

AUG 31 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No. AZ-10-1006-JuMkKi
)	
7	FIRST MAGNUS FINANCIAL)	Bk. No. 07-01578-JMM
	CORPORATION,)	
8)	Adv. No. 09-00381-JMM
	Debtor.)	
9	_____)	
10	WNS NORTH AMERICA, INC.,)	M E M O R A N D U M ¹
)	
11	Appellant,)	
)	
12	v.)	
)	
13	MORRIS C. AARON, Liquidating)	
	Trustee for the First Magnus)	
14	Liquidating Trust,)	
)	
15	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.

¹This 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.

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

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

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

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22
23 ²Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

25 ³The Trustee also sought subordination of WNS's claim under
26 § 510(b) if any portion of it was allowed. Because of its
27 ruling, the court did not reach the subordination issue or other
issues raised by the parties.

1 I. FACTS

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

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

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

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

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

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

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

12 The MSAA also added new obligations. Section 3, entitled
13 "Guaranteed Minimum Business Commitment" (the "Business
14 Commitment"), required debtor to guarantee to TPI a minimum
15 amount of business providing not less than \$60 million in
16 revenues from November 1, 2005, until the end of financial year
17 2010-2011. Also added was Section 4, entitled "First Right of
18 Refusal" which required debtor to look first to TPI for all of
19 its outsourcing work until March 31, 2008.

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

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

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

11 On January 4, 2008, WNS filed its proof of claim for
12 \$11,697,282.15 in lost profit damages. WNS asserted that its
13 claim was due to debtor's rejection of the MSAA, which gave rise
14 to a breach of the Business Commitment provision under § 365(g).⁵

15 On February 28, 2008, the bankruptcy court confirmed
16 debtor's Second Amended Plan of Liquidation dated January 4,
17 2008. The Effective Date of the Plan occurred on May 1, 2008
18 and, pursuant to the confirmation order and the plan, the
19 liquidating trust was deemed established and Aaron was appointed
20 the Trustee.

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

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

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

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

21 At oral argument, we sua sponte raised the issue whether
22 Section 8.2 applied to a claim for expectancy, or general,
23 damages for lost profits.⁶ Since neither party had raised or
24

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

(continued...)

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

4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
6 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.
7 § 158.

8 **III. ISSUE**

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

15 ⁶(...continued)

16 There is, . . . , no rigid and undeviating judicially
17 declared practice under which courts of review
18 invariably and under all circumstances decline to
19 consider all questions which have not previously been
20 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.'

21 K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 475 (9th Cir. 1974)
22 (citing 28 U.S.C. § 2106); see also Oyama v. Sheehan (In re
23 Sheehan), 253 F.3d 509, 518 (9th Cir. 2001) (stating court may
24 occasionally address issues not raised on appeal where proper
25 resolution is beyond doubt and the failure to address the issue
26 would result in a miscarriage of justice). Moreover, we observe
27 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.

1 interpreting a contract Delaware courts give priority to the
2 parties' intent. Id. To determine the parties' intent, the
3 court examines the contractual language and "interprets clear and
4 unambiguous terms according to their ordinary and usual meaning."
5 Id.; see also RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a)(1981)
6 ("Unless a different intention is manifested, . . . where
7 language has a generally prevailing meaning, it is interpreted in
8 accordance with that meaning."). "If a contract is unambiguous,
9 extrinsic evidence may not be used to interpret the intent of the
10 parties, to vary the terms of the contract or to create an
11 ambiguity." Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.,
12 702 A.2d 1228, 1232 (Del. 1987).

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

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

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

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

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

24

24 ⁸(...continued)

25 Delaware law. The MSAA provides no controverting provision.
26 Although the choice of law is Delaware, the Trustee has cited
27 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.

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

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

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

13 RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. b (1981).

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

27 We are unpersuaded by WNS's arguments. The plain language
28 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

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

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

18 **B. Interpretation of Section 8.2 of the MSA**

19 "Contract damages are ordinarily based on the injured
20 party's expectation interest and are intended to give him the
21 benefit of his bargain by awarding him a sum of money that will
22 . . . put him in as good a position as he would have been in had
23 the contract been performed." RESTATEMENT (SECOND) OF CONTRACTS § 347
24 cmt. a (1981); Duncan v Theratx, Inc., 775 A.2d 1019, 1022 (Del.
25 2001).

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

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

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

19 General damages are considered to include those damages
20 that flow naturally from a breach, that is, damages
21 that would follow any breach of similar character in
22 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

24 ¹⁰ Incidental damages relate to losses reasonably associated
25 with or related to actual damages; punitive damages are those
26 awarded in addition to actual damages when the defendant acted
27 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).

1 the bargain it made, or a failure of the promised
2 performance itself.

3 Consequential damages, on the other hand, include those
4 damages that, although not an invariable result of
5 every breach of this sort, were reasonably foreseeable
6 or contemplated by the parties at the time the contract
7 was entered into as a probable result of a breach.
8 These, too, must be proximately caused by the breach,
9 and the difference is that they do not always follow a
10 breach of this particular character. Thus, for
11 example, although lost profits often result from a
12 failure to deliver goods that have been contracted for,
13 and therefore are proximately caused by the breach,
14 they do not always flow from such a breach; whether
15 they are recoverable in a particular case depends on
16 whether they are the proximate result of the breach and
17 whether they were foreseeable.

18 R. Lord, 24 Williston on Contracts § 64:12 (4th ed. 2010); see
19 also Teitz v. Virginia Elec. Power Co. (In re Buffalo Coal Co.),
20 424 B.R. 738, 745 (Bankr. N.D. Va. 2010) (recognizing distinction
21 between seller's loss of profit related directly to the non-
22 performance of the primary contract and loss of profit that
23 occurs when the defendant's breach of a sale contract causes the
24 plaintiff to lose profit on third party, unrelated contracts).

25 Given the distinction between general damages for lost
26 profits and consequential damages for lost profits, we are
27 persuaded that WNS's claim, which was based on a calculation of
28 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

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

10 The Trustee asks us to read Section 8.2 as barring a damage
11 claim for lost profits as a whole, but that interpretation would
12 leave WNS without a remedy for breach of the Business Commitment
13 provision. Further, it is not reasonable to interpret Section
14 8.2 to include a general damage claim for lost profits when WNS
15 paid debtor and its affiliate twenty-two million for TPI with the
16 expectation that it would be earning profits under the Business
17 Commitment provision. Although the parties were free to shape
18 their remedies, the plain language of Section 8.2 does not
19 provide the Trustee with a means to avoid WNS's general damage
20 claim for lost profits.

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

1 **VI. CONCLUSION**

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

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