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Order on Plaintiffs' and Third-Party Defendants' Motion for Partial Summary Judgment on PRG's Claims for Lost Profits (PAYLESS CAR RENTAL SYSTEMS, INC.)

Alice D. Bonner
Superior Court of Fulton County

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Recommended Citation
Bonner, Alice D., "Order on Plaintiffs' and Third-Party Defendants' Motion for Partial Summary Judgment on PRG's Claims for Lost Profits (PAYLESS CAR RENTAL SYSTEMS, INC.)" (2010). *Georgia Business Court Opinions.* Paper 52.
http://scholarworks.gsu.edu/col_businesscourt/52

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IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

PAYLESS CAR RENTAL SYSTEMS, INC. and L & S VEHICLE LEASING, INC.,	)(	
Plaintiffs,	)(	
v.	)(	Civil Action File No. 2007CV129218
PRG GROUP, LLC and ANTHONY ELKIK,	)(	
Defendants.	)(	
PRG GROUP, LLC,	)(	
Third-Party Plaintiff,	)(	
v.	)(	
ORLIN, INC. and ATLIN, INC.,	)(	
Third-Party Defendants.	)(	

FILED IN OFFICE
JAN 07 2010
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON PLAINTIFFS' AND THIRD-PARTY DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PRG'S CLAIMS FOR LOST PROFITS

On November 18, 2009, counsel appeared before the Court to present argument on Plaintiffs' and Third-Party Defendants' Motion for Partial Summary Judgment on PRG's Claims for Lost Profits. After hearing the arguments made by counsel, reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows.

Defendant PRG Group, LLC ("PRG") and Plaintiff Payless Car Rental Systems, Inc. ("Payless") entered into a Franchise Agreement ("FA") in August 2006. PRG has asserted a counterclaim against Payless for breach of the FA and for breach of the implied duty of good faith and fair dealing. PRG alleges that Payless breached the FA

by occasionally failing to list the Atlanta airport store on the Payless reservation system and by failing to provide PRG with any meaningful consultation or assistance in operating its Payless franchise.

PRG has also asserted third-party claims against two of Payless's affiliates for breach of an asset purchase agreement ("APA") claiming that the Third-party Defendants failed to provide 300 vehicles to PRG as required by the APA. PRG also alleges breach of the implied duty of good faith and fair dealing as to the APA and negligent misrepresentation by Payless and Third-Party Defendants ("Movants").

Movants have filed a separate motion for summary judgment attacking the merits of PRG's counterclaims and third-party claims. However, Movants filed this motion to argue that PRG is really seeking lost profits as damages for its counterclaims and third-party claims and that PRG's claims for lost profits must be dismissed as a matter of law.

The parties engaged in significant briefing regarding the law to govern the question of whether PRG may recover for business losses as a result of Movants' alleged breaches of contract. Choice of law provisions in both the FA and the APA provide that those contracts will be governed by Florida law. Despite these contractual provisions, Movants argue that Georgia law should control the issue of PRG's damages under the rules of lex loci contractus and lex fori.

The rule of lex loci contractus controls all substantive matters, such as the nature, construction and interpretation of contracts, while the rule of lex fori controls all matters affecting only the remedy, such as rules of evidence, methods of shifting the burden of proof, and the presumptions arising from given states of fact. Menendez v.

Perishable Distributors, Inc., 254 Ga. 300 (1985). The Court finds that issues regarding damages are substantive because damages are an essential element of a claim for breach of contract under Georgia law. See, e.g., Kuritzky v. Emory University, 294 Ga. App. 370 (2008). In Kuritzky, the Court of Appeals noted that the elements for a breach of contract claim in Georgia are "(1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." Id. at 371. The Court also finds that the parties agreed that Florida law would govern their agreement, and there is no reason to set aside the bargained-for choice of law provision in the FA and the APA. Accordingly, the Court finds that Florida law controls the issue of damages and allows for the recovery of damages that PRG seeks. W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd., 545 So.2d 1348, 1350-51 (1989) ("if there is a 'yardstick' by which prospective profits can be measured, they will be allowed if proven... [A] business can recover lost prospective profits regardless of whether it is established or has any 'track record.'").

Even if Georgia law were to apply, the Court finds that PRG is entitled to present evidence to a jury to establish damages based on loss of business opportunity. O.C.G.A. § 13-6-2 provides that "damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable result of its breach." Movants provision of up to 300 cars to PRG was based on an understanding that PRG would use those cars in its car rental business so that PRG's inability to rent those cars would be a probable result contemplated by the parties of Movants' alleged breach in failing to deliver the promised cars. Likewise loss of rental

opportunities would also be a probably result of Movants' failure to assist PRG as promised in the FA. While requiring proof and explanation, and while subject to the rigors of cross examination and the rules of evidence, the Court finds that the damages PRG seeks could "be proved with reasonable certainty." Graham Bros.' Const. Co., Inc. v. C. W. Matthews Contracting Co., Inc.,159 Ga. App. 546 (1981).

Accordingly, Payless and Third-Party Defendants' Motion for Partial Summary Judgment on Defendant PRG Group's Claims for Lost Profits is hereby **DENIED**.

SO ORDERED this 7 day of January, 2010.

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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