IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
PROFESSIONAL VIDEO ASSOCIATION, INC.,	
Debtor,	Adv. Pro. No. 95-016 (PJW)
MICHAEL J HORAN,	
Appellant,	Civil Action No. 01-488 (GMS)
v.	
WILLIAM DANTON, VIDEO LOTTERY CONSULTANTS, INC. and PROFESSIONAL VIDEO ASSOCIATION, INC.,	
Appellees.	

MEMORANDUM

I. INTRODUCTION

On April 17, 1998, Michael J. Horan ("Horan") initiated an adversary proceeding in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") against William Danton ("Danton"), Professional Video Association, Inc. ("PVA"), and Video Lottery Consultants, Inc. ("VLC") (collectively, the "appellees"). Horan's complaint alleged three counts: (1) fraud, misrepresentation of ownership of certain "Software Assets" that are the subject of the settlement agreement (the "Settlement Agreement") executed by the parties on February 27, 1997 and approved by the Bankruptcy Court on March 4, 1997; (2) breach of the Settlement Agreement;

and (3) judicial estoppel. The Bankruptcy Court held a three day trial on the matter. On June 4, 2001, the Bankruptcy Court issued a final Order, entering judgment in favor of the defendants. On July 18, 2001, Horan appealed the decision. For the following reasons, the court will affirm the decision of the Bankruptcy Court.

II. STANDARD OF REVIEW

In reviewing a case on appeal, the Bankruptcy Court's factual determinations will not be set aside unless they are clearly erroneous. *See Mellon Bank, N.A. v. Metro Comm., Inc.*, 945 F.2d 635, 641 (3d Cir. 1991), *cert. denied*, 503 U.S. 937, (1992). Conversely, a Bankruptcy Court's conclusions of law are subject to plenary review. *See id.* Mixed questions of law and fact are subject to a "mixed standard of review." *See id*. at 641-42. Under this "mixed standard of review," the appellate court accepts findings of "historical or narrative facts unless clearly erroneous, but exercise[s] plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to historical facts." *Id*.

III. BACKGROUND

A. Elimination Draw Poker

In the 1980's, Horan developed Elimination Draw Poker, a game in which players could conduct a computer-operated poker tournament. Horan copyrighted the game and, with the help of his brother-in-law, wrote a computer software program to run the game. On October 28, 1983, he copyrighted the software program. In addition, Horan's company, PVA, copyrighted the rules of the game in February 1985. On March 10, 1987, Horan obtained a patent for the game..

In 1993, Stephen Holniker ("Holniker"), President of Amusement World, Inc., and Amusement World (collectively "Amusement World"), obtained the operating software for

Elimination Draw Poker. Amusement World then began to manufacture the game for PVA. The game, however, was manufactured for demonstration only because it did not have the necessary network software. In 1995, Amusement World developed the network software to make the game operational. Amusement World owns the software application that runs Elimination Draw Poker.

In December 1999, Don Pierce ("Pierce"), a software developer, created a software package to run Elimination Draw Poker for Fortune Entertainment Corporation ("FEC"), PVA's successor in interest.[1] Pierce testified, at the Bankruptcy Court trial, that he produced a complete software package for FEC that ran Elimination Draw Poker on a personal computer. Pierce further testified that the software was a demonstration model and not operational. Gaming Laboratories International Corporation ("GLI"), a regulatory firm that tests and approves gaming devices, tested Pierce's version of Elimination Draw Poker and determined that it was inoperable.

B. The Settlement Agreement

On February 27, 1997, Horan and the appellees executed the Settlement Agreement at issue in this appeal. The relevant portions of the Settlement Agreement provide:

> **Background**: Horan invented a certain computer software program commercially known as "Elimination Draw Poker". "Elimination Draw Poker" was patented at Patent No. 4,648,604 (the Patent). "Elimination Draw Poker" together with the Patent, related copyrights, rules, design, format, system and related hardware (the Software Assets) were assigned to PVA, a Delaware Corporation.
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> **Grant of Exclusive Rights to Software Assets**: PVA, with the joinder of Danton, hereby grants and conveys to Horan, all exclusive distribution and all other related rights in and to the Software Assets, including any and all upgrades, updates, modifications, the name and/or new versions [in 10 exclusive locations] . . . , which

[1] On January 6, 1995, PVA filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On September 5, 1997, FEC purchased PVA. FEC is not a party to this lawsuit.

> rights include the exclusive right to sell, advertise, distribute, demonstrate, manufacture and duplicate the Software Assets.
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> **Warranty of Ownership**: Danton and PVA warrants that PVA has exclusive ownership of the Software Assets and, subject to approval of the Bankruptcy Court as set forth herein, has the authority and power to transfer, convey, assign, sell, or grant the exclusive rights to the Software Assets as set forth herein to Horan. Danton and PVA acknowledges that this is a material representation of PVA and Danton and Horan is relying on such representations and warranty in connection with this Settlement Agreement.
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> **Governing Law**: The laws of the State of Delaware shall apply to and govern the enforcement of the terms and conditions of this Settlement Agreement. . . .

The court approved the Settlement Agreement on March 4, 1997, despite an objection by Holniker, who contended that the Settlement Agreement attempted to convey Amusement World's software to Horan. Amusement World then appealed the Bankruptcy Court's Order approving the Settlement Agreement. The appeal prevented the parties from finalizing the Settlement Agreement because the agreement, by its terms, required a final Order from the Bankruptcy Court. Amusement World later withdrew its appeal, but suggested that the parties redraft the Settlement Agreement to specifically exclude the Amusement World software. The parties did not redraft the Settlement Agreement but, instead, finalized and closed on the original Settlement Agreement in August 1997.

C. Proceedings in the Bankruptcy Court

On January 4, 2000, the Bankruptcy Court held a pretrial conference. Prior to the conference, the parties submitted a pretrial order, including a section of "facts which are admitted and require no proof." In the pretrial order, the parties admitted that "Danton agreed that in the event that he or his entity came up with a software program so that he didn't need Holniker, he'd give Horan use of that, to the extent that we changed the game, we would give Horan that also." (D.I. 135, at 9). The parties also admitted the following:

> The term "Software Assets" as set forth in the "Background" paragraph of the Settlement Agreement included whatever Plaintiff Horan assigned to Defendant PVA in 1985, and to the extent that Defendant PVA, after it received the assignment from Mr. Horan in 1985, either developed or acquired, upgrades, updates or new versions, then Mr. Horan was entitled to their use in connection with his distribution rights pursuant to the Settlement Agreement.

Id. During the pretrial conference, the Bankruptcy Court found that the settlement agreement was unambiguous and denied the admission of parol evidence for the purpose of interpreting the agreement. Using the language of the pretrial order as a guide, Judge Walsh determined that the term "Software Assets," as used in the Settlement Agreement, means whatever was assigned by Mr. Horan to PVA in 1985. Judge Walsh further determined that "to the extent that PVA, after it received the assignment from Mr. Horan in 1985, either developed or acquired upgrades, updates or new versions. Then, Mr. Horan was entitled to their use in connection with his distribution rights." (Defs.' Trial Exh. 46).

The Bankruptcy Court held a trial on February 12 and 13, 2001, and June 1, 2001. At the conclusion of Horan's case, Judge McCullough granted the appellees motion to dismiss and entered judgment in their favor on all three counts of the complaint pursuant to Federal Rule of Civil Procedure 52©.[2] Judge McCullough concurred in Judge Walsh's ruling as to the meaning of "Software Assets." He also found that the Software Assets including any and all upgrades, updates,

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[2] Federal Rule of Civil Procedure 52(c) provides:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. . . . Such a judgment shall be supported by findings of fact and conclusions of law.

FED. R. CIV. P. 52(c).

modifications, the name and/or new versions (the "upgrades, etc.") have to be upgrades, updates, modifications that PVA had. Next, Judge McCullough determined that PVA neither upgraded the Software Assets nor acquired any upgrades, etc. He then concluded that the appellees did not commit fraud or breach the Settlement Agreement, and that judicial estoppel did not apply.

IV. DISCUSSION

Horan appeals from the Bankruptcy Court's opinion on three grounds. First, Horan argues that the Bankruptcy Court erred in its construction of an unambiguous contract by failing to give effect to the plain terms of the Settlement Agreement. Second, Horan maintains that the Bankruptcy Court erred by failing to find fraud under the plain and unambiguous terms of the Settlement Agreement. Finally, Horan contends that had the Bankruptcy Court properly construed the Settlement Agreement, it would have reached the conclusion that the representations made in the appellees warranty were fraudulent and that the fraudulent representations amounted to a breach of the warranty and, therefore, a breach of contract. The court will address each of these issues in turn.

A. The Bankruptcy Court's Construction/Interpretation of the Settlement Agreement

As a preliminary matter, the parties disagree as to what standard of review the court should apply to the Bankruptcy Court's determinations. Horan asserts that the Bankruptcy Court misconstrued the unambiguous terms of the Settlement Agreement. The appellees, however, contend that Horan's appeal is to the Bankruptcy Court's interpretation, not construction, and that contract interpretation and contract construction are reviewed according to different standards.

After considering the parties' arguments and the appropriate case law, the court concludes that a different standard of review applies to contract interpretation than to contract construction in

certain instances. Questions of contract interpretation are reviewed according to the clearly erroneous standard, while questions of contract construction are reviewed *de novo*. *See Medtronic AVE Inc. v. Advanced Cardiovascular Systems, Inc.*, 247 F.3d 44, 53 n.2 (3d Cir. 2001); *John F. Harkins Co., Inc. v. Waldinger Corp.*, 796 F.2d 657, 659 (3d Cir. 1986). When a court engages in "interpretation of language," it determines what ideas the language induces in other persons. When a court engages in "construction of the contract," it determines the contract's legal operation –that is, its effect upon the action of courts and administrative officials. *Harkins*, 796 F.2d at 659. "[T]he construction of a contract starts with the interpretation of its language but does not end with it; while the process of interpretation stops wholly short of a determination of the legal relations of the parties." *Id.* (citing 3 Corbin, Corbin on Contracts § 534, at 9 (1960)).

In the present case, however, the disagreement between the contracting parties concerns the meaning of terms in an unambiguous contract,[3] and "[t]he interpretation and construction of a written contract present only questions of law . . . so long as the contract is unambiguous and the intent of the parties can be determined from the agreement's face." 11 Williston on Contracts § 30:6 (4th ed. 2004). Moreover, Delaware law applies to all disputes arising out of the Settlement Agreement and, under Delaware law, construction and/or interpretation of contract language is a question of law. *See Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Insurance Co.*, 616 A.2d 1192, 1195 (Del. 1992). Thus, it does not matter whether the Bankruptcy Court "construed" or "interpreted" the Settlement Agreement, as the court must review the Bankruptcy Court's determination *de novo*.

[3] Both Judge Walsh and Judge McCullough found that the Settlement Agreement was unambiguous. In addition, the parties agree that the Settlement Agreement is unambiguous.

When interpreting or construing a contract, the court's primary function is to ascertain the intent of the parties. *Coca-Cola Bottling Co., Inc. v. Coca-Cola Co.*, 769 F. Supp. 599, 616 (D. Del. 1991), *aff'd in part*, 988 F.2d 386 (3d Cir. 1993). When a contract is clear on its face, the court should rely solely on the clear, literal meaning of the words contained in the contract. *See Myers v. Myers*, 408 A.2d 279, 281 (Del. 1979). "Where [the] parties have entered into an unambiguous integrated written contract, the contract's construction should be that which would be understood by an objective reasonable third party." *Demetree v. Commonwealth Trust Co.*, 1996 WL 494910, at *4 (Del. Ch. Aug. 27, 1996). When a contract is unambiguous, *i.e.* when the provisions in controversy are not reasonably or fairly susceptible of different interpretations, an inquiry into the subjective unexpressed intent or understanding of the individual parties is neither necessary nor appropriate. *See id.* Additionally, when the language of a contract is clear and unambiguous, the court may not consider parol evidence to interpret the intent of the parties. *See Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992).

Horan asserts that the Bankruptcy Court erred when it construed the terms "any and all upgrades, etc. of the Software Assets" to mean any and all upgrades, etc. "that PVA had." According to Horan, the plain and unambiguous meaning of "any and all" is every possible number or specification possible. The Bankruptcy Court's construction is contrary to this meaning because it creates a condition that was not present in the contract – that is, any and all "that PVA had." In other words, Horan contends that he was not merely granted and conveyed the right to manufacture and duplicate that which he assigned to PVA in 1985. Rather, he maintains that he was granted and conveyed the Software Assets including any and all upgrades, etc. that existed as of March 4, 1997, even those that PVA did not own.

In response, the appellees contend that Horan's interpretation is neither credible nor comports with the plain meaning of the Settlement Agreement. The court agrees. Horan's reading of the Settlement Agreement is overly broad. It would require the appellees to provide Horan with any and all upgrades, etc. of the "Software Assets" that existed anywhere in the universe. The "Software Assets" are defined in the Background section of the Settlement Agreement as "'Elimination Draw Poker' together with the Patent, related copyrights, rules, design, format, system and related hardware" assigned to PVA in 1985. The "Terms and Conditions" establish that PVA granted and conveyed to Horan "all exclusive distribution and all other related rights in and to the Software Assets, including any and all upgrades, updates, modifications, the name and/or new versions." (Defs.' Trial Exh. 24 ¶ 1(a)). The parties' intent is clear from the terms of the Settlement Agreement – PVA agreed to convey to Horan exclusive distribution and related rights in the Software Assets, and any and all upgrades, etc. that PVA had. That is, in order for Horan to receive exclusive distribution and related rights to the Software Assets, PVA had to upgrade, update, modify, or create a new version of the them.[4] Thus, the court concludes that the Bankruptcy Court did not err in its construction/interpretation of the Settlement Agreement.

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[4] Indeed, the pretrial order filed by the parties supports this construction/interpretation:

> Danton agreed that in the event that he or his entity came up with a software program so that he didn't need Holniker, he'd give Horan use of that, to the extent that we changed the game, we would give Horan that also.
>
> The term "Software Assets" as set forth in the "Background" paragraph of the Settlement Agreement included whatever Plaintiff Horan assigned to Defendant PVA in 1985, and to the extent that Defendant PVA, after it received the assignment from Mr. Horan in 1985, either developed or acquired, upgrades, updates or new versions, then Mr. Horan was entitled to their use in connection with his distribution rights pursuant to the Settlement Agreement. (D.I. 135, at 9).

B. The Bankruptcy Court's Finding of No Fraud

Horan next asserts that the Bankruptcy Court erred by failing to find fraud under the plain and unambiguous terms of the Settlement Agreement. Under Delaware law, the elements of fraud consist of: (1) a false representation of material fact; (2) the knowledge or belief that the representation was false, or made with reckless indifference to the truth; (3) the intent to induce another party to act or refrain from acting; (4) justifiable reliance on the representation in the form of action or inaction; and (5) damage ensuing to the other party as a result. *See DRR, LLC v. Sears, Roebuck & Co.*, 949 F. Supp. 1142, 1137 (D. Del. 1996) (citing *Matter of Enstar Corp.*, 593 A.2d 543, 549 (Del. Ch. 1991)). Horan maintains that the appellees committed fraud because (1) the appellees made three material representations in the "Warranty of Ownership"; (2) they knew that these representations were false when made; (3) they made the representations in order to get Horan to sign the Settlement Agreement; (4) Horan relied on the false representations; and (5) they have never produced any software to Horan in accordance with the plain language of the Settlement Agreement.

The court is not persuaded by Horan's assertions. First, Horan's argument is premised on his reading of the Settlement Agreement as requiring PVA to grant and convey "every possible number or specification [of the Software Assets] possible," even those that PVA did not develop or own. According to Horan, the appellees warranted ownership and the ability to grant and convey any and all upgrades, etc. of the Software Assets that exist anywhere in the universe when, in fact, they neither owned the upgrades, etc. nor had the ability to grant and convey them. For example, Horan states that "Danton and VLC denied ownership of any software." (D.I. 11, at 19). Horan also states that the appellees "have consistently asserted that they do not own, nor have the ability to

grant and convey the exclusive right to duplicate and manufacture the Software Assets including any and all upgrades, updates, names and/or new versions." *Id.*

Horan's argument, however, misses the point and mischaracterizes the facts. The appellees did not deny ownership of "any software." Rather, they denied ownership of the software that Holniker developed and owned. In addition, the appellees contended that they did not develop, acquire, or own any upgrades, etc. of the Software Assets that Horan is entitled to under the terms of the Settlement Agreement. They never contended that they did not own or have the ability to grant the Software Assets. Moreover, the "Warranty of Ownership" term is clear on its face. PVA represented that it "has exclusive ownership of the Software Assets and . . . has the authority and power to transfer, convey, assign, sell or grant the exclusive rights to the Software Assets as set forth herein to Horan." (Defs.' Trial Exh. 24). After reviewing the record, the court concludes that PVA had exclusive ownership of the Software Assets and also had the authority and power to transfer, convey, assign, sell or grant the exclusive rights to Horan at the time the Settlement Agreement was executed. The appellees, therefore, did not make any false representations of material fact. As such, Horan has failed to establish a fraud claim and the court adopts the Bankruptcy Court's holding on this issue.

C. The Bankruptcy Court's determination of No Breach

Horan asserts that the Bankruptcy Court erred by failing to find that the appellees breached the Settlement Agreement. Horan's primary argument is again premised on his construction of the Settlement Agreement. He states that "[i]nitially, had the Bankruptcy Court properly construed the Settlement Agreement, it would have reached the conclusion that the representations made in the warranty were a fraud by the Appellees. Equally, these same

misrepresentations amount to a breach of the warranty, and therefore a breach of the contract." (D.I. 11, at 21). This argument is untenable, however, because the court has already determined that the Bankruptcy Court properly construed/interpreted the Settlement Agreement, and that the record did not support a claim of fraud.

Nevertheless, Horan offers further arguments concerning his claim for breach of the Settlement Agreement. First, Horan seems to assert that the appellees breached the Settlement Agreement by failing to grant and convey rights to manufacture and duplicate Amusement World's "new version" of the Software Assets. According to Horan, the appellees had an obligation to obtain a license to permit him to duplicate and manufacture the Amusement World software. The court disagrees. Were the court to read such an obligation into the Settlement Agreement, the appellees would have to determine whether any other person or company has developed software comparable to the Software Assets, then negotiate a license with that person or company to permit Horan to duplicate and manufacture the software. The court cannot find any term in the Settlement Agreement that imposes this obligation on the appellees. Nor has Horan brought any such term to the court's attention. Accordingly, the court concludes that the plain language of the Settlement Agreement does not require the appellees to purchase a license so that Horan can duplicate and manufacture software developed and owned by another person or company.

Horan next asserts that the Appellees, through FEC, developed operational software in 1999, but have not turned the software over to him, thereby breaching the Settlement Agreement. Horan contends that Pierce created a "new version" of the PVA Elimination Draw Poker game for FEC, but was unable to configure the software to any specific hardware because FEC did not provide proper hardware. Horan maintains that this is undisputed evidence that the appellees have breached

the Settlement Agreement. The court is not persuaded. First, as previously discussed, Pierce testified at the trial that his software was a demonstration model and not operational. In addition, James Maida, president of GLI, testified that GLI performed tests on the device submitted by Pierce. The test results showed that Pierce's device was inoperable and that GLI "couldn't get it to first base." (Tr. 42:9-43:7, 62:1-11). Pierce's Elimination Draw Poker software, therefore, is not a new version of the Software Assets.

Lastly, Horan asserts that the appellees breached the Settlement Agreement because they purchased 38 machines from Holniker and Amusement World in 1996. According to Horan, after VLC purchased the machines, it was in possession of upgrades, etc. and he was entitled to duplicate and manufacture them. During the Bankruptcy Court trial, Horan maintained that the software Holniker developed and PVA bought in the 38 machines, for more than $3,600 each, were upgrades of Software Assets, which Horan was entitled to receive. *See* D.I. 11, at 18. Judge McCullough disagreed, stating that Horan's argument wasn't "going to fly." (Tr. 16:21). The court agrees with Judge McCullough. There is no issue as to whether PVA purchased and owned 38 Amusement World machines because the appellees stipulated to this fact during the trial. However, PVA did not (and does not) own the software used to run the machines. The software was developed, manufactured, and owned by Holniker and Amusement World.[5] Thus, PVA did not acquire any upgrades, updates, modifications, names and/or new versions of the Software Assets when it

[5] The record does not contain any evidence that the software was owned by anybody other than Holniker. In fact, Holniker objected to the Settlement Agreement because he "was concerned that Amusement Wold software [would] be construed as being part and party to the [Settlement] [A]greement." (Tr. 330:114-15). However, Horan stated that he was not interested in the Amusement World software. Additionally, Horan and Danton explained that they were not making any claims to the Amusement World software. (Tr. 330:16-20; D.I. 135, at 9).

purchased the Amusement World Machines, or at any other time. The court, therefore, adopts the Bankruptcy Court's holding that the appellees did not breach the Settlement Agreement.

V. CONCLUSION

For the foregoing reasons, the Bankruptcy Court's legal conclusions regarding the construction/interpretation of the Settlement Agreement, fraud, and breach of the Settlement Agreement are affirmed.

Dated: January 27, 2005

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: PROFESSIONAL VIDEO ASSOCIATION, INC., Debtor,	Chapter 11 Adv. Pro. No. 95-016 (PJW)
MICHAEL J HORAN, Appellant, v. WILLIAM DANTON, VIDEO LOTTERY CONSULTANTS, INC. and PROFESSIONAL VIDEO ASSOCIATION, INC., Appellees.	Civil Action No. 01-488 (GMS)

ORDER

For the reasons stated in the court's Memorandum of this same date, IT IS HEREBY ORDERED that:

1. The June 4, 2001 Order by the Bankruptcy Court for the District of Delaware is AFFIRMED.

2. The Clerk shall close this case.

Dated: January 27, 2005

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE