AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Case Number: 01-19-0000-0256

Rita's Franchise Company, LLC (Claimant)
-vs-
Velicer Ice Kent, LLC; Velicer Ice Corporation, Velicer Ice Mariners, LLC and Mark Velicer (Respondents)

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreements entered into between the above-named parties and dated September 10, 2015, and having been duly sworn, and having duly heard the proofs and allegations of the Claimant, represented by J. Manly Parks, Esq. and William Shotzbarger, Esq., of Duane Morris, LLP, and Aaron-Michael Sapp, Esq., of Cheng Cohen, LLP, and Respondents, represented by Michael Duffy, Esq., of Mitts Law, LLC, and Richard L. Rosen, Esq., Avi Strauss, Esq., Shmuel Winiarz, Esq., Leonard Salis, Esq., and John A. Karol, Esq., of The Richard L. Rosen Law Firm, PLLC, hereby AWARD as follows:

An Evidentiary Hearing in the above matter was conducted from August 24, 2020 through September 4, 2020. The parties had a full and fair opportunity to present evidence in support of the claims and counterclaims filed in this matter. Thereafter, the parties filed Post Hearing Briefs and Reply Briefs. The following Award is prepared following the arbitrator's deliberation.

The credible facts support that Respondent/Counter Claimant Mark Velicer, through various legal entities formed Velicer Ice Kent, LLC, Velicer Ice Corporation, Velicer Ice Mariners, LLC ("Velicer"). Velicer conducted a period of due diligence in determining whether to proceed with a franchise opportunity in the Rita's Business network. Ultimately, Velicer did proceed with the Franchise opportunity on September 10, 2015 through execution of an Area Developer Agreement ("ADA"); and Kent Franchise Agreement ("FA"). Mr. Velicer also Executed an Express Unit Addendum to the Rita's Water Ice Franchise Company, LLC franchise agreement on December 29, 2016; this was also known as the Mariners Franchise Agreement. Each of these agreements was entered with a different corporate entity than Claimant. For clarity, the agreements with Velicer for the Rita's franchise opportunity were with Rita's Water Ice Franchise Company, LLC ("RWIFC"). Velicer asserts that the Clamant is responsible for the alleged wrongful acts of RWIFC under the theory of successor liability.

Successor Liability Issue

Claimant, Rita's Franchise Company, LLC ("RFC") acquired the assets of RWIFC as outlined in an Asset Purchase Agreement ("APA") executed on December 30, 2016. This acquisition included area development and franchise agreements contained in the contracts with Respondents. Specifically, the contracts were for an ADA and FA in Washington State. Claimant's argument on this point is that they acquired only the assets of the contracts. Claimant argued that Respondents were required to honor their obligations under the contract going forward and any action or breach of the ADA, FA or Addendum to the FA occurring prior to the APA effective date of December 30, 2016 was not their responsibility. Respondents argue that the APA amounted to merely a mechanism to permit a continuation of the organization (e.g. through De Facto merger, sham transaction, or other legal theory leading to successor liability), while shedding liability exposure for actions that occurred prior to the effective date of the APA. The parties presented evidence and extensive legal argument on this point in the form of Motions for Summary Judgment, testimony, exhibits and briefing throughout the arbitration process. The Motions for Summary Judgment were denied by the Arbitrator, as issues of fact were presented by the cross filings of the parties. The factual issues have now been resolved at the arbitration and, therefore, this seminal issue of successor liability will be addressed.

Claimant argued that the APA was a clear asset purchase and only involved acquisition of liabilities to the extent specifically outlined and delineated in the APA. Claimant presented documentation and testimony supporting their position on this point. Respondents argued that the actions of the parties to the APA and their respective employees and owners indicate the asset purchase transaction was not exclusively an asset purchase, but rather, was a merger of the entities, thereby exposing the successor entity to liability exposure for the acts of the predecessor.

The salient facts on this issue must be reviewed to determine if the APA was, as Claimant argues, strictly an asset purchase

Claimant offered Jeffrey Harris as an expert in asset purchase transactions and successor liability. He outlined a number of factors that aided in his evaluation and ultimate conclusion that the subject agreement was an asset purchase. The factors included, but were not limited to, the following:

1- There was extensive negotiation by Buyer (referenced as "New Rita's") and Seller (referenced as "Old Rita's");
2- The APA contained very specific allocation of assets and liabilities;
3- The APA clearly identified the purchased assets and assumed liabilities;
4- The Excluded Assets and Retained Liabilities were also outlined with a clear statement that New Rita's was not assuming breach of contract claims for breach occurring on or before closing date of the APA, December 30, 2016.

These factors were among the most critical for analysis of the transaction and led Jeffrey Harris to the following opinions:

1- The Velicer claims are Retained Liabilities under the APA and therefore remain the responsibility of Old Rita's ("Seller"), not New Rita's ("Purchaser") under the APA;
2- There was no implicit assumption of liabilities by New Rita's;
3- No De Facto merger occurred;
4- New Rita's was not a mere continuation of Old Rita's;
5- The APA and transaction was not a sham transaction as evidenced by numerous factors, including, significant due diligence performed, highly qualified law firms involved in the negotiation and analysis, and significant financial cost for completion of due diligence and final closure of the arm's length transaction.

The testimony of Jeffrey Harris was thorough, comprehensive and this arbitrator found it to be highly credible.

Respondents offered the testimony of William Purcell as an expert in Business Finance and Transactions. Mr. Purcell opined that the terms equity and ownership are, in essence interchangeable in evaluating ownership and that the profit interest incentive plan of Old Rita's continued in some form for New Rita's. His testimony was proffered by Respondents to support the proposition that the APA transaction was a mere continuation of the business enterprise and, according to Respondents, evidenced the merger or continuation of the enterprise by New Rita's. Overall, the arbitrator finds the evidence presented by Respondents/Cross Claimants Velicer in support of their argument that RFC was the successor to RWIFC was not sufficient to support their request that RFC be responsible for the actions of RWIFC.

Accordingly, on the issue of successor liability, the arbitrator finds that the APA was strictly an asset purchase. Claimant, New Rita's, is not responsible for the alleged breach for actions taken by Old Rita's prior to the effective date of the APA. The claims of Respondents/Cross Claimants, as they relate to actions of alleged breach against Old Rita's as the predecessor entity, are not intended to be impacted by this award. They stand independent of this decision and Respondents' rights against that predecessor entity.

Claims of Claimant, Rita's Franchise Company, LLC (RFC)

RFC's claims are governed by the terms of the agreements reached in this matter - the ADA, FA and addendums to the FA. (Kent and Mariners/Safeco field agreements) The agreements were reviewed in detail, submitted as evidence and used by experts in determining the parties' rights and the allegations of damages sustained.

Claimant argues that the Velicer Parties breached the ADA in failing to meet the development schedule in the ADA and abandoning all efforts to develop the territory, the state of Washington and the included Kent and Mariner's locations. Claimant states, as a result, Velicer has breached the ADA and FAs, and the rights under those agreements should be declared terminated as a result. Further, Claimant argues the breach of the agreements led to damages for which the Velicer parties are responsible.

Claimant presented testimony of RFC employees in support of its claim. They testified that RFC provided support to the Velicer entities in accordance with the ADA and the FAs. Support was in the form of documentation provided; annual business meetings; product and franchise development and support; and, a system intranet containing information for the Rita's Franchise partners. RFC provided training and support for store opening and management. This testimony and documentation supported Claimant's position that it honored the terms of the ADA and FAs. The arbitrator finds that the weight of the evidence supports these arguments and Claimant did meet its contractual obligations contained in the ADA and FAs.

Claimant presented evidence that Mr. Velicer and the Velicer parties did not perform their obligations under the ADA and FAs. The testimony on this point is uncontroverted. Mr. Velicer acknowledges that he in essence closed the operations of the Kent store, the Mariner's location was not renewed, and he discontinued activity towards development of Washington State, contrary to the commitments made in the ADA.

Evidence was presented by Claimant to support their position that Mark Velicer, as principal of Respondents', was primarily responsible for the failure of the franchise business and Respondents' ADA and FAs. Specifically, Mr. Velicer represented his intention to move to the State of Washington in support of his ADA and FAs. He disclosed initially that he would not be moving from Pennsylvania immediately and, in fact, negotiated a reduced development schedule in the ADA to reflect the timing of his move to Washington State. Mr. Velicer told Old Rita's representatives of his intention to move to Washington State. In fact, Mr. Velicer never did move to Washington State; Claimant states that this fact would have likely precluded the issuance of the ADA and FAs had it been represented as such at the outset. The arbitrator finds this evidence compelling, and that the decision of Mr. Velicer not to move to Washington State was a significant factor in the apparent inability of the businesses to succeed.

Both parties presented evidence demonstrating that Mr. Velicer is an intelligent and sophisticated businessman and an accredited investor. He read the contracts, recognized unfavorable terms and negotiated more favorable terms where possible, and proceeded with execution of the written contracts after completion of significant due diligence. Mr. Velicer initially disengaged with Old Rita's but after a period of time reengaged with them and negotiated amendments in the contracts that he determined to be sufficient to proceed with the transactions. The amendments included a longer development schedule; reduction in the number of stores required to be opened under the standard ADA; extended time period for opening of the first store; and an increased royalty share. The arbitrator finds that Mr. Velicer may have claims to assert against RWIFC and the Old Rita's organization; however, these claims of alleged breach for actions prior to the effective date of the APA do not vitiate the agreements. During his testimony, Mr. Velicer acknowledged that he negotiated the contract terms including his commitment to development of the franchise as stated in the ADA and FAs. The arbitrator finds that the Velicer entities were responsible to honor the commitment made and the terms of the agreements. Their failure to do so and their unilateral decision to stop development and franchise activity in the State of Washington are a breach of the agreements subjecting Respondents to liability for the damages sustained by Claimant.

Counterclaims of Respondents, the Velicer Parties (Velicer)

The claims asserted by Respondents Velicer as counterclaims relate primarily to the actions and alleged conduct by RWIFC, Old Rita's. As previously reflected in this Award, the arbitrator finds that Claimant is not responsible for the alleged wrongful conduct of RWIFC, its owners and related entities. Therefore, the counterclaims asserted in this matter are denied as against RFC, New Rita's. As a result of the arbitrator's findings on the successor liability issue, it was not necessary for the arbitrator to address the Releases executed by Mr. Velicer, nor the Statute of Limitations argument raised by Claimant with regard to Respondents' counterclaim.

To be clear, this award is not rendering an opinion or position regarding the substance of any claim Respondents may have against RWIFC and, to the extent viable, those claims survive this Award.

Guarantee issue

Claimant asserts that Mark Velicer, individually, is personally liable for their damages under the ADA, the Kent FA, and the addendum, Mariners FA. To support their position on this issue, Claimant points to the personal guarantees executed by Mark Velicer both at the time Mark Velicer executed the agreements at issue, and when he transferred and assigned his rights under the agreements to one of the Velicer Parties corporate entities. Claimant references exhibits CX015-031; CX017-059; CX029-003; CX030-003; CX060-065 to support this position. Claimant suggests these guarantees require Mark Velicer to pay New Rita's damages jointly and severally with the respective corporate entity respondents. The arbitrator finds that the guarantees are clear and unambiguous and, therefore, Mark Velicer is jointly and severally liable with each of the Respondents, for the damages awarded against each Respondent in this matter.

Damages and Findings

Claimant RFC sought the right to terminate the ADA as a result of the Velicer Parties' material breach. The evidence showed that the Velicer Parties breached the ADA and FAs by failing to meet the development schedule, and that they ceased efforts to develop the territory and operate the franchise stores. Accordingly, the arbitrator finds that the Velicer parties haves repudiated the ADA and FAs, and their rights under those agreements are declared terminated as a result.

The Claimant has sustained monetary damages as a result of Respondents' breach of the agreements. Claimant has requested the reimbursement of financial damages be limited to the time period from its inception to the present. Therefore, the damage award will be reviewed in that context.

Award of Financial Damages and Declaration Regarding ADA and FA Rights

In accordance with the arbitrator's reasoning and analysis, the Arbitrator finds that the area development and franchise rights conveyed to Respondents by the ADA, FA and any addendum or satellite agreements thereto are, by declaration of this award, transferred to Claimant, Rita's Franchise Company, LLC.

Further, the Arbitrator awards Claimant, Rita's Franchise Company, LLC the amount of $738,892.27 (Seven Hundred Thirty-Eight Thousand Eight Hundred Ninety-Two Dollars and 27/100).

The Award breakdown is as follows:
For Claimant and against Respondent Velicer Ice Kent, LLC, in the amount of $ 138,067.24;
For Claimant and against Respondent Velicer Ice Mariners, LLC in the amount of $214,596.03; and,
For Claimant and against Respondent Velicer Ice Corporation in the amount of $386,229.00.

With respect to the Award, including all attorney's fees, arbitrator fees, AAA administrative fees, the responsibility for these amounts shall be apportioned as follows:

Respondent Velicer Ice Kent, LLC 18.7% of said amounts;
Respondent Velicer Ice Mariners, LLC 29.0% of said amounts, and:
Respondent Velicer Ice Corporation 52.3% of said amounts.

Additionally, as stated herein, Mark Velicer in his individual capacity, through execution of personal guarantees, is jointly and severally liable for all amounts awarded.

Pursuant to Section 19 of the ADA and Section 25 of the FA, the administrative fees of the American Arbitration Association totaling $32,350.00 and the compensation of the Arbitrator totaling $102,892.50, shall be borne by Respondents. Therefore, Respondents shall reimburse Claimant, RFC the sum of $67,621.25, representing Claimant RFC's prior contribution to said fees.

The ADA, section 19 and the FA, section 25 also mandate the award of costs and attorney's fees to the prevailing party. In accordance with the agreements of the parties, the prevailing party, RFC, is entitled to reimbursement of their attorney's fees of $1,012,565.92 and costs of $245,656.31 to be paid by Respondents Velicer.

Accordingly, the arbitrator finds in favor of Claimant and against Respondents with respect to all claims and counterclaims in the amount of $1,997,114.50 (One Million Nine Hundred Ninety-Seven Thousand One Hundred Fourteen Dollars and 50/100) and the reimbursement to Claimant of Claimant's share of pre-paid administrative fees and Arbitrator compensation of $67,621.25 (Sixty-Seven Thousand Six Hundred Twenty-One Dollars and 25/100), for a total of $2,064,735.75 (Two Million Sixty-Four Thousand Seven Hundred Thirty-Five Dollars and 75/100).

In accordance with the finding and apportionment of damages, costs, expenses, fees and all monetary damages listed above, the arbitrator finds:

In favor of Claimant and against Respondent Velicer Ice Kent, LLC in the amount of $386,105.58;
In favor of Claimant and against Respondent Velicer Ice Mariners, LLC in the amount of $598,773.37, and;
In favor of Claimant and against Respondent Velicer Ice Corporation in the amount of $1,079,856.80.

The Velicer parties are to pay the award within 30 days from the date of this Award. Thereafter, interest will be due on any unpaid amount at the rate of eighteen percent (18%) per annum until the Award is paid in full.

This Award is in full settlement of all claims and counterclaims submitted in this Arbitration. All claims not expressly granted herein are, hereby, denied.

12/2/20
Date

Francis S. Blatcher, Arbitrator