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ATTORNEYS FOR APPELLANT:

JONATHAN H. NUSBAUM
CASEY B. COX
Beers Mallers Backs & Salin, LLP
Fort Wayne, Indiana

ATTORNEY FOR APPELLEES:

TERRY L. CORNELIUS
Cornelius & Weingartner
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KJE, LLC,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 02A03-1102-PL-52
	)	
RAC HOLDINGS, INC., and	)	
REX CARROLL,	)	
	)	
Appellees.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Nancy Eschoff Boyer, Judge
Cause No. 02D01-1004-PL-135

June 23, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

KJE, LLC, appeals the trial court's grant of summary judgment in favor of Rex Carroll and RAC Holdings, Inc. (collectively "RAC"). We reverse and remand.

Issue

KJE raises several issues, which we combine and restate as whether the trial court properly concluded that RAC did not breach a franchise agreement between RAC and KJE.

Facts

KJE is a franchisor that owns the rights to Zesto, a restaurant franchise that operates in northeast Indiana and sells primarily ice cream-related products. In 2002, RAC, as a franchisee, executed a franchise agreement with KJE to open a Zesto in Auburn. The franchise agreement refers at various times to the "franchise store," the "Restaurant," the "Site," the "Premises," and the "building." The agreement defines "Restaurant" as "Franchisor's business for which this franchise is granted." App. p. 87. The agreement also states, "Franchisee shall either lease premises for the Restaurant, sometimes referred to as the 'Site,' or shall construct its own building." Id. at 90. None of the other terms are expressly defined in the agreement.

The following are other provisions of the agreement relevant to this appeal:

> 3.3 Site Selection. Franchisee shall have 30 days from execution of this Agreement to submit a proposed Site to Franchisor for approval. After such submission, Franchisor shall have 30 days to either approve or disapprove said site. . . .

* * * * *

3.5 Construction. Franchisee shall commence and diligently continue to construct the building, or remodel an existing building, as soon as possible, and in any event not later than 120 days after the date the Site is available for Franchisee's possession. . . . Franchisee agrees to have all construction plans, specifications, and any deviations therefrom, for any construction and any remodeling first approved by Franchisor in writing. Franchisor will approve or disapprove such plans within 30 days of submission. . . . Franchisee agrees that all construction or remodeling shall be completed and the Restaurant shall be open and operating (or ready to operate depending on the time of year) no later than 180 days after the date the Site is available for Franchisee's possession. . . .

* * * * *

6.1 Compliance With Standards. Franchisee shall comply with the uniform standards for quality, appearance, cleanliness, service, and promotion established from time to time by Franchisor. . . .

* * * * *

6.1.3 Premises. The construction, appearance, design, fixtures, equipment, and furniture of the Restaurant, both outside and inside, and any material repair, remodeling, or alteration thereof, must be approved in advance by Franchisor in writing, and the Restaurant must be maintained by Franchisee at his own expense in good repair and clean condition. All architectural, construction, signage, and interior decor and furnishing plans must be submitted to Franchisor for its written approval prior to commencement of any construction. Such approval shall not be deemed as any guarantee or warranty of the appropriateness or correctness of same, but merely that they meet the minimum reasonable specifications of the Franchisor. . . .

6.1.4 Supplies. Franchisee must use food, supplies, materials, and uniforms which comply with the reasonable specifications and quality standards established from time to time by Franchisor. . . .

* * * * *

6.1.7 Variances. Franchisor may approve exceptions or changes from the uniform standards which Franchisor, in its sole discretion, believes necessary or desirable under particular circumstances. Franchisee understands that he has no right to object to, or obtain, such variances, and that any such exception or change from the uniform standards for Franchisee's activities must be approved in advance by Franchisor in writing. . . .

* * * * *

7.7 Noncompetition During Term of Agreement. During the term of this Agreement, unless Franchisee has the prior written consent of Franchisor, Franchisee shall not directly or indirectly, . . . perform any services for, engage in or acquire, be an employee of, have any financial, beneficial, or equitable interest in, or have any interest whatsoever in any business similar to the Restaurant, except for other Restaurants franchised to Franchisee from Franchisor. . . .

* * * * *

11.2 Breach by Franchisee. If Franchisee breaches or defaults under any provision of this Agreement, Franchisor shall have all rights and remedies permitted by law or equity, including, but not limited to, the right of termination. Franchisor will not terminate this Agreement unless it has good cause to do so. Good cause shall include, but not be limited to, the reasons specified in subparagraphs 11.2.1, 11.2.2 and 11.2.3 below.

11.2.1 After Notice. . . . For purposes of this Agreement, a default or breach shall be a good cause for termination and shall include, but not be limited to, the following:

* * * * *

> (f) Standards and Specifications of Shop. Failure to construct, maintain, remodel, decorate or equip the Franchise Store in accordance with this Agreement and Franchisor's plans and specifications, if provided.

Id. at 90-106.

In 2002, RAC purchased an abandoned 1600 square foot restaurant building in Auburn and adapted it for use as a Zesto location, which included repainting the entire exterior of the building in the Zesto franchise color scheme requirements and remodeling the front half of the interior. The rear half of the interior was not remodeled and was not a public part of the Zesto restaurant, although it did have a walk-in cooler that was used as part of the Zesto business. RAC sought and obtained KJE's approval that the remodeled building was acceptable as a Zesto franchise location.

RAC soon discovered that the Zesto restaurant was not making as much money as anticipated. Thus, in 2003, RAC explored the possibility of opening a deli in the rear half of the building to earn more income. KJE, through its attorney, indicated that opening a deli in the rear half of the building would constitute a breach of the franchise agreement, and RAC did not pursue the deli idea any further at that time.

In 2009, however, RAC proceeded to remodel the rear half of the building for use as a deli, without first obtaining approval from KJE. RAC also placed signs for the deli outside of the building, one of them over a door on the side of the building for an entrance to the deli that was separate from the entrance to Zesto. KJE representatives

indicated afterwards that the remodeling "looked great," but said they would have to speak to their attorney about it. Id. at 180. In December 2009, KJE's attorney wrote a letter to RAC indicating that operating a deli in the same building as Zesto would breach the franchise agreement and giving RAC thirty days to correct the breach. RAC began operating the deli despite the warnings in January 2010, running it as a separate business from Zesto. There is no solid wall in the building completely dividing Zesto and the deli, and customers may go between Zesto and the deli without going outside the building. The deli sells different food items than those sold by Zesto.

On April 21, 2010, KJE filed a complaint seeking to terminate the franchise agreement with RAC or for injunctive relief against RAC. KJE subsequently filed a motion for summary judgment, and RAC responded with a cross-motion for summary judgment. Apparently, however, the trial court considered the cross-motion to be untimely filed. Nevertheless, on January 18, 2011, the trial court denied KJE's motion for summary judgment and also entered summary judgment in favor of RAC. KJE now appeals.

Analysis

We apply the same standard as the trial court when reviewing a grant of summary judgment. Kroger Co. v. Plonski, 930 N.E.2d 1, 4-5 (Ind. 2010). Namely, summary judgment should be granted only if the designated evidence shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. Id. at 5. "All factual inferences must be construed in favor of the non-moving party, and

all doubts as to the existence of a material issue must be resolved against the moving party." Id.

We also note that the trial court here accompanied its summary judgment ruling with some factual findings. Those findings are not binding upon us and do not alter the traditional standard of review for summary judgment rulings. See Rice v. Strunk, 670 N.E.2d 1280, 1283 (Ind. 1996). They may, however, aid our review by providing us with a statement of reasons for the trial court's actions. Id.

This case concerns interpretation of the franchise agreement, or contract, between KJE and RAC, and whether RAC's opening of the deli in the same building as the Zesto breached that agreement. Construction of a written contract is generally a question of law, making contract disputes particularly appropriate for resolution by summary judgment. Stewart v. TT Commercial One, LLC, 911 N.E.2d 51, 55 (Ind. Ct. App. 2009), trans. denied. Because contract interpretation presents a question of law, we review a trial court's interpretation de novo. Id. If a trial court has entered summary judgment in a contract dispute, it necessarily has determined either that: 1) the contract is not ambiguous or uncertain as a matter of law and the trial court need only apply the terms of the contract; or 2) the contract is ambiguous, but the ambiguity may be resolved without the aid of factual determinations. Id. Our paramount goal when interpreting a contract is to ascertain and effectuate the intent of the parties. Id. at 56. "This requires the contract to be read as a whole, and the language construed so as not to render any words, phrases, or terms ineffective or meaningless." Id. A contract is ambiguous only if

reasonable persons would differ as to the meaning of its terms. Id. "A contract is not ambiguous merely because the parties disagree as to its proper construction." Id.

RAC contends that the opening of the deli did not breach the franchise agreement because that agreement did not apply to the rear half of the store, the interior of which was not remodeled and not made part of the public portion of the Zesto restaurant when it originally opened. The trial court agreed with this contention. It stated in its summary judgment order, "KJE approved the use of only the front portion of the building for the Zesto restaurant. Since the franchise was granted to the front portion of the building, the remainder of the building does not fall under the control of KJE." App. p. 8.

Our review of the record fails to disclose any designated evidence that KJE only intended the franchise agreement to cover only the front half of the building, with RAC free to do whatever it wanted with the rear half. Certainly, there is no language to that effect in the franchise agreement. In all of the agreement's mentions of "site," "restaurant," "franchise store," "premises," and "building," there is no reference to the possibility that a Zesto location could share space within a building with another business. The franchise agreement identifies the proposed location for the Zesto as a single, undivided address in Auburn. The clear implication throughout the agreement is that a Zesto location should be a stand-alone operation.

Additionally, the agreement contains multiple statements regarding the need for a franchisee such as RAC to comply with "uniform standards" for Zesto restaurants. Such uniformity would be compromised by the placement of an entirely different food

establishment within the same building as a Zesto, particularly without there being a permanent physical separation between the establishments. We conclude that on its face, the franchise agreement is unambiguous and does not contemplate permitting a franchisee to operate another business within the same building that has been approved for use a Zesto restaurant, unless KJE has approved such operation.

We also conclude there is no ambiguity in the agreement that arises when applying it to the facts here. That is to say, there is no designated evidence aside from the agreement suggesting, as the trial court found, that KJE expressly approved only the front half of the store for use as a Zesto restaurant, with RAC free to do whatever it wanted with the rear half. When KJE approved the original remodeling of the building, there was nothing in the rear half of the building. That is the arrangement and floor plan that KJE approved. Even if the rear half of the building was not a public part of the Zesto restaurant, and even if the deli does not directly compete with Zesto, the remodeling of the rear half and subsequent use of it as a deli clearly changed the entire character of the whole building, especially given that there is no permanent division between the deli and the Zesto. Placing a deli in that half of the building is a significant, material alteration to the building that KJE did not approve of. KJE could have granted a variance to RAC to allow the deli to open and operate, but it chose not to do so and was not required to do so. It is not our place to second-guess the wisdom of KJE's business decision.

The franchise agreement further clearly states that the outside of the building housing a Zesto restaurant must comply with Zesto uniform standards, and that any

change to the outside of the building, including signage, must be approved by KJE. Here, the entire exterior of the building was painted in compliance with the Zesto color scheme, not just the front half of it. RAC placed signage for the deli directly on the outside of the building, and also on the signpost in front of the building where originally only the Zesto sign had been located. RAC did not obtain approval from KJE for these changes to the outside of the Zesto restaurant building.

On appeal, RAC requests this court to consider that it is "commonplace" for two restaurants to occupy space in the same or adjoining buildings, citing as examples Taco Bell and Long John Silver's, or Taco Bell and KFC. Appellee's Br. p. 10. As KJE points out in its reply brief, the Taco Bell, Long John Silver's, and KFC brands all used to be owned by one company, Yum! Brands.[1] In any event, the particular business arrangements for one company or companies are irrelevant to the question of what the specific franchise agreement between KJE and RAC required. On that point, we conclude as a matter of law that RAC breached section 11.2.1(f) of that agreement by remodeling and altering both the outside and inside of the building housing the Zesto restaurant without KJE's approval.

Conclusion

We reverse the trial court's granting of summary judgment in favor of RAC. We remand to direct the entry of summary judgment in favor of KJE and for the trial court to

[1] Yum! Brands recently decided to sell the Long John Silver's and A&W brands, while retaining Taco Bell, Pizza Hut, and KFC. See http://www.bbb.org/us/post/yum-brands-to-sell-aw-long-john-silvers-9342 (posted Jan. 19, 2011).

determine the relief to which KJE is entitled for RAC's breach of the franchise agreement.

Reversed and remanded.

RILEY, J., concurs.

DARDEN, J., dissents with opinion.

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	)	
Appellant,	)	
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vs.	)	No. 02A03-1102-PL-52
	)	
RAC HOLDINGS, INC., and REX CARROLL,	)	
	)	
Appellees.	)	

DARDEN, Judge, dissenting

I respectfully dissent. I do not agree with the majority's interpretation that the franchise agreement limits the use of the entire building owned by RAC to only that of a Zesto restaurant. Although the franchise agreement expresses a preference for a particular design, no where does it limit a franchise's location to a stand-alone operation or building.

I further do not agree that the standards established by KJE for its franchises, which must be met pursuant to the franchise agreement, apply to the entire building or site where a franchise may be located. Rather, the franchise agreement specifically provides that only those areas consisting of the "Restaurant" or the "Franchise Store" must be approved by KJE. *See* App. 95; 106. The franchise agreement defines "Restaurant" as the "Franchisor's business for which this franchise is granted." App. 87 (emphasis added).

"Business" is commonly defined as "a usual commercial or mercantile activity engaged in as a means of livelihood[.]" *See* http://www.merriam-webster.com/dictionary/business (last visited June 10, 2011). Therefore, the franchise agreement only applies to those areas used to operate the Zesto restaurant. It does not include the entire building, part of which may be used to operate the franchise and part of which may be used to operate a separate commercial activity; particularly where the businesses are not in conflict with each other.

With that said, I believe a material issue of fact exists as to whether the failure to erect a solid wall between Zesto and the deli altered the Restaurant portion of the building in such a way as to constitute breach of the franchise agreement. I therefore would remand for further proceedings consistent herewith.