NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-10-1006-JuMkKi
FIRST MAGNUS FINANCIAL CORPORATION,	Bk. No. 07-01578-JMM
Debtor.	Adv. No. 09-00381-JMM
WNS NORTH AMERICA, INC.,	M E M O R A N D U M[1]
Appellant,	
v.	
MORRIS C. AARON, Liquidating Trustee for the First Magnus Liquidating Trust,	
Appellee.	

Argued June 18, 2010 and Submitted on July 2, 2010
at Phoenix, Arizona

Filed - August 31, 2010

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Chief Bankruptcy Judge, Presiding

Before: JURY, MARKELL, and KIRSCHER Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Appellant WNS North America, Inc. ("WNS") filed a proof of claim for $11,679,282.15 in First Magnus Financial Corporation's Chapter 11 case.[2] The claim was for lost profit damages that arose from debtor's rejection of several agreements between the parties, including the Master Services Agreement ("MSA") and Master Services Agreement Amendment ("MSAA"), which resulted in a breach of those agreements under § 365(g).

Appellee Morris C. Aaron, the liquidating trustee ("Trustee") for the First Magnus Liquidating Trust, filed an adversary complaint against WNS objecting to its proof of claim, alleging that lost profit damages were excluded under Section 8.2 (the damage limitation provision) of the MSA ("Section 8.2"). On the parties' cross-motions for summary judgment, the bankruptcy court agreed with the Trustee and disallowed WNS's claim in its entirety.[3]

We conclude that WNS asserted a general damage claim for lost profits which was not the type of damages referred to in Section 8.2. Accordingly, we REVERSE and VACATE the court's judgment and REMAND for proceedings consistent with this decision.

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[3] The Trustee also sought subordination of WNS's claim under § 510(b) if any portion of it was allowed. Because of its ruling, the court did not reach the subordination issue or other issues raised by the parties.

I. FACTS

Debtor was in the business of originating, purchasing and selling residential mortgage loans to investors in a secondary market. The investors bundled the loans into mortgage-backed securities, which were themselves sold in the market.

To operate its business, debtor outsourced information technology and business management services to Trinity Partners Incorporated ("TPI"). Debtor and an affiliate — First Magnus Consulting LLC — owned fifty percent of TPI. TPI conducted its business in India through its wholly-owned Indian subsidiary, Trinity Business Process Management Private Limited ("Trinity"). The bulk of TPI's and Trinity's business was devoted to servicing debtor.

In December 2003, TPI and debtor entered into the MSA and several service orders (the "Service Orders"). Under the MSA and Service Orders, Trinity, through TPI, provided debtor with various information technology and business process management services.

On November 8, 2005, WNS (Holdings) Limited ("WNS Holdings"),[4] the parent company of appellant, WNS, entered into a stock purchase agreement with debtor, First Magnus Consulting, LLC, TPI and Trinity. In consideration for WNS Holdings' purchase of TPI's stock, WNS Holdings sought assurances from debtor that it would continue doing business with TPI in the

[4] WNS Holdings was an Indian-based company which also engaged in business process outsourcing.

future. Accordingly, prior to the closing, debtor and TPI entered into the MSAA, dated November 16, 2005.

The MSAA stated in Recital (C) that the parties "agreed to amend the Master Services Agreement upon the terms and subject to the conditions specified herein." In Definitional Section 1.1, the MSAA stated "[a]ll capitalized terms mentioned herein, unless specifically defined herein, shall have the same meaning assigned to such terms in the Master Services Agreement." Section 2 of the MSAA set forth amendments to the MSA, by specific reference, deleting and replacing the original MSA terms. Section 2 of MSAA did not amend Section 8.2.

The MSAA also added new obligations. Section 3, entitled "Guaranteed Minimum Business Commitment" (the "Business Commitment"), required debtor to guarantee to TPI a minimum amount of business providing not less than $60 million in revenues from November 1, 2005, until the end of financial year 2010-2011. Also added was Section 4, entitled "First Right of Refusal" which required debtor to look first to TPI for all of its outsourcing work until March 31, 2008.

The parties confirmed in Section 7 of the MSAA that debtor was aware of the stock purchase agreement between TPI and WNS Holdings and that TPI would become a wholly-owned subsidiary of, and be subject to the control and management of WNS Holdings. Finally, the parties agreed in Section 7 that, "except as amended hereby, the Master Services Agreement shall continue in full force and effect in accordance with the terms thereof."

By August of 2007, the secondary markets for residential mortgage loans and mortgage-backed securities evaporated. Debtor was unable to fulfill its Business Commitment to TPI (and therefore WNS) and eventually had to close its doors.

On August 21, 2007, debtor filed its chapter 11 petition. WNS moved to compel debtor to assume or reject the MSA, MSAA and related Service Orders on the ground that they were executory contracts under § 365. Debtor did not oppose and the court entered an order authorizing debtor to reject the MSA, the MSAA and related agreements on November 15, 2007.

On January 4, 2008, WNS filed its proof of claim for $11,697,282.15 in lost profit damages. WNS asserted that its claim was due to debtor's rejection of the MSAA, which gave rise to a breach of the Business Commitment provision under § 365(g).[5]

On February 28, 2008, the bankruptcy court confirmed debtor's Second Amended Plan of Liquidation dated January 4, 2008. The Effective Date of the Plan occurred on May 1, 2008 and, pursuant to the confirmation order and the plan, the liquidating trust was deemed established and Aaron was appointed the Trustee.

[5] Section 365(g) provides that the rejection of an executory contract constitutes a breach of the contract. § 365(g). The measure of damages for breach of an executory contract is determined by reference to state law so long as the result is not inconsistent with federal bankruptcy policy. Dunkley v. Rega Props., Ltd. (In re Rega Props., Ltd.), 894 F.2d 1136, 1139 (9th Cir. 1990).

On April 10, 2009, the Trustee filed the adversary complaint against WNS objecting to its proof of claim on various grounds. The complaint alleged in paragraph 34 that WNS's claim was barred under Section 8.2 as a matter of law.

On September 22, 2009, WNS moved for summary judgment, arguing, among other things, that its claim was based on the Business Commitment provision in the MSAA, which was not an amendment to, or otherwise incorporated into, the MSA. On October 22, 2009, the Trustee filed an opposition and cross-motion for summary judgment contending, among other things, that Section 8.2 compelled the disallowance of WNS's claim in its entirety.

On December 9, 2009, the court issued its Memorandum Decision re Cross Motion for Summary Judgment, finding that under Section 8.2, the parties agreed to limit damages if there was a breach and specifically agreed that lost profits were not a compensable item of damages. The bankruptcy court entered its order granting summary judgment for the Trustee and disallowing WNS's claim in its entirety on December 30, 2009. WNS timely appealed.

At oral argument, we sua sponte raised the issue whether Section 8.2 applied to a claim for expectancy, or general, damages for lost profits.[6] Since neither party had raised or

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[6] We may sua sponte consider points not presented to the bankruptcy court and not even raised on appeal by any party if necessary to reach the correct result.

(continued...)

briefed the issue, we issued an Order Directing Supplemental Briefing on June 22, 2010, inviting the parties to address the issue. WNS filed a supplemental brief, but the Trustee did not.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Whether the court erred in granting summary judgment for the Trustee on the ground that Section 8.2 barred WNS's claim for lost profit damages.

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[6](...continued)

> There is, . . . , no rigid and undeviating judicially declared practice under which courts of review invariably and under all circumstances decline to consider all questions which have not previously been specifically urged. Indeed there could not be without doing violence to the statutes which give federal appellate courts the power to modify, reverse or remand decisions 'as may be just under the circumstances.'

K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 475 (9th Cir. 1974) (citing 28 U.S.C. § 2106); see also Oyama v. Sheehan (In re Sheehan), 253 F.3d 509, 518 (9th Cir. 2001) (stating court may occasionally address issues not raised on appeal where proper resolution is beyond doubt and the failure to address the issue would result in a miscarriage of justice). Moreover, we observe that the new issue we raised is purely one of law and depends neither on a factual record developed below nor requires the introduction of further evidence. Here, the parties received ample notice of the issue and were given an opportunity to present their respective positions. See Id.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's decision to grant a motion for summary judgment de novo. Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com), 504 F.3d 775, 783 (9th Cir. 2007).

We review a bankruptcy court's legal conclusions and application of state law de novo. Circle K Corp. v. Collins (In re Circle K Corp.), 98 F.3d 484, 486 (9th Cir. 1996).

V. DISCUSSION

In reviewing the bankruptcy court's decision on a motion for summary judgment, we apply the same standards as the bankruptcy court. We must determine whether the record shows that "there is no genuine material issue of fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).[7] When the evidence shows no genuine issues of material fact in dispute, the burden shifts to the opposing party to demonstrate, by affidavits or otherwise, that there are genuine issues of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e)(2).

The resolution of this appeal turns on the interpretation of the MSA and MSAA. Under Delaware law, "questions concerning the interpretation of contracts are questions of law." Paul v. Deloitte & Touche, LLP, 974 A.2d 140, 145 (Del. 2009).[8] When

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[7] Rule 7056 incorporates Fed. R. Civ. P. 56.

[8] Section 10.4 of the MSA states that it is governed by (continued...)

interpreting a contract Delaware courts give priority to the parties' intent. Id. To determine the parties' intent, the court examines the contractual language and "interprets clear and unambiguous terms according to their ordinary and usual meaning." Id.; see also RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a)(1981) ("Unless a different intention is manifested, . . . where language has a generally prevailing meaning, it is interpreted in accordance with that meaning."). "If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity." Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1987).

As explained below, we see no ambiguity in the MSA or MSAA.

A. Section 3 of the MSAA and Section 8.2 of the MSA Are Not Inconsistent

In its opening brief, WNS asserted that the Business Commitment provision in the MSAA supercedes Section 8.2 due to their inconsistency.

RESTATEMENT (SECOND) OF CONTRACTS § 213 provides in relevant part:

> (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
> . . . .

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[8](...continued)
Delaware law. The MSAA provides no controverting provision. Although the choice of law is Delaware, the Trustee has cited Arizona case law in his pleadings. WNS concedes that application of Delaware law, Arizona law or the RESTATEMENT (SECOND) CONTRACTS yields the same result under the circumstances here. We agree.

Before addressing whether the two provisions are inconsistent, we consider whether the MSAA was a binding integrated agreement.

> Where the parties reduce an agreement to writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

RESTATEMENT (SECOND) OF CONTRACTS § 209(3)(1981). A "document in the form of a written contract, signed by both parties and apparently complete on its face, may be decisive of the issue [of integration] in the absence of credible contrary evidence." RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. b (1981).

WNS advances several reasons why we should conclude that the MSAA is a stand-alone fully-integrated document. First, WNS contends that the MSAA has all of the "structural" components of a complete agreement – recitals, acknowledgment of receipt and sufficiency of exchanged good and valuable consideration and a statement that the parties agree as to the specific operative sections. Next, WNS points out that there is no statement providing for the incorporation of any terms of the MSA into the MSAA. Third, WNS argues that the terms of Section 2.1 of the MSAA exclude any possible inference that any general amalgamation was intended. This section provides that in the event of a conflict or inconsistency between the terms of the MSAA and any Service Order, the terms in the MSAA shall govern.

We are unpersuaded by WNS's arguments. The plain language of the MSAA shows that the parties agreed the MSA, except as amended in the MSAA, was to remain in "full force and effect" in

accordance with its terms. See Section 7 of the MSAA. We conclude the MSAA did not purport to express, to the exclusion of all provisions under the MSA, the overall intent of the parties. Therefore, the MSAA was not a binding integrated agreement and the parties' contractual obligations were defined by both the MSA and MSAA. WNS was thus bound by Section 8.2 which was not amended by the MSAA.

Moreover, we do not perceive any inconsistency between the Business Commitment provision in the MSAA and Section 8.2 in the MSA. Each provision has a distinct and independent purpose and function. The Business Commitment provision does not cover the same subject matter as Section 8.2; the former setting forth the minimum business commitment over a certain time frame while Section 8.2 is a damage limitation provision. Because the provisions do not contradict one another, both apply. Thus, the remaining question is whether WNS's claim for lost profit damages is limited by the plain language in Section 8.2.

B. Interpretation of Section 8.2 of the MSA

"Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will . . . put him in as good a position as he would have been in had the contract been performed." RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (1981); Duncan v Theratx, Inc., 775 A.2d 1019, 1022 (Del. 2001).

RESTATEMENT (SECOND) OF CONTRACTS § 347, entitled "Measure of Damages In General" states:

> Subject to the limitations stated in §§ 350-53[9], the injured party has a right to damages based on his expectation interest as measured by
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> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
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> (b) any other loss, including incidental or consequential loss, caused by the breach, less
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> (c) any cost or other loss that he has avoided by not having to perform.

WNS calculated its damage claim for lost profits by estimating its revenue from sales had debtor performed under the Business Commitment provision and subtracting from that amount the expenses it anticipated during the remaining time period.

Whether WNS's claim for lost profit damages is the type of damage claim that falls within the scope of Section 8.2 is a question of law. Paul, 974 A.2d at 145. Section 8.2, entitled "Damages and Exclusions and Limitations", provides:

> Except as expressly provided in this section, in no event shall either Party be liable or responsible to

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[9] Damages under § 347 of the Restatement are subject to the limitations of avoidability, uncertainty, or loss due to emotional disturbance. See RESTATEMENT (SECOND) CONTRACTS §§ 350-53. We do not address any of these limitations in this appeal. Our Order Directing Supplemental Briefing requested the parties to address the narrow issue whether expectation interest damages (or general damages) fell within the plain meaning of Section 8.2. Accordingly, whether any of the limitations apply is beyond the scope of our request for supplemental briefing and the issue we address in this appeal. Our holding does not prevent the bankruptcy court from reaching the issue whether WNS's expectation interest for damages was subject to any of these limitations.

> the other for any type of incidental, punitive, indirect, special or consequential damages, including, but not limited to, . . . lost profits, . .whether arising under theory of contract, tort (including negligence) strict liability or otherwise.

The plain language of Section 8.2 unambiguously restricts damages from lost profits in the context of incidental, punitive, indirect, special or consequential damages.

WNS's claim neither seeks nor includes incidental, punitive, indirect or special damages.[10] See Paul, 974 A.2d at 145 (Delaware courts interpret clear and unambiguous terms according to their ordinary and usual meaning). Further, WNS's claim for lost profits does not include losses based on consequential damages. RESTATEMENT (SECOND) OF CONTRACTS § 347(a) sets forth the calculation for the measure of damages arising from breach of contract, separating general damages for loss of value in subsection (a) from consequential damages in subsection (b). Therefore, a party's expectancy, or general damages, for loss of value due to a breach is a separate category of damages and legally distinct from consequential damages.

> General damages are considered to include those damages that flow naturally from a breach, that is, damages that would follow any breach of similar character in the usual course of events. Such damages are said to be the proximate result of a breach, and are sometimes called 'loss of bargain' damages, because they reflect a failure on the part of the defendant to live up to

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[10] Incidental damages relate to losses reasonably associated with or related to actual damages; punitive damages are those awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; and special damages are those alleged to have been sustained in the circumstances of a particular wrong. BLACK'S LAW DICTIONARY (8th ed. 2004).

> the bargain it made, or a failure of the promised performance itself.
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> Consequential damages, on the other hand, include those damages that, although not an invariable result of every breach of this sort, were reasonably foreseeable or contemplated by the parties at the time the contract was entered into as a probable result of a breach. These, too, must be proximately caused by the breach, and the difference is that they do not always follow a breach of this particular character. Thus, for example, although lost profits often result from a failure to deliver goods that have been contracted for, and therefore are proximately caused by the breach, they do not always flow from such a breach; whether they are recoverable in a particular case depends on whether they are the proximate result of the breach and whether they were foreseeable.

R. Lord, 24 Williston on Contracts § 64:12 (4th ed. 2010); see also Teitz v. Virginia Elec. Power Co. (In re Buffalo Coal Co.), 424 B.R. 738, 745 (Bankr. N.D. Va. 2010) (recognizing distinction between seller's loss of profit related directly to the non-performance of the primary contract and loss of profit that occurs when the defendant's breach of a sale contract causes the plaintiff to lose profit on third party, unrelated contracts).

Given the distinction between general damages for lost profits and consequential damages for lost profits, we are persuaded that WNS's claim, which was based on a calculation of the actual and direct loss of anticipated, and contracted for, profits arising directly from debtor's breach of the Business Commitment provision, was for general damages not within the scope of Section 8.2. Further support for our conclusion that Section 8.2 does not include a claim for general damages for lost profits is evidenced by decisions in other jurisdictions that have construed language almost identical to that in Section 8.2

as pertaining only to consequential damages for lost profits. Penncro Assocs., Inc. v. Sprint Spectrum, L.P., 499 F.3d 1151 (10th Cir. 2007) (interpreting similar damage limitation clause as forbidding recovery of lost profits related only to consequential damages); Coremetrics, Inc. v. Atomic Park.com, LLC, 2005 WL 3310093, at *4 (N.D. Cal. Dec.7, 2005) (finding reasonable reading of damage limitation clause barred recovery only of indirect damages, of which lost profits is just one of several possible measures).

The Trustee asks us to read Section 8.2 as barring a damage claim for lost profits as a whole, but that interpretation would leave WNS without a remedy for breach of the Business Commitment provision. Further, it is not reasonable to interpret Section 8.2 to include a general damage claim for lost profits when WNS paid debtor and its affiliate twenty-two million for TPI with the expectation that it would be earning profits under the Business Commitment provision. Although the parties were free to shape their remedies, the plain language of Section 8.2 does not provide the Trustee with a means to avoid WNS's general damage claim for lost profits.

We do not reach any of the other issues or theories the parties raised in their respective motions for summary judgment regarding the subordination of WNS's claim or its validity or amount. Therefore, on remand, either party may renew their motion for summary judgment on those or other issues.

VI. CONCLUSION

For the reasons stated above, we REVERSE and VACATE the bankruptcy court's judgment and REMAND for proceedings consistent with this decision.