IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

VELOCITY EXPRESS, INC.,	:	
	:	**C.A. No: 07C-05-012 (RBY)**
Plaintiff,	:	
	:	
v.	:	
	:	
OFFICE DEPOT, INC.,	:	
	:	
Defendant.	:	

Submitted: December 1, 2008
Decided: February 4, 2009

Upon Consideration of Defendant's
Motion for Partial Judgment on the Pleadings
GRANTED IN PART, DENIED IN PART

OPINION AND ORDER

Noel E. Primos, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware and Michael M. Rosenbaum, Esq., Budd Larner, P.C., Short Hills, New Jersey for Plaintiffs.

Arthur G. Connolly, III, Esq., Connolly, Bove, Lodge & Hutz, LLP, Wilmington, Delaware and Marcie R. Ziegler, Esq., Paul T. Hourihan, Esq., and Ana Reyes, Esq., Williams & Connolly, LLP, Washington, DC for Defendants.

Young, J.

Defendant Office Depot, Inc. ("Defendant") moves this Court to grant partial judgment on the pleadings. Plaintiff is Velocity Express, Inc. ("Plaintiff"). Plaintiff instituted legal proceedings against Defendant in May of 2007, alleging that Defendant breached its contract with Plaintiff. Defendant now seeks resolution of three issues on the pleadings.

I. Facts

Plaintiff is a corporation organized in Delaware with a principal place of business in Connecticut. Defendant is also a corporation organized in Delaware, but with a principal place of business in Florida. Plaintiff and Defendant entered into a contract for delivery services on October 23, 2003. This contract obligated Plaintiff to provide delivery of Defendant's products in certain geographic regions throughout the United States. The contract included a choice of law provision, naming Florida substantive law as the governing law.

The contract contained several provisions affecting this suit. First, the contract has a clause which limits the damages available. This clause, paragraph 43 of the contract, limits all recoverable damages to $5,000,000. The clause also prohibits recovery of consequential, special, indirect, or incidental damages. The exact language of paragraph 43 is:

> 43. LIMITATION OF LIABILITY. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES, INCLUDING BUT NOT LIMITED TO ANY DAMAGES RESULTING FROM LOSS OF USE OR LOST PROFITS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, WHETHER IN AN ACTION BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE) OR ANY OTHER

> LEGAL THEORY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. FURTHERMORE, IN NO EVENT WHATSOEVER SHALL THE AMOUNT OF DAMAGES RECOVERABLE BY A PARTY HEREUNDER, UNDER ANY THEORY OF LAW OR EQUITY, EXCEED THE OVERALL SUM OF FIVE ($5,000,000) MILLION DOLLARS IN TOTAL. EACH PARTY AGREES THAT SUCH SUM IS A FAIR AND REASONABLE LIMITATION ON DAMAGES HEREUNDER.

Furthermore, the contract included certain Schedules outlining the prices Plaintiff would earn during its performance. These Schedules highlighted the guaranteed minimums Plaintiff would earn on specified stops. When Defendant failed to pay these guaranteed minimums, Plaintiff complained to no avail. These minimums were never paid.

The initial term of the contract ran until October 26, 2006, with an automatic one-year extension unless Defendant gave Plaintiff 90 days written notice of its desire not to renew. The contract gave termination rights to Defendant if Plaintiff committed a material breach, and such breach was not cured within a 30-day period. On October 23, 2006, Defendant sent a termination for cause to Plaintiff, relying on several alleged causes. This notice, however, failed to give the appropriate 30-day opportunity to cure. Plaintiff responded to the notice with a letter indicating the invalidity of these allegations. Furthermore, Defendant never gave the required 90-day notice of termination necessary to avoid renewal. Without proper notice, the agreement automatically renewed for one year on October 27, 2006.

Plaintiff instituted this action on May 7, 2007. Plaintiff seeks several judgments against Defendant. Plaintiff seeks the outstanding balance owed and

unpaid to them on the contract in the amount of $594,526.71. Plaintiff also seeks $3,096,301.81 in unpaid guaranteed minimums. Lastly, Plaintiff seeks $9,914,117.58 representing the amounts Plaintiff would have earned for the period October 23, 2006 through October 23, 2007 under the terms of the contract. In addition to these amounts, Plaintiff seeks to recover interest, counsel fees, and costs associated with this litigation.

II. Standard of Review

A. Conversion of Motion for Partial Judgment on the Pleadings into Motion for Summary Judgment

Defendant initially moved for partial judgment on the pleadings. Superior Court Civil Rule 12 states that if matters outside of the pleadings are presented and not excluded by the Court, the Court must convert the motion to one for summary judgment. Conversion to a motion for summary judgment allows the Court to consider matters outside of the pleadings such as exhibits and factual disputes when ruling on a motion for summary judgment.[1] This raises Plaintiff's burden of proof as a motion for summary judgment requires Plaintiff to present evidence of a genuine issue for trial.[2] This differs from the burden when Defendant's motion is one for judgment on the pleadings, which accepts all Plaintiff's well pleaded allegations in the complaint as true.[3]

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[1] *See Walls v. Levinson*, 1990 WL 47346 at *4 (Del. Super.).

[2] *Id*. at *5.

[3] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

Defendant attached the contract, as well as its amendments, to its motion. This practice is appropriate. Since the contract is a document central to Plaintiff's claims, but not incorporated into the Complaint, Defendant is able to attach it without converting the motion into one for summary judgment.[4] Plaintiff, in its response to Defendant's motion, presented many exhibits to the Court, including deposition testimony. Plaintiff also relied on deposition testimony during its Oral Argument presentation. While oral arguments may be within the pleadings, a deposition arises out of discovery and is outside of the scope of the pleadings. Considering such evidence would require conversion of the motion to a motion for summary judgment. Based on Superior Court Civil Rule 12, however, the Court may avoid conversion of the motion if it does not consider this supplemental information in its ruling. The Court issued the required notice of the possible conversion into a motion for summary judgment as required by *Appriva Shareholder Litigation Company LLC v. EV3, Inc.*[5] Both parties responded in opposition to such conversion.

The initial motion for partial judgment on the pleadings filed by Defendant did not raise issues this Court cannot consider on a motion for judgment on the pleadings. Defendant seeks only partial judgment on undisputed portions of the contract. In consideration of Defendant's motion, it is not necessary to analyze the supplemental documents and testimony offered by Plaintiff. Therefore, this Court

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[4] *Lagrone v. American Mortell Corp.*, 2008 WL 4152677 at *4 (Del. Super.).

[5] 937 A.2d 1275 (Del. 2007).

WILL NOT convert Defendant's motion for partial judgment on the pleadings into a motion for summary judgment.

B. Appropriate Standard for Motion for Partial Judgment on the Pleadings

Motions for partial judgment on the pleadings have encountered varying standards of review. The Delaware Supreme Court has stated that "courts *generally* apply the same standard of review to motions for judgment on the pleadings and summary judgment."[6]

The Superior Court has applied a similar standard to a motion for judgment on the pleadings. Superior Court Rule 12(c) entitles the non-moving party to the benefit of any inferences that can be fairly drawn from its pleading.[7] The motion will be granted when no material issues of fact exist, and the moving party is entitled to judgment as a matter of law.[8] This standard is the same as the appropriate standard for a motion for summary judgment.

The Delaware Court of Chancery has addressed the standard of review for judgment on the pleadings differently. The Court of Chancery stated that the standard of review in a motion for judgment on the pleadings under Court of Chancery Rule 12(c) is "almost identical to the standard in a Rule 12(b)(6) motion

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[6] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1205 n.9 (Del. 1993) (emphasis added).

[7] *Gonzales v. Apartment Communities Corp.*, 2006 WL 2905724 at *1 (Del. Super).

[8] *Id.*

to dismiss."[9] The Court of Chancery further expounded on these competing standards as follows:

> Although apparently at odds with each other, these different formulations of the standard governing Rule 12(c) are contextual. When the question is whether to dismiss a claim in the context of a motion for judgment on the pleadings, the inquiry follows the procedures established by Rule 12(b)(6) jurisprudence. If affirmative relief is sought, the analysis is substantially the same, although subject to the constraint of a more limited record, as that for summary judgment motions.[10]

Black's Law Dictionary defines affirmative relief as "[t]he relief sought by a defendant by raising a counterclaim or cross-claim that could have been maintained independently of the plaintiff's action."[11] Defendant raised no counterclaims or cross-claims in this matter.

The Court of Chancery's explanation of the contradictory standards of review used in Rule 12(c) motions is logical. Because Defendant offers no evidence to support its claim other than the contract itself, Defendant's motion does not resemble one for summary judgment where a more established record is available. The more established record would allow claims to be decided based on certain factual information, not merely the allegations contained in the complaint. Defendant presented this motion in the stage of discovery where many critical elements to the

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[9] *Cantor Fitzgerald L.P. v. Cantor*, 2001 WL 1456494 at *4 (Del. Ch.).

[10] *BAE Systems North America Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522 at *3. n. 13 (Del. Ch.).

[11] Black's Law Dictionary 1317 (8th ed. 2004).

claim were still unknown. Therefore, applying a higher burden such as the motion for summary judgment's requisite burden would not allow the most just determination of this motion.

After considering the Court of Chancery's explanation compared with the previous standards from the Delaware Supreme and Superior Courts, the appropriate standard of review for Defendant's motion is that of the Rule 12(b)(6) motion to dismiss. Defendant's motion does not seek affirmative relief, but seeks to dismiss portions of Plaintiff's claims. Defendant moves this Court to dismiss Plaintiff's claims for any amount exceeding $5,000,000 (Part I), any claim to the guaranteed minimums not sought within the agreed time period (Part II), and any claim involving lost revenues or profits (Part III). Defendant's relief through this motion would therefore be in the form of dismissal, and the Rule 12(b)(6) standard of review applies.

The appropriate standard of review accepts all well-pleaded allegations from the complaint as true.[12] If Plaintiff presents any reasonably conceivable set of facts susceptible of proof to support its claim, the motion against it must be denied.[13] A complaint will not be dismissed unless it is clearly without merit.[14] "Vagueness or

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[12] *Spence*, 396 A.2d at 968.

[13] *Id*.

[14] *Diamond State Telephone Co. v. University of Delaware*, 269 A.2d 52, 58 (Del. 1970).

lack of detail" is not enough for dismissal.[15]

III. Discussion

A. Judgment Against Damages in excess of $5,000,000

Defendant first asks this Court to grant partial judgment on any damages in excess of $5,000,000. Mentioned above, the contract states conspicuously:

> "IN NO EVENT WHATSOEVER SHALL THE AMOUNT OF DAMAGES RECOVERABLE BY A PARTY HEREUNDER, UNDER ANY THEORY OF LAW OR EQUITY, EXCEED THE OVERALL SUM OF FIVE ($5,000,000) MILLION DOLLARS IN TOTAL. EACH PARTY AGREES THAT SUCH SUM IS A FAIR AND REASONABLE LIMITATION ON DAMAGES HEREUNDER."

Defendant contends that the terms of the contract are unambiguous and judgment as a matter of law is therefore appropriate.

Florida law supports Defendant's position. In *Strama v. Union Fidelity Life Insurance Company*, the court held that if a contract is unambiguous, its application is a matter of law.[16] In *Miller v. Kase*, the court held that contract provisions are only susceptible to summary judgment when the provision is unambiguous.[17] Ambiguities arise when a term or phrase has two or more reasonable interpretations.[18] Further, there are two types of ambiguities. First, patent ambiguities exist when the ambiguity

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[15] *Id.*

[16] 793 So. 2d 1129, 1132 (Fla. Dist. Ct. App. 2001).

[17] 789 So. 2d 1095, 1097-98 (Fla. Dist. Ct. App. 2001).

[18] *Id.*

appears on the face of the document.[19] If a patent ambiguity arises, parties may not use extrinsic evidence to "clear any confusion."[20] Second, latent ambiguities exist when the different interpretations are realized during the application or enforcement of the contract.[21] Extrinsic evidence may be used to clarify latent ambiguities.[22] Florida law requires the trial court to construe these ambiguous provisions in accord with their ordinary meanings.[23]

Considering only the pleadings, the $5,000,000 limitation does not appear ambiguous. Paragraph 43 of the contract explains conspicuously that no damages, in any event, may exceed $5,000,000. It goes on to state that both parties, Plaintiff and Defendant, consider that amount to be fair and reasonable. The language does not conflict itself, which would create a patent ambiguity, nor does it yield conflicting applications, which would create a latent ambiguity. A thorough reading of the language produces one clear result, that damages in any scenario are limited at $5,000,000.

The $5,000,000 limitation applies to all damages. The language of the contract is clear that this limitation survives all theories of law or equity. This includes actual

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[19] *Emergency Associates of Tampa P.A. v. Sassano*, 664 So. 2d 1000, 1002 (Fla. Dist. Ct. App. 1995).

[20] *Id*.

[21] *Id*.

[22] *Id*. at 1002-03.

[23] *Id*. at 1003.

damages. Within actual damages are amounts already earned and owed. These damages are often called compensatory damages, as they compensate the injured party for expenses arising from someone else's breach. In a literal sense, it follows that any amounts earned yet unpaid would be included in the scope of the $5,000,000 limitation.

Florida law is settled that the terms of an agreement between parties will be enforced if those terms are mutual, unequivocal, and reasonable.[24] Plaintiff argues that the $5,000,000 limitation became unreasonable during its performance of the contract as the obligations and expectations increased. Plaintiff contends that the volume of services it provided to Defendant increased significantly during the parties' relationship and therefore rendered the initial terms unreasonable. After reviewing the contract, however, it is clear that the parties amended the contract to deal with certain provisions of the initial document. It seems that it would not have been unreasonable for the parties to account for the increase in services via some form of amendment to the contract (as was accomplished by the parties for other matters – see Section B, below). This would have prevented the damage limitation from becoming allegedly unreasonable.

Plaintiff does have support in its contention from *RKR Motors, Inc. v. Associated Uniform Rental and Linen Supply, Inc.*[25] The court in *RKR Motors* stated that reasonableness includes when terms become unconscionable at the time of

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[24] *Greenstein v. Greenbrook, Ltd.*, 413 So. 2d 842, 844 (Fla. Dist. Ct. App. 1982).

[25] 2008 WL 4862514 at *6 (Fla. Dist. Ct. App.).

breach.[26] This holding assists Plaintiff if Plaintiff were to show that in October 2006, when Defendant allegedly breached the contract, the $5,000,000 limitation on damages was unconscionable. In *Bland ex rel. Coker v. Healthcare and Retirement Corp. Of America*, the Florida court somewhat provincially, explained unconscionable contracts as follows:

> "To succeed on an unconscionability claim, [the party] must demonstrate *both* procedural and substantive unconscionability. Procedural unconscionability relates to the manner in which a contract is made and involves consideration of issues such as the bargaining power of the parties and their ability to know and understand the disputed contract terms. Substantive unconscionability, on the other hand, requires an assessment of whether the contract terms are "so 'outrageously unfair' as to 'shock the judicial conscience.' ". A substantively unconscionable contract is one that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[27]

In this situation, while it may appear that after the increase in volume expected from Plaintiff a $5,000,000 cap seems insufficient, it is not enough to shock the judicial conscience. Nor is it entirely unfair as both parties agreed on the limitation. Furthermore, the ability to amend certain provisions apparently existed.

Finally, this contract was entered into by two sophisticated corporations. The contract was arranged in a detailed manner to highlight the expectations and limitations on each party and its performance. Neither party alleges that it entered

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[26] *Id.*

[27] *Bland ex rel. Coker v. Health Care and Retirement Corp. of America*, 927 So. 2d 252, 256 (Fla. Dist. Ct. App. 2006) (internal citations omitted).

into an unfair contract with unclear terms of unclear meanings. Without unreasonable terms, unconscionability, or evidence of attempts to amend, the damage limitation is unambiguous and must be enforced as written. Therefore, any claim damages over the $5,000,000 limitation that Plaintiff seeks is dismissed, and Part I of Defendant's motion for partial judgment on the pleadings is **GRANTED**.

B. Waiver of Claims for Guaranteed Minimums

Part II of Defendant's motion addresses Plaintiff's claims in Count II of the complaint. Count II seeks payment for unpaid guaranteed minimum fees which the parties agreed to in an amendment to the initial contract. This guarantee was to pay Plaintiff a minimum rate if a delivery did not warrant enough of a fee based on the initial pay scale.

In the complaint, Plaintiff states that after it discovered discrepancies within the invoices generated by Defendant representing the guaranteed minimum payments, Plaintiff alerted Defendant of those discrepancies. Plaintiff alleges that no action was ever taken by Defendant on the discrepancies, leading to the amount of damages claimed in Count II of the complaint.

Defendant argues that the contract provides for a seven-day period for Defendant to issue an invoice, followed by another seven-day period for Plaintiff to inform Defendant about any discrepancies. Defendant continues that Plaintiff failed to inform it within the seven-day period. Defendant asserts that this failure operates as a waiver under Florida law, barring any entitlement Plaintiff may have to those minimum payments.

Florida law is clear that waiver is the intentional relinquishment of a known

right.[28] Waiver is an affirmative defense, and as such, the party invoking the defense has the burden of proving such waiver.[29] Defendant urges the explanation in *Arbogast v. Bryan*, which states if a party fails timely to demand performance, it is intentional, and therefore such party waives the right to demand such performance.[30]

In the present case, Plaintiff alleges that it attempted to demand performance and payment from Defendant, but its claims went unanswered. While Plaintiff gives no specific time frames as to the immediacy of its complaints, the allegations can be construed reasonably to have Plaintiff in conformance with the contractual requirements. Since a reasonable inference may be drawn in Plaintiff's favor supporting that it made appropriate claims about the discrepancies to Defendant, the matter is subject to factual presentation and consideration. Accordingly, the Plaintiff survives Part II of Defendant's motion. Therefore, Part II of Defendant's motion is **DENIED**.

C. Damages Sought in Count III of Complaint as Barred by Contract

Part III of Defendant's motion seeks judgment against Count III of the complaint. Defendant contends that Count III seeks damages which are unavailable under the unambiguous terms of the contract. Defendant refers to paragraph 43 of the contract, which states:

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[28] *Fireman's Fund Insurance Co. v. Vogel*, 195 So. 2d 20, 24 (Fla. Dist. Ct. App. 1967).

[29] *Goodwin v. Blu Murray Insurance Agency, Inc.*, 939 So. 2d 1098, 1104 (Fla. Dist. Ct. App. 2006).

[30] 393 So. 2d 606, 608 (Fla. Dist. Ct. App. 1981).

> IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES, INCLUDING BUT NOT LIMITED TO ANY DAMAGES RESULTING FROM LOSS OF USE OR LOST PROFITS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, WHETHER IN AN ACTION BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE) OR ANY OTHER LEGAL THEORY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

Defendant first contends, and rightly so, that lost revenue is not an available remedy under Florida law.[31] A favorable reading of the complaint, however, does not seek lost revenue, but the amount the contract would have contributed to Plaintiff's income under the additional year. While the complaint does address revenues, a reading in favor of Plaintiff indicates that Plaintiff is seeking the monies which would have been earned on the contract, less expenses incurred while earning them. The reading permitted to Plaintiff at this stage will view the request for revenues as actually a request for the profits, which would have been generated from fulfilling its obligations in the contract.

Defendant also argues that the limitation placed on lost profits prohibits Plaintiff from seeking recovery of this type in Count III of the complaint. Facially, Defendant's contention is correct with respect to lost profits. As mentioned above in section III(A), however, if a contract term or phrase is ambiguous, it is not appropriate for adjudication at the summary or pleadings stage. An ambiguity is

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[31] *See Physicians Reference Laboratory, Inc. v. Daniel Seckinger, M.D.*, 501 So. 2d 107, 108-09 (Fla. Dist. Ct. App. 1987).

created with the restriction on lost profits, as two reasonable interpretations could be derived from the language in paragraph 43. While the contract explicitly mentions lost profits, it is mentioned in the context of an example of consequential, special, indirect, or incidental damage. Defendant reads paragraph 43 to bar lost profits as a whole. Plaintiff argues, however, that the mention of lost profits applies only to those included within the four subparts of damages mentioned. Plaintiff urges that Paragraph 43 does not exclude a party from liability for general damages. Plaintiff further claims that the damages it seeks in Count III of the complaint are more like general damages and therefore are available.

Consequential damages are defined in Florida law as "those that do not arise within the scope of the immediate buyer-seller transaction, but rather stem from the losses incurred by the non-breaching party in its dealings . . . which were a proximate result of the breach . . . ."[32] While Florida case law does offer lost profits as the quintessential example of consequential damages,[33] the lost profits restricted by paragraph 43 can be distinguished from such a categorization. The *Hardwick* court spoke of lost profits in a buyer-seller transaction.[34] The buyer-seller transaction is one where the buyer obtains supplies from a seller, and then sells them to a third party. The buyer's business is generated by the profits gained on the sale to the third

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[32] *Hardwick Properties, Inc. v. Newbern*, 711 So. 2d 35, 40 (Fla. Dist. Ct. App. 1998), *quoting Petroleo Brasileiro, S.A., Petrobas v. Ameropan Oil Corp.*, 372 F. Supp. 503, 508 (E.D.N.Y. 1974).

[33] *Hardwick,* 711 So. 2d at 40.

[34] *Id*.

party. Through these third party transactions, the buyer becomes a seller, setting its price point and realizing gains (profits) from the goods themselves. The buyer's damage would be a consequence of the seller's failure to supply.

Blacks Law Dictionary defines consequential damages as "losses that do not flow directly from an injurious act but that result indirectly from the act."[35] The profits Plaintiff seeks to recover here are payments for services. Plaintiff performs the service of delivering products, which have already been purchased for Defendant. Defendant's breach arguably renders Plaintiff unable to continue to provide the service. This inability, it is propounded, removes Plaintiff's earning potential. Plaintiff does not create price points or earnings arrangements on its own. Therefore, these monies would not be *consequential* of a breach on behalf of a supplier, but instead created *directly* by the actions of Defendant. Damages arising directly from the breach do not fit within the meaning of consequential damages. The monies Plaintiff seeks are therefore distinguishable from the lost profits discussed in *Hardwick*.

Instead, the monies Plaintiff seeks appear to be expectation damages. Expectation damages, recognized by Florida law, are those that a person reasonably anticipates from an unfinished transaction.[36] Plaintiff had the reasonable expectation to complete the term on the contract. Through completing the contract, Plaintiff

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[35] Black's Law Dictionary 416 (8th ed. 2004).

[36] *Resorts International, Inc. v. Charter Air Center, Inc.*, 503 So.2d 1293, 1296 (Fla. Dist. Ct. App. 1987).

could have realized the profits outlined by the various schedules of the contract. In Count III of the complaint, Plaintiff seeks the amount "representing the contribution to [Plaintiff's] operating income which would have been generated from the gross revenue [Defendant] would have paid" during the additional year. Should the Court find Defendant in breach, Plaintiff would be left with no recovery if the contract is interpreted to preclude recovery of these damages. Therefore, an appropriate distinction may be drawn that Plaintiff is seeking expectation damages.

The language of the complaint, although vague, does not seek a type of damages prohibited by the contract or Florida law. Even if phrased as lost profits, the dispute between the parties concerning which type of damage these monies fall within raises a certain ambiguity. The interpretations of lost profits as part of special or consequential damages, or as part of general or expectation damages, are reasonable. These two reasonable interpretations create an ambiguity in the term. As indicated earlier, ambiguous parts of a contract generally are not susceptible to summary adjudication. It follows that these ambiguities would also not be susceptible to adjudication at the pleadings stage. Ultimately, discovery may demonstrate the absence of ambiguity. At this point, and for this proceeding on the pleadings, however, Defendant's motion is **DENIED**.

IV. Conclusion

Based on the foregoing analysis, Part I of Defendant's Motion for Partial Judgment on the Pleadings is **GRANTED**. Parts II and III, however, are **DENIED**.

SO ORDERED.

/s/ Robert B. Young
J.

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