Ex. B.) Pursuant to the January 28, 2015 termination letter, the Agreement was set to terminate on July 28, 2015. *Id.* On February 26, 2015, WSC sent written notice to WSSC that it was terminating the Agreement for cause pursuant to Section 4.1(c). (Document No. 85-1, Deville Decl., Ex. C.) WSC's termination for cause set the Agreement to terminate on May 27, 2015, unless Counter-Defendants cured the material breaches identified in the February 2015 Termination Notice. (*Id.*)

WSSC claims it is entitled to the Termination Obligation identified in Section 4.2 because it claims WSC terminated the Agreement without cause. (Document No. 31, First Amended Complaint ¶ 163(e).) Peter Wrobel, WSSC's damages witness, claims that WSC's Termination Obligation is nearly $2.6 million, which is more than 60% of his damages analysis. However, WSC contends that WSSC is not entitled to the Termination Obligation because it failed to cure the numerous material breaches previously identified by WSC after receiving reasonable notice and an opportunity to cure.

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III. ALL WSSC'S BREACHES OF THE AGREEMENT ARE RELEVANT

WSC provided WSSC reasonable notice of several material breaches of the Agreement. Section 4.2 of the Agreement says WSSC is not entitled to the Termination Obligation if it failed to cure the breaches after "reasonable notice and opportunity to cure." Section 4.2 does not require ***written notice*** of the material breaches, just ***reasonable notice***. (*Compare* Document No. 85-1, Deville Decl., Ex. A, §§ 4.1(a)-(c), and 4.2.) Therefore, all material breaches of which WSSC received notice are relevant, regardless of whether they were in the February 2015 notice of termination.

Evidence is relevant if it: (1) tends to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence to the action. Fed. R. Evid. 401. Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issue, or misleading the jury. Fed. R. Evid. 403.

In California, "a right to terminate 'for cause' or 'for good cause' means upon reasonable grounds assigned in good faith." *R.J. Cardinal Co. v. Ritchie*, 218 Cal.App.2d 124, 146 (1963). WSC terminated the Agreement for cause pursuant to Section 4.1(c). (Document No. 85-1, Deville Decl., Ex. C.) The February 2015 Termination Notice identified WSSC's failure to collect and/or remit license and technology fees from its affiliated franchisees as a material breach of the Agreement. (*Id.*) WSSC did not cure the material breach identified in the February 2015 Termination Notice, and the Agreement terminated pursuant to Section 4.1(c). Consequently, WSSC is not entitled to any Termination Obligation.

Moreover, even absent written notice of WSSC's other material breaches, WSSC would still not be entitled to the Termination Obligation because it received reasonable notice and an opportunity to cure prior to termination, which is all Section 4.2 requires. Section 4.1(c) clearly states that to terminate the Agreement for cause, the terminating party must provide 90 days ***written notice*** and an

opportunity to cure. (Document No. 85-1, Deville Decl., Ex. A § 4.1(c).) In contrast, Section 4.2 states that no Termination Obligation is owed if the terminated party is given ***reasonable notice*** and an opportunity to cure. (Document No. 85-1, Deville Decl., Ex. A § 4.2.) The difference between these two sections is important. "A court must give effect to every word or term employed by the parties and reject none as meaningless or surplusage in arriving at the intention of the contracting parties." *Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996). Further, courts use the ordinary and popular meanings of contract terms unless a special meaning is given to them by usage. *Klees v. Liberty Life Assur. Co. of Boston*, 110 F. Supp. 3d 978, 984 (C.D. Cal. 2015). The parties to the Agreement drew a distinction between "written notice" for purposes of Section 4.1(c) and "reasonable notice" for purposes of the applicability of the Termination Obligation in Section 4.2. Had they intended that a terminated party would be entitled to the Termination Obligation absent only written notice of a material breach, they would have specifically used "written notice" as they did in Section 4.1. The fact that they did not clearly demonstrates the parties' intent that written notice was not required for purposes of Section 4.2.

Counter-Defendants' motion ignores the plain language of the Agreement, and assumes WSSC received no notice of any material breaches other than those identified in the February 2015 Termination Notice. This argument is wrong on the law and the facts. Because Section 4.2 only requires "reasonable notice," all material breaches of which WSSC received reasonable notice are relevant to determining whether WSSC is entitled to the Termination Obligation. WSC notified WSSC of material breaches of the agreement on multiple occasions throughout 2014. (Feasby Decl. Ex. A, Teather Dep. pp. 40-41, 47-49, 134-138, 174-175, 188-190, and 230-233.) Whether the notice provided to WSSC beyond the 2015 Termination Notice was reasonable under the circumstances is a question of fact that must be determined from the particular circumstances. *Fieldstone Co. v.*

Briggs Plumbing Products, Inc., 54 Cal.App.4th 357, 370 (1997). Consequently, evidence regarding WSSC's material breaches of the Agreement, beyond the February 2015 Termination Notice, are relevant to this dispute.

Finally, Counter-Defendants argue without any support that evidence of WSSC's material breaches outside of the February 2015 Termination Notice should be excluded because they would "confuse the issues presented to the jury." (Document No. 85, p. 4.) As discussed above, the evidence Counter-Defendants seek to exclude is highly probative and essential to this case. Counter-Defendants claim WSSC is entitled to $2.6 million for the Termination Obligation. WSC responds that WSSC is not entitled to any of the Termination Obligation because it received reasonable notice and opportunity to cure several material breaches prior to WSC's written terminations the Agreement. Whether WSSC received notice of material breaches beyond the February 2015 Termination Notice is highly probative of this key damages issue. Therefore, to exclude this evidence, Counter-Defendants must show the danger of confusing the issues "substantially outweighs" its probative value. *Ohio Six Limited v. Motel 6 Operating L.P.*, No. 11-08102, 2013 WL 12125747, at *7 (C.D. Cal. Aug. 7, 2013) ("Rule 403 favors admitting evidence, and permits its exclusion only where the probative value of evidence is *substantially* outweighed by the unfair prejudice that may result from admitting it") (emphasis original). Counter-Defendants have not met this burden.

Evidence regarding WSSC's breaches of the Agreement and how it was notified of those breaches is relevant to determining whether it is entitled to the Termination Obligation. It is difficult to imagine how a jury could be confused by being asked to determine whether any of WSC's notices were reasonable under the circumstances. Accordingly, Counter-Defendants' motion should be denied.

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IV. CONCLUSION

For all of these reasons, The B&D Parties' Motion *In Limine* to Preclude WSC from Introducing Evidence of Breach by Services SoCal Not Identified in the Notice of Termination should be denied in its entirety.

DATED: April 10, 2017 PEREZ VAUGHN & FEASBY INC.

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