UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re: Case No. 9:16-bk-09777-FMD
Chapter 7

Pure Performance Golf, LLC,

Debtor.
_____/

ORDER DENYING AMENDED JOINT MOTION FOR FINAL APPROVAL OF SALE OF BOCA INVENTORY TO TOUR FIT GOLF LABS, LLC (DOC. NO. 51)

Only where a contract is silent or ambiguous may a court consider the parties' course of dealings to evidence the parties' intent. In this case, although neither party to the contract gave written notice of its termination, the Chapter 7 Trustee contends that their course of dealings resulted in the contract's *de facto* termination. But because the parties' contract unambiguously required written notice of termination, the parties' conduct could not give rise to a *de facto* termination.

BACKGROUND

The Agreement

Pure Performance Golf, LLC ("Debtor") was in the business of manufacturing custom golf clubs. Prior to the filing of this bankruptcy case, Debtor and Pure Performance Labs of Boca Raton, LLC ("Boca Labs") entered into a License and Supply Agreement (the "Agreement")[1] under which Debtor agreed to sell golf equipment (the "Equipment") to Boca Labs in exchange for payment of $111,000.00. The Equipment included the "Demonstration Stock" and "Initial Demo Fitting Matrix" listed on Exhibits A and B to the Agreement.

The Agreement provided for Debtor to sell additional golf equipment to Boca Labs and for Boca Labs to pay Debtor an annual licensing fee of $25,000.00 in August of each year. Debtor also agreed that it would not operate any business competitive with Boca Labs within Saint Lucie, Martin, Palm Beach, or Broward Counties, Florida.[2]

Section 7.1 of the Agreement provided for an initial term of five years "unless terminated by written notice by either party no less than six months prior to the expiration of the existing term." Section 7.2 permitted the termination of the Agreement with notice, stating that

> [e]ither party may terminate this Agreement in the event of a breach by the other party, upon seven (7) days notice in the following [enumerated] events . . . .

Sections 7.2.1, 7.2.2, and 7.2.3 list the events that could give rise to termination upon notice. Section 7.3, titled "Effect of Termination," states: "[i]f this agreement is terminated by either party for any reason, Boca Labs shall . . . return to PPG all items and materials supplied directly by PPG related to the Business, excluding the Equipment on Exhibit 'A.''

The State Court Litigation

In early 2016, the relationship between Debtor and Boca Labs soured. When Boca Labs failed to pay Debtor for golf equipment shipped to it, Debtor refused to accept further orders from Boca Labs. In March 2016, Boca Labs sued Debtor and its principal in state court for breach of contract and injunctive relief, including breach of the covenant not to compete within the specified counties. On April 28, 2016, Boca Labs placed its last order with Debtor.

On May 13, 2016, the state court found that Debtor had violated the Agreement's covenant not to compete, and enjoined Debtor and its principal from conducting business in the listed counties (the "Injunction").[3] However, the Injunction contemplated the continuation of Boca Labs and

[1] Doc. No. 52-1.

[2] *Id.* Section 10.2.2.

[3] Doc. No. 55-1.

Debtor's business relationship. Paragraph 12 of the Injunction states:

> Defendants shall immediately fulfill all obligations to Mr. Jurado[4] and Boca Labs under the License and Supply Agreement, including specifically building and delivering custom-fitted clubs for orders that have been placed *and will be placed* by Mr. Jurado and Boca Labs in the future.[5]

Later in May 2016, Boca Labs filed a motion to hold Debtor in contempt for failure to comply with the Injunction. In June 2016, the state court found that Debtor had substantially complied with the Injunction, but further ordered Debtor to either supply the golf clubs to Boca Labs that it had paid for or refund the payment back to Boca Labs.[6] In August 2016, Boca Labs failed to pay Debtor the $25,000.00 licensing fee then due. However, neither party gave written notice of termination of the Agreement.

The Chapter 7 Bankruptcy

On November 14, 2016, Debtor filed this Chapter 7 case. Although the Chapter 7 Trustee did not file a motion to assume or reject the Agreement under 11 U.S.C. § 365(m),[7] he moved to sell Debtor's assets, including golf equipment, to Tour Fit Golf Labs, LLC ("Tour Fit").[8] The Court granted the Trustee's motion, but deferred ruling on the sale of the golf equipment in Boca Lab's possession (the "Boca Labs Inventory") pending a determination of whether the Boca Labs Inventory is property of Debtor's estate.[9]

DISCUSSION

Under § 541(a), all legal and equitable interests of the debtor as of the commencement of the case are property of the estate. Assets which are property of the estate are subject to sale by the bankruptcy trustee under § 363. In this case, whether the Boca Labs Inventory is property of Debtor's estate depends upon whether Debtor had a legal or equitable interest in it as of the commencement of the case. This issues hinges, in turn, on whether Boca Labs was required to return the Boca Labs Inventory to Debtor.

The Argument of the Trustee and Tour Fit

The Trustee and Tour Fit acknowledge that the Agreement was not formally terminated. However, they contend that the Court should look to the parties' course of dealings because the contract's termination provisions are not clear in order to find that a *de facto* termination occurred. Specifically, the Trustee and Tour Fit argue that Boca Labs' filing its lawsuit against Debtor, its failure to place additional orders with Debtor after April 28, 2016, and its failure to pay the licensing fee in August 2016, all evidence the *de facto* termination of the Agreement.

The Trustee and Tour Fit argue that because the Agreement was terminated, Boca Labs is required to return to Debtor the Equipment as defined in the Agreement, i.e., the Boca Labs Inventory, and that the Boca Labs Inventory is property of the bankruptcy estate. Thus, the Trustee and Tour Fit contend that the Court should approve the Trustee's sale of the Boca Labs Inventory to Tour Fit.

The Agreement Is Clear and Unambiguous.

Under Florida law, if a contract is clear and unambiguous, it must be enforced as written[10] and construed according to its express terms.[11] The actual language used in the contract is the best evidence of the intent of the parties.[12] Only where a contract is silent or ambiguous may a court

[4] Norberto Jurado is the franchisee of Boca Labs.
[5] Doc. No. 55-1 (emphasis supplied).
[6] Doc. No. 52-5.
[7] Unless otherwise stated, statutory references are to the United State Bankruptcy Code, 11 U.S.C. § 101, *et seq.*
[8] Doc. No. 8.
[9] Doc. No. 35.
[10] *See Anderson Windows, Inc. v. Hochberg*, 997 So. 2d 1212, 1214 (Fla. 3d DCA 2008).
[11] *In re Yates Dev., Inc.*, 241 B.R. 247, 252 (Bankr. M.D. Fla. 1999).
[12] *Id.* at 252.

consider the parties' course of dealings to evidence the parties' intent.[13]

Here, the Agreement clearly and unambiguously provides a mechanism for either party to terminate the Agreement. Section 7.2 requires seven days' written notice of early termination. Where a contract provides a mechanism for termination, it is not terminated when the parties fail to comply with the express termination language provided for in the agreement.[14] Neither Debtor nor Boca Labs exercised the Agreement's mechanism for termination. And, contrary to the Trustee's argument, the Injunction does not evidence the *de facto* termination of the Agreement. Rather, the very language of the injunction contemplates the parties' continuing a future business relationship.

The Agreement Is Deemed Rejected.

Because the Agreement's termination provisions are clear and unambiguous, it must be enforced as written. If the Trustee had assumed the Agreement under § 365, the Trustee could have exercised the Agreement's termination provisions, thereby triggering Boca Labs' obligation to turn over the Boca Labs Inventory to Debtor.

But the Trustee did not timely assume the Agreement. The Agreement is therefore deemed rejected under § 365(d)(1). The rejection of an executory contract does not constitute a termination of the contract but is merely a breach by the debtor occurring immediately prior to the petition date leaving a claim for rejection damages under § 502(g).[15] Upon rejection, the Trustee was divested of all rights under the Agreement, including the ability to exercise the Agreement's termination provisions.

[13] *Id.*

[14] *See Welsh v. Carroll*, 378 So. 2d 1255, 1257 (Fla. 3d DCA 1979) (affirming the trial court's finding that the employment contract was not terminated because neither party acted upon the method of termination provided for in the agreement).

[15] *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007).

CONCLUSION

For the foregoing reasons, the Court finds that the Agreement was not terminated prepetition. Because Boca Labs is not required to return the Boca Labs Inventory to Debtor, the Boca Labs Inventory is not property of the bankruptcy estate, and the Trustee may not sell the Boca Labs Inventory to Tour Fit.

Accordingly, it is

ORDERED that the *Amended Joint Motion for Final Approval of Sale of Boca Inventory to Tour Fit Golf Labs, LLC,* filed by the Chapter 7 Trustee and Tour Fit (Doc. No. 51) is DENIED.

DATED: September 29, 2017.

/s/ Caryl E. Delano

Caryl E. Delano
United States Bankruptcy Judge

Michael R. Dal Lago, Esquire
Naples, Florida
Counsel for Debtor

Robert E. Tardif, Jr., Esquire
Counsel for the Chapter 7 Trustee

Jeffrey W. Leasure, Esquire
Fort Myers, Florida
Counsel for Tour Fit Golf Labs, LLC

Vincent F. Alexander, Esquire
Miami, Florida
Counsel for Pure Performance Golf Labs Boca Raton, LLC, and Norberto Jurado, Jr.