

Not intended for publication

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

THE GREAT AMERICAN PYRAMID
JOINT VENTURE, et al.,

Debtor.

CASE NO. 91-27955
CASE NO. 91-27956
CASE NO. 91-27957
CASE NO. 91-27958
CASE NO. 91-27959
CASE NO. 91-27960

Chapter 11

MEMORANDUM OPINION AND ORDER RE
TRUSTEE'S OBJECTION TO CLAIM OF
DICK CLARK PRODUCTIONS, INC.

This Court conducted a hearing in this matter on December 2, 1997, pursuant to FED. R. BANKR. P. 9014. This is a core proceeding. 28 U.S.C. § 152(b)(2). After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

On June 11, 1990, the debtor in this case, Pyramid Operating Authority ("Pyramid"), entered into a trademark licensing agreement with Dick Clark Productions, Inc. ("DCP"). The purpose of this agreement was to allow Pyramid to use DCP's trademark and trade name "American Music Awards" or "AMA" in the AMA Hall of Fame Pyramid intended to establish in the downtown convention center in Memphis commonly known as The Pyramid. This licensing agreement also allowed Pyramid to use the AMA trademark in marketing certain items in connection with the Hall of Fame. The licensing agreement provided that California law was to apply to the contract.

Despite the licensing agreement and Pyramid's plans to develop the convention facility, the AMA Hall of Fame never opened to the public in Memphis. At the hearing on DCP's claim, the parties stipulated to this fact. On June 23, 1991, approximately one year after entering into the licensing agreement with DCP, Pyramid filed for chapter 11 bankruptcy relief in the Western District of Tennessee. The case was subsequently converted to a chapter 7 liquidation.

Based on the June 11, 1990, contract and pursuant to 11 U.S.C. § 501, DCP has filed an unsecured claim against Pyramid in the amount of \$2.5 million. DCP alleges that this is the amount due under the licensing agreement and even though the Hall of Fame was never opened, Pyramid is liable for the entire amount. The chapter 7 trustee filed an objection to this claim based on a lack of sufficient supporting documentation.

II. CONCLUSIONS OF LAW

After considering the proof introduced at the hearing on the trustee's objection, this Court finds that DCP does not have an allowable claim against the debtor. The basis for this finding is that the licensing agreement was drafted so as to make any monetary obligation on the part of Pyramid wholly dependent on the Hall of Fame being opened to the Public. Since this event never occurred, Pyramid's obligation to pay DCP the \$2.5 million never arose.

At the hearing, DCP argued that the contract language should be interpreted to establish accrual of DCP's right to the "Applicable Guaranty" as of the date of execution of the agreement. Such an interpretation would be clearly erroneous.

The relevant contract provisions at the heart of this dispute include the following language:

"The term of this Agreement shall commence upon the execution hereof and shall continue . . . until ten (10) years after the Opening to the Public of the Hall (the 'Original Term')." (Contract Para. 8).

"POA hereby guarantees DCP the sum of \$250,000.00 in compensation during each full Fiscal Year . . . of the Original Term . . . *commencing on the Opening of the Hall to the Public* through the end of the Original Term, for a total of \$2,500,000.00 for the entire Original Term payable as set forth in this subparagraph 11.D." (Contract Para. 11D) (emphasis added).

"POA shall pay the Applicable Guaranty in equal quarterly installments, in advance, commencing on the first day of the Opening of the Hall to the Public . . ." (Contract Para. 11D)

"If an Event of Default occurs . . . and if the aggrieved party is DCP then DCP also may accelerate the remaining Applicable Guaranty for the applicable term" (Contract Para. 14B).

As the above contractual provisions set forth, it is clear that the "Original Term" of the agreement

included both the ten-year period dating from the Opening of the Hall to the Public and the period from the execution of the agreement until the Hall was opened. As indicated in paragraph 8B, the parties contemplated that this latter period might span up to approximately eighteen months. As a result of these provisions, the “Original Term” of the licensing agreement was to include some period in excess of ten years and up to approximately eleven and one-half years.

Although the agreement between Pyramid and DCP did become effective upon execution, the accrual of DCP’s right to the annual guaranty in the amount of \$250,000 *did not* “commenc[e] [until] the Opening of the Hall to the Public” (Contract Para. 11D). Paragraph 11D goes on to state that the total guaranteed amount due during the entire “Original Term” would equal \$2.5 million (ten years times \$250,000 per year). If then the total guaranteed amount during the entire “Original Term” was equal to the sum of the yearly guaranty for each of the ten years “commencing on the Opening of the Hall to the Public,” and if, as noted above, the “Original Term” was defined to span more than ten years, it is clear that no amount could have been payable during the period of the “Original Term” in excess of the ten year period which did not begin until the Hall was opened to the public. Thus, both the clear language of the agreement (guaranteeing compensation “commencing on the Opening of the Hall to the Public”) and the mathematical compulsion (that a total guarantee obligation of \$2.5 million at \$250,000 per year cannot contemplate a term of obligation in excess of ten years) refute DCP’s contention that Pyramid’s obligation to pay the guarantee arose prior to the opening of the hall.

Although not raised by DCP as a theory of its claim, it should be considered whether the guaranty language of paragraph 11D, taken together with the acceleration clause of paragraph 14B, constitutes a liquidated damages provision sufficient to establish DCP’s claim and, if so, whether such provision is enforceable under California law.

The licensing agreement between DCP and Pyramid provides that California law will govern this contract. Nothing appears that such election should not be given effect as offensive to Tennessee or other law, and the California statutes specifically authorize such an election in the instant circumstance. (*See* Cal. Civ. Code § 1646.5 (West 1998)). The relevant California statute governing the enforceability of liquidated damages with regard to a nonconsumer contract is California Civil Code § 1671(b). Such statute states:

Except as provided in subdivision (c), [subdivision (c) regards consumer contracts] a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.

Cal. Civ. Code § 1671(b) (West 1988).

The Law Revision Commission Comments to section 1671 further make clear that California law generally favors the enforceability of liquidated damages provisions in commercial contract cases. (*See id.* at Comments). The burden of proof as to the unreasonableness of a liquidated damages provision is on the party seeking to invalidate the provision. All circumstances existing at the time of contracting are to be considered on the question of reasonableness, including: the dollar amount of liquidated damages and whether such amount bears a reasonable relationship to the possible range of actual damages that could have been anticipated at the time of contracting; anticipation by the parties that proof of actual damages would be costly or difficult; and the relative bargaining power of the parties. (*See generally id.*; Californians For Population Stabilization v. Hewlett-Packard Co., 67 Cal. Rptr.2d 621; Weber, Lipshie & Co v. Christian, 53 Cal. Rptr.2d 468 (1996). If, however, the challenging party is able to show the unreasonableness of a liquidated damages provision, the provision should be disallowed as constituting an unenforceable penalty. (*See id.*)

On the facts as they were presented at this hearing, it does not appear that a \$2.5 million damages/penalty award could have had a reasonable relationship to any amount that DCP could have anticipated as actual damages at the time of contracting. This is especially true if, as it appears from the parties' agreement, the license granted to Pyramid did not confer exclusive rights to use the AMA trademark. DCP could not have incurred any opportunity loss in marketing the license elsewhere precisely because the license granted to Pyramid was not an exclusive one.

As a result of today's finding that no money was due under the contract until the Hall was opened to the public and that the \$2.5 million could not be seen as a liquidated damages provision, the claim of DCP will be disallowed and the trustee's objection to such claim will be sustained. An order will be entered accordingly.

III. ORDER

It is therefore **ORDERED** that the trustee's objection to the claim of Dick Clark Productions, Inc., is **SUSTAINED** and Dick Clark Productions, Inc.'s claim in the amount of \$2,500,000.00 is **DISALLOWED**.

IT IS SO ORDERED.

BY THE COURT,

G. HARVEY BOSWELL
United States Bankruptcy Judge

Date: January 27, 1998