

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ASSOCIATED/ACC INTERNATIONAL, :
LTD., :
 :
Plaintiff/Counterclaim Defendant, :
 :
v. : Civil Action No. 99-803-JJF
 :
DUPONT FLOORING SYSTEMS FRANCHISE :
COMPANY, INC., DUPONT COMMERCIAL :
FLOORING SYSTEMS, INC. and DUPONT :
FLOORING SYSTEMS, INC. :
 :
Defendants/Counterclaim Plaintiffs:

Edmond D. Johnson and Cheryl Siskin, Esquires of THE BAYARD FIRM,
Wilmington, Delaware.
Of Counsel: John T. Morin, Esquire of WORMSER, KIELY, GALEF &
JACOBS, LLP., New York, New York.
Attorneys for Plaintiff.

Richard L. Horwitz and Kevin R. Shannon, Esquires of POTTER,
ANDERSON & CORROON, LLP., Wilmington, Delaware.
Attorney for Defendants.

MEMORANDUM OPINION

January 28, 2003
Wilmington, Delaware

FARNAN, District Judge

Defendants have filed a Motion For The Entry Of Final Order And Judgment And Award Of Attorneys' Fees and Costs. (D.I. 117)

The Response of the Plaintiff, Associated/ACC International, LTD. ("Associated") (D.I. 118) states in paragraphs 3 and 4:

3. Associated certainly does not contest the voluntary dismissal of the defamation counterclaim, and it does not at this time contest DuPont Flooring Systems Franchise Company's entitlement to the \$27,154.95 in damages related to the breach of contract counterclaims. (footnote omitted)

4. Nor, for purposes of this Motion, does Associated (i) contest DuPont Flooring Systems Franchise Company's entitlement to an award of some attorneys' fees and expenses pursuant to Section 22(c) of the Franchise Agreement; (ii) contest the reasonableness of the rates charged by the Defendants' outside counsel, Potter Anderson & Corroon; (iii) claim that the work reflected in the time records appended to the Motion was not done.

Further, in Paragraph 5 of its Response, Associated addresses the objection it does maintain against Defendants' motion:

5. Associated does, however, contest its liability for attorneys' fees and expenses incurred by Potter Anderson & Corroon in representing defendants other than DuPont Flooring Systems Franchise Company and the request for 18% interest on the damage award. (footnote omitted) (D.I. 118 p.2)

Based on the limited nature of Associated's opposition to Defendants' instant motion, the Court will focus on Associated's

two specific objections.

Amount of Attorneys' Fees and Expenses

The Defendants seek the payment of \$388,433.17 for attorneys' fees and costs relating to the instant litigation. Defendants were jointly represented and seek payment of their fees and costs. The Defendants contend that they are entitled to the requested payment because Associated asserted various claims against all three Defendants without distinction. In seeking payment, the Defendants rely on the "Franchise Agreement" which Associated alleged in the instant action all three Defendants either breached or induced a breach of.

In response, Associated contends that it is only obligated to pay the reasonable fees and costs of one Defendant, DuPont Flooring Systems Franchise Company, Inc. ("DFSFC"), which is the only Defendant who was a party to the Franchise Agreement.

Both the Plaintiff and the Defendants argue that Section 22(c) of the Franchise Agreement supports their position. Section 22(c) provides in pertinent part:

In the event of any litigation **between the parties hereto**, the loser in such litigation or the party deemed by the court to be at fault in the dispute between the parties shall pay all expenses incurred by the other party in connection with such litigation, including without limitation attorneys' consultants' and accountants' fees. (Emphasis Added)

I read Section 22(c) to apply only to the parties to the

Franchise Agreement, and therefore, I conclude that Plaintiff need only pay the fees and expenses incurred by DFSFC. In reaching this conclusion, I am not persuaded by the Defendants' contention that they may have saved Plaintiff greater exposure for litigation expenses by all three Defendants using the same law firm in responding to the Plaintiff's claims against the three Defendants. Also, I am not convinced that the Plaintiff's assertion of the same or similar claims against the two Defendants who were not parties to the Franchise Agreement with regard to events closely surrounding the negotiation, execution, and conduct of the Franchise Agreement should extend the coverage of Section 22(c) to those non-parties. In my view, if the entitlement to the payment of attorneys' fees arises out of the Franchise Agreement, the Franchise Agreement controls who may recover litigation expenses.

A more difficult question once DFSFC is determined to be the only Defendant entitled to payment, is what percentage of the claimed attorneys' expenses should be allocated to DFSFC and required to be paid by the Plaintiff. The Plaintiff suggests a 50% allocation of the total fee be made to the representation of DFSFC. The Defendants argue, in essence, that the representation was so intertwined that any allocation would be arbitrary and thus unfair to the Defendants.

I suppose a somewhat arbitrary but explainable allocation

could be to divide the total fee claimed by three and order the Plaintiff to pay according to a three (3) way allocation.

However, I find that the majority of the claims made by the Plaintiff focused on the alleged failures of DFSFC to perform pursuant to the terms of the Franchise Agreement. Thus, I find that 2/3 of the defense required to respond to the Plaintiff's allegations related to the actions of DFSFC. For this reason, I conclude that pursuant to Section 22(c) of the Franchise Agreement DFSFC is entitled to recover 2/3 of the total attorneys' expenses claimed by the Defendants.

The 18% Interest Rate

On the interest rate issue, I conclude that a plain reading of the Franchise Agreement resolves the interest rate dispute. Specifically, I conclude that Section 5(d) of the Agreement provides that the parties to the Agreement agree to pay interest on amounts due under the Agreement at a rate of 18%. In sum, I agree with the Defendants that because the Franchise Agreement sets an interest rate on unpaid obligations, the provisions of the cited Delaware statutes are not applicable.

An appropriate Order will be entered.

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 COMPANY, INC., DUPONT COMMERCIAL :
 FLOORING SYSTEMS, INC. and DUPONT :
 FLOORING SYSTEMS, INC. :
 :
 Defendants. :

FINAL JUDGMENT ORDER

For the reasons set forth in the Court's Memorandum
Opinion issued this date;

IT IS HEREBY ORDERED that:

1) Defendants' Motion For The Entry Of Final Order And
Judgment And Award Of Attorneys' Fees And Costs (D.I. 117) is
GRANTED ;

2) For the reasons set forth in the Court's Memorandum
Opinion and Order (D.I. 115, 116) dated March 28, 2002, summary
judgment is entered in favor of the Defendants and against the
Plaintiff with regard to all claims asserted by the Plaintiff;

3) For the reasons set forth in the Court's Memorandum
Opinion and Order (D.I. 115, 116) dated March 28, 2002, summary
judgment is entered in favor of the Defendants with regard to
their counterclaims for breach of contract against the Plaintiff,
and Defendants are awarded damages of \$27, 154.95, plus interest

at a rate of eighteen percent (18%) per annum;

4) Defendants' Counterclaim for Defamation is dismissed; and

5) The Defendants are awarded two-thirds ($\frac{2}{3}$) of the attorneys' fees and costs claimed.

January 28, 2003
DATE

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE