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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	94002596
Party	Registrant D'Amico Holding Company
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No.: 76/685,731
Filed: January 14, 2008
For the mark: MASA
Published in the Trademark Official Gazette on August 23, 2011

Masayoshi Takayama,

Plaintiff,

v. Concurrent Use No. 94002596

D'Amico Holding Company,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Applicant failed to carry his burden with respect to his Motion for Summary Judgment. Applicant offers only conclusory statements about his erroneous interpretation of the parties' Confidential Settlement Agreement to support his argument that he is entitled to the geographic area identified in his Concurrent Use Application; namely, the entire United States except for Minnesota, 50 miles around Minneapolis, and Florida. There are genuine disputes of material fact with respect to the territory not specifically identified in the parties' Confidential Settlement Agreement. Therefore, D'Amico Holding Company ("D'Amico") respectfully requests that the Board deny Applicant's Motion for Summary Judgment.

STATEMENT OF DISPUTED FACTS

- Paragraph 1 of the Confidential Settlement Agreement established the geographic territory for Applicant's use of his alleged MASA mark as New York and 50 miles around New York City. [Decl. Plumley, Ex. A.]

- Paragraph 2 of the Confidential Settlement Agreement established the geographic territory for D'Amico's use of its MASA and MASA & Design marks as Minnesota, 50 miles around Minneapolis, and Florida. [*Id.*]

- Other than the territories expressly identified in Paragraphs 1 and 2, the Confidential Settlement Agreement does not designate a geographic territory for Applicant and D'Amico. [*Id.*]

ARGUMENT

I. PLAINTIFF HAS NOT DEMONSTRATED THE ABSENCE OF ANY GENUINE DISPUTES OF MATERIAL FACT

A. *Standard of Review*

A party moving for summary judgment has the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to judgment as a matter of law. *Copelands' Enterprises Inc. v. CNV Inc.*, 20 U.S.P.Q.2d 1295, 1298-99 (Fed. Cir. 1991) (moving party's conclusory statement as to intent insufficient). This burden is greater than the evidentiary burden at trial. *Gasser Chair Co. Inc. v. Infanti Chair Manufacturing Corp.*, 34 U.S.P.Q.2d 1822, 1824 (Fed. Cir. 1995). When considering a summary judgment motion, the Board must construe the facts and all inferences reasonably drawn therein in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A factual dispute is genuine if sufficient evidence is presented such that a reasonable fact finder could decide the question in favor of the non-moving party. *Opryland USA Inc. v. The Great American Music Show Inc.*, 23 U.S.P.Q.2d 1471, 1472 (Fed. Cir. 1992).

As the concurrent use applicant, Plaintiff has the burden to show that: (1) he made lawful concurrent use of the MASA mark in commerce prior to the filing dates of D'Amico's MASA and MASA & Design applications; and (2) that confusion, mistake, or deception is not likely to result from his continued use of the MASA mark in the areas in which he is currently using his mark. *Turdin, Jr. v. Trilobite, Ltd.*, 109 U.S.P.Q.2d 1473 (T.T.A.B. 2014).

There is no dispute that the first condition to the issuance of a concurrent use registration has been satisfied. *See id.* The parties acknowledged in the Confidential Settlement Agreement that Plaintiff used the MASA mark in connection with Japanese sushi restaurant and bar services in New York City, NY since at least 2004. [Decl. Plumley, Ex. A.] It is also undisputed that D'Amico filed its application to register its MASA mark for "restaurant and bar services" on June 20, 2005 and filed its application to register its MASA & Design mark for "restaurant and bar services" on November 30, 2006. [Decl. Walz, Exs. 1, 2.]

There is also no dispute that the second condition to the issuance of a concurrent use registration has been satisfied. *See Trilobite, Ltd.*, 109 U.S.P.Q.2d at 1473. Pursuant to Paragraph 1 of the Confidential Settlement Agreement, D'Amico will not provide restaurant or bar services under the MASA mark in New York or within 50 miles of New York City, NY. [Decl. Plumley, Ex. A.] Likewise, pursuant to Paragraph 2 of the Confidential Settlement Agreement, Plaintiff will not provide restaurant or bar services under the MASA mark in Minnesota, 50 miles of Minneapolis, MN, or Florida. [Decl. Plumley, Ex. A.] What remains in dispute are the registrable rights to the remainder of the United States possessed by each party.

B. *The Confidential Settlement Agreement is ambiguous and cannot be construed as a matter of law*

Plaintiff's sole basis for concluding that he is entitled to the entire United States except for Minnesota, 50 miles around Minneapolis, MN, and Florida is the parties' Confidential Settlement Agreement. [Pl.'s Br., at 1.] The parties did not include a governing law clause directing that the laws of any particular state apply. [Decl. Plumley, Ex. A.] Nevertheless, there is no conflict between Minnesota and New York law.

Under Minnesota law, "where [contract] language is ambiguous, resort may be had to extrinsic evidence, and construction then becomes a question of fact for the jury . . . ." *Bari v.*

Control Data Corp., 439 N.W.2d 44, 47 (Minn. App. 1989), *review denied* (Minn. July 12, 1989). "The language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010) (citations omitted). A contract is ambiguous if it is silent on a particular issue. *See Badger Equipment Co. v. Brennan*, 431 N.W.2d 900, 904 (Minn. App. 1988) (finding the Badger plan ambiguous because it was silent as to the priority of payment).

Under New York law, in determining the obligations of parties to a contract, the threshold determination as to whether an ambiguity exists is a question of law to be resolved by the court. *Agor v. Board of Educ.*, 981 N.Y.S.2d 485, 487 (N.Y.A.D. 3 Dept. 2014) (citations omitted). "A contract is ambiguous if the language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion" *Id.* A contract is ambiguous if it is silent on a particular issue. *See Spano v. Kings Park Cent. School Dist.*, 61 A.D.3d 666, 669 (N.Y.A.D. 2 Dept. 2009) (finding CBA ambiguous because it was silent on the issue of whether "continuous service" included only service as a permanent employee); *Village Sav. Bank v. Caplan*, 87 A.D.2d 145, 147 (N.Y.A.D. 1982) (finding the mortgage and accompanying document ambiguous because they were silent as to the maintenance and separate reserve accounts). "If the court concludes that a contract is ambiguous, it cannot be construed as a matter of law . . . ." *Agor*, 981 N.Y.S.2d at 487.

Applying either Minnesota or New York law, the Confidential Settlement Agreement is ambiguous with respect to the registrable rights to the remainder of the United States possessed by each party. It specifically identifies only each party's right to use its respective MASA mark outside of New York, 50 miles around New York City, NY, Minnesota, 50 miles around Minneapolis, MN, and Florida and is silent with respect to the rest of the United States. [Decl.

Plumley, Ex. A.] Additionally, the Confidential Settlement Agreement states that "[Plaintiff] shall not object to [D'Amico's applications and] shall withdraw its Notice of Opposition to [application Serial No. 78654116] with prejudice." [Decl. Plumley, Ex. A.] D'Amico's MASA and MASA & Design applications were geographically unrestricted. [Decl. Walz, Exs. 1, 2.] Considering the agreement as a whole, the silence in the Confidential Settlement Agreement could reasonably be interpreted to mean the parties intended that D'Amico's remaining registrable rights would include the rest of the United States. *See Dykes*, 781 N.W.2d at 582; *Agor*, 981 N.Y.S.2d at 487. The silence in the Confidential Settlement Agreement with respect to the parties registrable rights to the remainder of the United States creates an ambiguity. *See Badger Equipment Co.*, 431 N.W.2d at 904; *Spano*, 61 A.D.3d at 669. Therefore, the Confidential Settlement Agreement cannot be construed as a matter of law and its interpretation creates a genuine dispute of material fact for trial. *See Bari*, 439 N.W.2d at 47; *Agor*, 981 N.Y.S.2d at 487.

C. *Plaintiff's use of the MASA mark has been static*

In general, a prior user of a mark is entitled to a registration covering the entire United States, limited only to the extent that the junior user can establish that no likelihood of confusion exists and that it has concurrent rights in its actual area of use plus its area of natural expansion. *Boi Na Braza, LLC v. Terra Sul Corporation a/k/a Churrascaria Boi Na Brasa*, Concurrent Use No. 94002525, at 16 (March 26, 2014). However, this general rule may be overcome if a senior user "remains static" and the junior user is the first to file for registration. *Id.* In other words, there is a policy of encouraging prompt registration of marks, and the concurrent use provision of Section 2(d) exhibits no bias in favor of the prior user. *Id.*, at 17.

"[A] senior party may abandon its right as a prior user to expand into a particular area or its right to enjoy nationwide protection of its mark" where it does not actively expand. *America's Best Franchising, Inc. v. Abbott*, 106 U.S.P.Q.2d 1540 (T.T.A.B. 2013) (quoting *Noah's Inc. v. Nark, Inc.*, 222 U.S.P.Q. 697, 701 (E.D. Mo. 1983), *aff'd*, 728 F.2d 410 (8th Cir. 1984)). The determination of whether a senior user "remains static" considers: (1) the party's previous business activity; (2) previous expansion or lack thereof; (3) dominance of contiguous areas; (4) presently planned expansion; and, where applicable (5) possible market penetration by means of products brought in from other areas (collectively the "Static Factors"). *Id.*, at 16.

Plaintiff claims to have used the MASA mark since 2004 in New York City, NY. [Decl. Plumley, Ex. A.] Plaintiff's MASA restaurant is a single location located at 10 Columbus Circle, Time Warner Center, 4/F, New York, NY 10019. [Decl. Walz, Exs. 3 - 5.] Therefore, the second and third Static Factors weigh in favor of D'Amico.

In 10 years, Plaintiff has not opened another MASA restaurant, and has demonstrated his proclivity to keep his MASA restaurant a single location. Since 2004, Plaintiff has developed other restaurant concepts: BAR MASA, SHABOO, TETSU, KAPPO MASA, and BUTCHER'S PLACE, and chose to open restaurants under a few of these concepts rather than the MASA concept. [Decl. Walz, Exs. 6 – 11.] In December 2009, Plaintiff opened BAR MASA and SHABOO in the Aria Resort and Casino in Las Vegas, NV. [Decl. Walz, Ex. 12.] In August 2012, Plaintiff opened TETSU also in the Aria Resort and Casino in Las Vegas, NV and planned to expand this restaurant concept in New York, NY. [Decl. Walz Exs. 13, 14.]

On June 24, 2011, Plaintiff filed an intent-to-use application to register the mark BUTCHER'S PLACE, and on May 9, 2013 filed an intent-to-use application to register the mark KAPPO MASA both in connection with restaurant services. [Decl. Walz Exs. 10, 11.] And as recently as January 25, 2014, the United States Patent and Trademark Office granted Plaintiff's fourth extension of time to file the statement of use for the BUTCHER'S PLACE mark. [Decl. Walz, Ex. 15.] Plaintiff's stated reason for the extension of time was "product or service research and development." [Decl. Walz, Ex. 16.]

Generally, reporters covering the restaurant industry will report on a restaurateur's plans to open a new restaurant like the story written about Plaintiff's plans to open his TETSU restaurant in New York, NY. [*See* Decl. Walz Ex. 14.] There have been no stories written about Plaintiff's plans to expand the MASA restaurant. Additionally, Plaintiff has not updated his website located at <masanyc.com> in over nine years. [Decl. Walz, at Ex. 5.] The copyright notice on Plaintiff's website identifies 2005. [*Id.*] If Plaintiff has not changed his website in over nine years, he certainly has no intention of expanding his use of the MASA mark beyond New York City, NY. Therefore, the first and fourth Static Factors weigh in favor of D'Amico, and the fifth factor is inapplicable.

D'Amico was the first to file applications for its MASA and MASA & Design marks and the consideration of the Static Factors demonstrate that Plaintiff's use of his MASA mark has been static. D'Amico has overcome the general rule that Plaintiff is entitled to a registration covering the entire United States, and Plaintiff has not and cannot produce any admissible evidence to create a genuine dispute of material fact regarding Plaintiff's static use of the MASA mark.

Indeed, the facts of this case are very similar to the facts in the *America's Best Franchising, Inc.* case. Mr. Abbot was the first to use the 3 PALMS mark in 2004 in Scottsdale, AZ. *America's Best Franchising, Inc. v. Abbott*, 106 U.S.P.Q.2d at 1544. The Board found that Mr. Abbot had not offered hotel services under the 3 PALMS mark outside of Scottsdale, AZ, but had made fairly extensive use of the mark on the Internet. *Id.* Mr. Abbot offered testimony of his attempts to establish a hotel in another location, but the Board found that oral testimony alone is insufficient to demonstrate expansion into other areas. *See id.*, at 1553. Because Mr. Abbott had not expanded his use of the 3 PALMS mark since 2004, the Board held that "through [his] inaction over a considerable period of time, [he] abandoned [his] right to expand use of the mark . . . outside of [his] trading area; and that by virtue of such abandonment, [Mr. Abbott's] prior use of the mark cannot serve to preclude [America's Best Franchising, Inc.], a[n] innocent user, from filling the territorial void left by" Mr. Abbott. *Id.*, at 1554. Therefore, the Board awarded America's Best Franchising, Inc. the entire United States with the exception of Arizona.

CONCLUSION

Plaintiff's only basis for claiming the entire United States with the exception of Minnesota, the area 50 miles around Minneapolis, and Florida is the parties' Confidential Settlement Agreement. Because the Confidential Settlement Agreement is ambiguous with respect to the parties remaining registrable rights, there are genuine disputes of material fact for trial. Therefore, D'Amico requests that the Board deny Plaintiff's Motion for Summary Judgment.

Respectfully Submitted,

WINTHROP & WEINSTINE, P.A.

Date: April 22, 2014

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APPENDIX

Pursuant to TBMP § 101.03, the following authority is not reported in United States Patent Quarterly or the USPTO's public electronic databases:

1. *Bari v. Control Data Corp.*, 439 N.W.2d 44 (Minn. App. 1989);
2. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578 (Minn. 2010);
3. *Badger Equipment Co. v. Brennan*, 431 N.W.2d 900 (Minn. App. 1988);
4. *Agor v. Board of Educ.*, 981 N.Y.S.2d 485 (N.Y.A.D. 3 Dept. 2014);
5. *Spano v. Kings Park Cent. School Dist.*, 61 A.D.3d 666 (N.Y.A.D. 2 Dept. 2009);
6. *Village Sav. Bank v. Caplan*, 87 A.D.2d 145 (N.Y.A.D. 1982); and
7. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Copies are attached to Defendant's Response to Plaintiff's Motion for Summary Judgment.

8968473v3

439 N.W.2d 44
Court of Appeals of Minnesota.

Robert L. BARI, Appellant,
v.
CONTROL DATA CORPORATION, Respondent.

No. C4-88-1783. | May 2, 1989. | Review Denied July 12, 1989.

Employee brought action against employer, alleging breach of employment contract. The District Court, Hennepin County, Steven Z. Lange, J., entered judgment in favor of employer. Employee appealed. The Court of Appeals, Foley, J., held that testimony supported jury determination that employer did not breach employee's employment contract.

Affirmed.

West Headnotes (1)

[1] **Labor and Employment**
Weight and Sufficiency

231HLabor and Employment
231HVIIIAdverse Employment Action
231HVIII(B)Actions
231Hk859Evidence
231Hk863Weight and Sufficiency
231Hk863(1)In General
(Formerly 255k40(3.1), 255k40(3) Master and Servant)

Determination that exception in employer's disability policy for work force reduction occurring during disability applied to discharge of employee was supported by testimony of employer's personnel consultant that employee told her he did not want to consider a lesser position and to proceed with his termination.

2 Cases that cite this headnote

44 *Syllabus by the Court

The trial court did not abuse its discretion in denying former employee's motion for new trial where testimony supported the jury's determination that former employee's contract of employment was not breached.

Attorneys and Law Firms

William J. Mavity, James G. Ryan, Mavity & Ryan, Minneapolis, for appellant.

Barbara A. Leininger, Bloomington, for respondent.

Heard, considered and decided by LANSING, P.J., and FOLEY and SCHUMACHER, JJ.

Opinion

***45 OPINION**

FOLEY, Judge.

Appellant Robert L. Bari brought suit against respondent Control Data Corporation for breach of employment contract and discrimination on the basis of age and disability and failure to make reasonable accommodation under Minn.Stat. § 363.03 (1986). The contract claim was tried to the jury and the discrimination claims were tried to the court. Judgment was entered for Control Data on all claims. Bari appeals from the order denying his motion for new trial. We affirm.

FACTS

Bari, age 53 at the time of trial, was employed by Control Data from 1968 to 1985, when his employment was terminated. His last position with Control Data was that of District Manager for Engineering Services in the Eastern Region (New York). Bari was considered an exempt employee.

Bari had his first heart attack in 1975 at age 40. This attack was followed by other attacks in 1976, 1979, and 1982. After recovering from the 1982 attack, Bari requested and received a transfer to a less stressful position. In February 1983 he was transferred to his last position.

Several months later Bari experienced a recurrence of his heart problems. He relocated to Minneapolis to be closer to his doctors and eventually took a disability leave of absence in November 1983.

The parties stipulated that the "Control Data Corporation Approved Policy and Procedure on Sick Leave and Disability Programs" constituted part of Bari's employment contract. This policy establishes the procedures the company is to follow once a disabled employee is released by his physician to return to work. The policy "guarantees every employee returning from a period of disability a job offer after an appropriate medical release to resume working." Employees released without any medical restrictions are to be placed on the payroll immediately. Those having restrictions "are to be returned to work as rapidly as practical, but definitely within 30 calendar days of the medical release date." It is the responsibility of management and personnel to "evaluate the employee's ability to perform the duties of a given occupation, with appropriate medical information."

If medical restrictions exist, disability benefits continue until either the employee returns to work or until thirty days from notice of a release to return to work, unless a deviation to the policy is approved. If the personnel manager believes that it will be "impossible" to place the employee within the 30 day period, "a deviation from policy must be requested." If no job is found and no deviation has been approved, the employee "must be placed, by the 31st day, on the payroll of the department which the employee left when the disability began."

The policy also contains an exception relevant to this case, which provides as follows:

> 9. After being released to return to work, the employee should be terminated or laid off if a workforce reduction occurred during the disability that would have affected the employee had the employee remained at work (see policy 6:15:66, Temporary Work Force Adjustments Nonexempt Employees).

That exception was later modified by Control Data to provide as follows:

> 9. After being released to return to work full-time, the employee should be terminated or laid off if a work force reduction occurred during the disability that would have affected the employee had the employee remained at work (See 6:15:66, Work Force Adjustments/Reductions).

The reference to nonexempt employees was removed in the amended version.

Carolyn Floyd, a personnel consultant at Control Data, testified that the original version did not apply to exempt employees. She further testified that the amended version would appear to cover all employees, including exempt employees.

***46** In June 1985, Bari was formally released by his treating physicians to return to work, and he was informed by Control Data that his disability benefits would be terminated. Bari contacted Merodie Kosta, a consultant in Control Data's Disability Management Department, who advised him to meet with Floyd. At that meeting, Floyd gave Bari a formal notification letter stating that the company would attempt to locate a position for him within Engineering Services and that, if after 30 days no position had been found, he would be terminated "due to workforce reduction."

Floyd testified that it was her responsibility to identify an available position, evaluate whether or not Bari could perform that job given his medical restrictions, and place him in an acceptable position as guaranteed by the company. She testified that she spent a week and a half in June and some additional time in July 1985 attempting to find a position for Bari. Although an opportunity was discussed, she did not offer any positions to Bari; she did not tell him about any jobs she thought were suitable or look for a job outside of Engineering Services; she did not have a copy of his resume or medical report; and no deviation from policy was requested at the end of the 30 day placement period. Both Floyd and Kosta testified that Bari's case was handled strictly as a workforce reduction case and not as a return to work matter under the disability policy.

Floyd testified that Bari indicated to her he was not willing to look at a position two or three levels below his last job. He decided not to complete a three day job search seminar after attending the first day and a half.

Floyd further testified that on July 23, 1985, Bari called her to tell her that he had decided not to pursue placement within Control Data and that she should go ahead and process his termination. Bari testified that he did not ask Floyd to stop the internal placement efforts and that he never told Floyd he wanted to take the termination.

While Bari was on disability leave, a consolidation occurred in Engineering Services, in which the eastern and southeastern regions were combined. As a result, the number of district management positions was reduced. Floyd testified that Bari's position in the eastern region had changed and that he had been identified as an excess employee.

At the close of the testimony, the trial court ruled on the applicability of the workforce reduction paragraph to Bari.

> The court will make a finding as a matter of law that the plaintiff is subject to paragraph 9 of Plaintiff's Exhibit 47 pursuant to the return to work procedure. That it is not intended by the caveat in that paragraph to exclude Mr. Bari from the return to work procedure by defining him as an exempt employee. That in fact the plaintiff is subject to the work force reduction that went into effect during the period of his disability. That in fact his New York City district under engineering services of Control Data was eliminated. And that as such, he was subject to the non-disability benefits of a work force reduced excess employee on the date of his formal return to work which the Court is concluding was July 2, 1987 when he received his notice.

In its special verdict, the jury determined that Control Data had not breached its contract of employment with Bari. The jury was also asked to render advisory findings on the discrimination claims. The jury found that Bari's disability was a discernible, causative factor in the decision to discharge him, but that Control Data did not fail to make reasonable accommodation to his disability. The trial court rejected the advisory findings and ruled in favor of Control Data on each of Bari's discrimination claims.

ISSUE

Did the trial court err in determining as a matter of law that the workforce reduction exception in the disability policy applied to Bari?

ANALYSIS

The decision to grant a new trial is vested in the discretion of the trial court, and the trial court's decision will be reversed ***47** only for a clear abuse of that discretion. *City of Ogema v. Bevins,* 341 N.W.2d 298, 299 (Minn.Ct.App.1983). As grounds in his motion for new trial, Bari asserts that the trial court erred as a matter of law when it ruled that the workforce reduction exception of paragraph 9 applied to him.

The parties stipulated that the Policy and Procedure on Sick Leave and Disability Programs constituted part of Bari's employment contract. The general rule in construing contracts is that where the intention of the parties may be determined entirely from the writing, the construction of the contract is a question of law for the court. *Empire State Bank v. Devereaux,* 402 N.W.2d 584, 587 (Minn.Ct.App.1987). However, where the language is ambiguous, resort may be had to extrinsic evidence, and construction then becomes a question of fact for the jury, unless such evidence is conclusive. *Id.* A contract is ambiguous if it is susceptible to more than one meaning. *Clapp v. Haferman Water Conditioning, Inc.,* 380 N.W.2d 838, 842 (Minn.Ct.App.1986).

Bari contends that paragraph 9 was clearly ambiguous and susceptible to more than one interpretation and that extrinsic evidence was offered at trial to determine the meaning of that paragraph. Bari testified that during his tenure with the company, exempt employees had never been subject to workforce reductions. He also cites to the testimony of Floyd, who indicated that paragraph 9 did not apply to exempt employees. Bari argues that the construction of the contract therefore became a question for the fact finder, and that it was error to remove the issue from the jury.

Even if there is ambiguity here and the question should have been considered a question of fact, the issue has been rendered moot by the finding of the jury and its obvious reliance on the testimony of Floyd. Floyd's testimony supports the jury's determination that Control Data did not breach Bari's employment contract. Floyd testified that Bari asked her to proceed with his termination prior to the expiration of the 30 day employment search period. She also testified that Bari did not attend the entire job search seminar and did not want to consider a lesser position.

Bari argues that the findings in the special jury verdict are inconsistent, and that the jury's answer to the finding on disability would disprove the fact that he asked Floyd to process his termination. In its first finding, the jury answered that Control Data had not breached its contract of employment with Bari. In the third finding, the jury answered that Bari's disability was a discernible, causative factor in the decision to discharge him. In our view, the finding on his disability is not inconsistent with the evidence in this case, and we cannot view this finding in isolation. The jury had the opportunity to assess the credibility of the witnesses, and we conclude that the jury relied on Floyd's testimony. It is the unique function of the factfinder to assess witness credibility. *Tews v. Geo. A. Hormel & Co.,* 430 N.W.2d 178, 180 (Minn.1988). A single credible witness can be relied upon to prove or disprove a material fact.

A new trial is required only where the alleged error of law results in prejudice to the plaintiff. *Danielson v. Hanford,* 352 N.W.2d 758, 762 (Minn.Ct.App.1984). Even if the question of the applicability of the workforce reduction exception should have been submitted to the jury, there is no reversible error here because the case could be decided on Floyd's testimony that Bari asked her to proceed with his termination. We find no prejudice to Bari and no abuse of discretion in the trial court's refusal to grant his motion for new trial. *See Berry v. Goetz,* 348 N.W.2d 376, 379 (Minn.Ct.App.1984).

As we find no abuse of discretion in the denial of the motion for new trial, we do not reach Bari's argument that the court's decision on the discrimination claims be vacated pending a new trial on the contract claim.

DECISION

Affirmed.

End of Document

781 N.W.2d 578
Supreme Court of Minnesota.

Virgil DYKES and Connie Dykes d/b/a Dykes Farms, Respondents,
v.
SUKUP MANUFACTURING COMPANY, defendant and third-party plaintiff, Appellant,
v.
Superior, Inc., third-party defendant, Respondent.

No. A08–583. | May 13, 2010.

Synopsis
Background: Farmers brought action against manufacturer of farm equipment, alleging claims for breach of warranties, negligence, strict liability, and consumer fraud. After filing third-party complaint against equipment installer, manufacturer moved for summary judgment, alleging that agreement settling installer's prior lien-foreclosure action against farmers released manufacturer from farmers' claims. The District Court, Wabasha County, Terrence M. Walters, J., entered summary judgment in favor of manufacturer, and farmers appealed. The Court of Appeals, 761 N.W.2d 892, reversed.

Holdings: After granting review, the Supreme Court, Dietzen, J., held that:

[1] prior settlement did not release installer or manufacturer;

[2] dismissal of lien-foreclosure action precluded farmers' claims against installer; but

[3] record on appeal was inadequate to allow resolution of question of whether dismissal of lien-foreclosure action precluded farmers' claims against manufacturer.

Affirmed in part, reversed in part, and remanded.

West Headnotes (15)

[1] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

30Appeal and Error
30XVIReview
30XVI(A)Scope, Standards, and Extent, in General
30k862Extent of Review Dependent on Nature of Decision Appealed from
30k863In general

On appeal from summary judgment, an appellate court examines whether there are genuine issues of material fact that preclude summary judgment and whether the lower court properly applied the law.

3 Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court

30Appeal and Error
30XVIReview
30XVI(F)Trial De Novo
30k892Trial De Novo
30k893Cases Triable in Appellate Court
30k893(1)In general

When reviewing the application of law, an appellate court applies a de novo standard of review.

5 Cases that cite this headnote

[3] **Compromise and Settlement**
Construction of Agreement

89Compromise and Settlement
89IIn General
89k10Construction of Agreement
89k11In general

A settlement agreement is a contract and a court reviews the language of the contract to determine the intent of the parties.

12 Cases that cite this headnote

[4] **Compromise and Settlement**
Construction of Agreement

89Compromise and Settlement
89IIn General
89k10Construction of Agreement
89k11In general

When the language of a settlement agreement is clear and unambiguous, a court enforces the agreement of the parties as expressed in the language of the contract.

7 Cases that cite this headnote

[5] **Evidence**
Grounds for admission of extrinsic evidence

157Evidence
157XIParol or Extrinsic Evidence Affecting Writings
157XI(D)Construction or Application of Language of Written Instrument
157k448Grounds for admission of extrinsic evidence

If the language of a settlement agreement is ambiguous, parol evidence may be considered to determine intent.

6 Cases that cite this headnote

[6] **Appeal and Error**
Cases Triable in Appellate Court

30Appeal and Error
30XVIReview
30XVI(F)Trial De Novo
30k892Trial De Novo
30k893Cases Triable in Appellate Court
30k893(1)In general

Whether a contract is ambiguous is a question of law that is reviewed de novo on appeal.

11 Cases that cite this headnote

[7] **Contracts**
Existence of ambiguity

95Contracts
95IIConstruction and Operation
95II(A)General Rules of Construction
95k143Application to Contracts in General
95k143(2)Existence of ambiguity

The language of a contract is "ambiguous" if it is susceptible to two or more reasonable interpretations.

12 Cases that cite this headnote

[8] **Release**
Nature and requisites in general

331Release
331IRequisites and Validity
331k1Nature and requisites in general

At a minimum, an agreement must manifest an intent to release, discharge, or relinquish a right, claim, or privilege by a person in whom it exists to a person against whom it might have been enforced to be a release.

3 Cases that cite this headnote

[9] **Release**
Joint Wrongdoers

331Release
331IIConstruction and Operation
331k26Parties
331k29Joint Wrongdoers
331k29(1)In general

To release all joint tortfeasors, a release must manifest an intent to release all joint tortfeasors and the claimant must have received full compensation for the injury.

2 Cases that cite this headnote

[10] **Compromise and Settlement**
Matters included
Release
Release of specific indebtedness or liability in general

89Compromise and Settlement
89IIn General
89k10Construction of Agreement
89k12Matters included
331Release
331IIConstruction and Operation
331k33Release of specific indebtedness or liability in general

Mediated agreement settling farm equipment installer's lien-foreclosure action against farmers, stating that installer would remove lien on farmers' property and farmers would dismiss their answer and counter complaint against installer, was not a release of farmers' breach of warranty and other claims against installer or equipment manufacturer, since it did not expressly manifest an intent to release installer or manufacturer and did not state that farmers had been fully compensated for their injuries.

Cases that cite this headnote

[11] **Pretrial Procedure**
Dismissal with or without prejudice
Pretrial Procedure
Adjudication on merits

307APretrial Procedure
307AIIIDismissal
307AIII(B)Involuntary Dismissal
307AIII(B)6Proceedings and Effect
307Ak690Dismissal with or without prejudice
307APretrial Procedure
307AIIIDismissal
307AIII(B)Involuntary Dismissal
307AIII(B)6Proceedings and Effect
307Ak693Operation and Effect
307Ak694Adjudication on merits

A dismissal with prejudice and on the merits executed by both parties is a final determination and is equivalent to an adjudication on the merits regarding the claims asserted or which could have been asserted by the parties to that lawsuit, subject to certain exceptions.

Cases that cite this headnote

[12] **Judgment**
Consent or agreement

228Judgment
228XIIIMerger and Bar of Causes of Action and Defenses
228XIII(A)Judgments Operative as Bar
228k570Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(6)Consent or agreement

A stipulation of dismissal and the resulting judgment operates as a bar to a subsequent lawsuit by either party to the original lawsuit, which asserts claims raised or which could have been raised in the original lawsuit.

Cases that cite this headnote

[13] **Judgment**
Consent or agreement

228Judgment
228XIIIMerger and Bar of Causes of Action and Defenses
228XIII(A)Judgments Operative as Bar
228k570Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(6)Consent or agreement

Dismissal of farm equipment installer's prior lien-foreclosure action against farmers, including dismissal of farmers' counterclaims against installer arising from allegedly defective nature of equipment, extinguished and discharged farmers' right, in farmer's subsequent action against equipment manufacturer in which installer had been added as a third-party defendant, to litigate claims against installer that had been raised or could have been raised in prior action.

Cases that cite this headnote

[14] **Appeal and Error**
Res judicata

30Appeal and Error
30XRecord
30X(M)Questions Presented for Review
30k673.2Defenses
30k673.4Res judicata

Record on appeal of dismissal of farmers' complaint against farm equipment manufacturer was inadequate to enable Supreme Court to resolve question of whether farmers' claims against manufacturer were precluded from being litigated by dismissal of equipment installer's prior lien-foreclosure action against farmers, which had included dismissal of farmers' counterclaims against installer arising from allegedly defective nature of equipment.

Cases that cite this headnote

[15] **Appeal and Error**
Necessity of presentation in general

30Appeal and Error
30VPresentation and Reservation in Lower Court of Grounds of Review
30V(A)Issues and Questions in Lower Court
30k169Necessity of presentation in general

Generally, issues not presented to the trial court may not be raised for the first time on appeal.

2 Cases that cite this headnote

579** ***Syllabus by the Court

1. A settlement agreement that does not manifest an intent to release, discharge, or relinquish claims against a party to the agreement does not operate to discharge an alleged joint tortfeasor.

2. A judgment of dismissal with prejudice and on the merits is a final determination and an adjudication as to the claims asserted by the parties in the lawsuit.

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Opinion

OPINION

DIETZEN, Justice.

Respondents Virgil Dykes and Connie Dykes, d/b/a Dykes Farms, commenced this lawsuit against appellant Sukup Manufacturing Company asserting claims of consumer fraud, negligence, and breach of warranty arising out of the purchase and operation of an allegedly defective grain-moving system manufactured by Sukup. Sukup denied the allegations of the complaint and moved for summary judgment alleging that when the Dykes released and dismissed their claims against the equipment dealer, Superior, Inc., in a mediated agreement arising from a prior lawsuit, the Dykes also released their claims against Sukup. The district court granted Sukup's summary judgment motion and dismissed the Dykes' claims. The court of appeals reversed and remanded on the grounds that there were fact issues regarding the scope of the mediated agreement. We affirm the decision of the court of appeals in part, reverse in part, and remand for further proceedings.

The Dykes operate a farm in southern Minnesota. Sukup manufactures farm machinery, including grain-moving equipment. Sukup markets its products through a network of independent dealers. Superior is a Sukup dealer.

Prior to 2002, the Dykes transferred their harvested corn between a grain dryer and large capacity storage bins using a portable auger. In the summer of 2001, the Dykes were introduced to Sukup's "Cyclone Pneumatic Grain Moving System," which moves the corn from grain bins to a grain dryer using blowers and air transfer tubes rather than augers. In June 2002, the Dykes contacted Superior to discuss the Sukup equipment and to request a bid. Subsequently, the Dykes entered into a contract with Superior for the purchase and installation of the "Cyclone" equipment. In September 2002, Sukup delivered its components for the grain-moving system to the Dykes' farm, where Superior installed the system. The Cyclone system was operational in October. Superior billed the Dykes $33,390 for the equipment, labor, and change orders related to the installation.

Shortly after installation, problems with the system developed. According to the Dykes, the corn was being blown through the tubes at a very high rate of speed with no way to slow it down, resulting in damage to the corn. Because of that problem, the Dykes stopped using the equipment on October 20, 2002. The Dykes later determined that 75,000 bushels of corn had been damaged. The Dykes made repeated phone calls to Superior to try to resolve the problem, but were not successful. Finally, a Sukup representative inspected the equipment on November 15, 2002, and made modifications to the equipment. Despite the modifications, the system did not function properly.

When the Dykes refused to pay Superior's invoices, Superior filed a mechanic's lien and commenced a lawsuit to enforce its lien. The lawsuit named the Dykes and two of the Dykes' lenders—Security State Bank of Pine Island and Wells Fargo Financial Leasing, Inc. The Dykes counterclaimed for damages exceeding $50,000. Following mediation in August 2003, the parties executed a document entitled "Mediated Agreement."

***581** The mediated agreement is one page in length, and includes an introductory paragraph stating that Superior and the Dykes "reached the following agreement relating to all issues growing out of the above noted lawsuit." The four paragraphs of the agreement provide that (1) Superior "will take down and remove" the grain-moving system installed on the Dykes' property; (2) Superior will remove an auger it installed; (3) Superior will remove its lien from the Dykes' property, and the parties will dismiss the complaint, answer, and counterclaim; and (4) Superior will return two uncashed checks to the Dykes. When the terms of the agreement were satisfied, the parties executed a stipulation for dismissal "with prejudice and on [the] merits."

In August 2006, the Dykes commenced this lawsuit against Sukup asserting claims including consumer fraud, negligence, and breach of warranty, and ultimately claimed damages of $2.5 million arising out of the operation of the allegedly defective grain-moving system manufactured by Sukup. Sukup denied the allegations of the complaint and asserted a third-party complaint against the dealer, Superior, for contribution and indemnity. Subsequently, Sukup brought a motion for summary judgment to dismiss the complaint on the grounds that the Dykes had previously settled their claims against Superior, and that the mediated agreement between the Dykes and Superior had the effect of releasing Sukup. Virgil Dykes submitted an opposing affidavit in which he stated that "[a]t the mediation there were no discussions about Sukup's liability," they did not "discuss the issue of damages in any detail," the mediated agreement did not release any claims, and the Dykes did not receive full compensation. The district court agreed with Sukup and granted its motion for summary judgment dismissing the complaint.

The court of appeals reversed and remanded, holding that a settlement agreement that releases one or more joint tortfeasors does not release other tortfeasors from joint and several liability unless the parties to the settlement agreement "manifested such an intent, or if the injured party received full compensation for the damages sought against the other tortfeasors." *Dykes v. Sukup Mfg. Co.,* 761 N.W.2d 892, 893 (Minn.App.2009). As a result, the court remanded the case for resolution of the fact issues. Subsequently, we granted review.

Sukup argues that there are no genuine issues of material fact that preclude summary judgment and that the court of appeals erred in failing to affirm the summary judgment. Essentially, Sukup argues that the mediated agreement entered into by the Dykes and Superior released Superior from liability and, because the Dykes did not preserve their claims against Sukup, they thereby released Sukup. The Dykes argue that the mediated agreement is not a general release, does not manifest an intent to release Sukup, and does not provide for full compensation; therefore, the court of appeals should be affirmed.

[1] [2] On appeal from summary judgment, we examine whether there are genuine issues of material fact that preclude summary judgment and whether the lower court properly applied the law. *Kratzer v. Welsh Cos., LLC,* 771

N.W.2d 14, 18 (Minn.2009). When reviewing the application of law, we apply a de novo standard of review. *Id.*

[3] [4] [5] [6] [7] The outcome of this dispute turns on the meaning of the mediated agreement and the consequences of the dismissal with prejudice and on the merits. Thus, we must examine whether the legal effect of the agreement was to release Sukup. A settlement agreement is a contract, ***582** *Ryan v. Ryan,* 292 Minn. 52, 55, 193 N.W.2d 295, 297 (1971), and we review the language of the contract to determine the intent of the parties, *Valspar Refinish, Inc., v. Gaylord's, Inc.,* 764 N.W.2d 359, 364 (Minn.2009). When the language is clear and unambiguous, we enforce the agreement of the parties as expressed in the language of the contract. *Id.* at 364–65. But if the language is ambiguous, parol evidence may be considered to determine intent. *Flynn v. Sawyer,* 272 N.W.2d 904, 908 (Minn.1978). Whether a contract is ambiguous is a question of law that we review de novo. *Carlson v. Allstate Ins. Co.,* 749 N.W.2d 41, 45 (Minn.2008). The language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations. *Id.*

Historically, the release of one joint tortfeasor released all other joint tortfeasors. *Frey v. Snelgrove,* 269 N.W.2d 918, 921 (Minn.1978); *see generally* W. Prosser & W. Page Keeton, *Prosser and Keeton on Torts* § 49, at 332 (5th ed. 1984) (explaining that at common law the release of one joint tortfeasor released all others because, in the eyes of the law, there was but one cause of action against those liable for the same acts). In *Gronquist v. Olson,* 242 Minn. 119, 128, 64 N.W.2d 159, 165 (1954), we considered whether the release of one joint tortfeasor operated to discharge the other from liability. We modified the common law rule, concluding that when the injured party receives part of the damages from one tortfeasor, but "the receipt [is] not [ ] understood to be in full satisfaction of the injury," the release does not discharge the others from liability. *Id.* at 126, 64 N.W.2d at 164. We stated that the factors "determinative of whether a release of one of several joint tortfeasors will operate to release the remaining wrongdoers should be and are: (1) [t]he intention of the parties to the release instrument, and (2) whether or not the injured party has in fact received full compensation for his injury." *Id.* at 128, 64 N.W.2d at 165; *see also Couillard v. Charles T. Miller Hosp., Inc.,* 253 Minn. 418, 426–27, 92 N.W.2d 96, 102 (1958).

[8] [9] We have observed that the court does not favor one type of settlement agreement over another. *Pac. Indem. Co. v. Thompson–Yaeger, Inc.,* 260 N.W.2d 548, 558 (Minn.1977). Rather, we examine such agreements "on a case-by-case basis and assess their validity and effect." *Id.* Moreover, we have never prescribed specific language that is necessary to create a valid release of claims. At a minimum, however, the agreement must manifest an intent to release, discharge, or relinquish a right, claim, or privilege by a person in whom it exists to a person against whom it might have been enforced to be a release. *Gronquist,* 242 Minn. at 125, 64 N.W.2d at 163–64. Further, to release all joint tortfeasors the release must manifest an intent to release all joint tortfeasors and the claimant must have received full compensation for the injury. *Id.* at 128, 64 N.W.2d at 165.

[10] The mediated agreement does not state that the Dykes release and discharge their claims against Superior. The operative language merely states that "Superior, Inc. will remove its lien it placed upon this property and dismiss its complaint and Virgil L. Dykes and Constance E. Dykes will dismiss their answer and counter complaint." Thus, the agreement does not manifest an intent to release Superior. Moreover, the agreement does not state that the Dykes were fully compensated for their injuries. We conclude that the mediated agreement did not expressly manifest an intent to release, discharge, or relinquish the Dykes' claims against Superior or Sukup. Consequently, we reverse the court of appeals' conclusion that the modified ***583** agreement released the Dykes' claim against Superior.

The mediated agreement, however, also provided that when certain conditions were satisfied, the parties would dismiss the complaint, answer and counterclaim. Pursuant to the agreement, the conditions were satisfied, and the parties executed and filed a stipulation dismissing the Superior lawsuit, including the Dykes' counterclaim, "with prejudice and on [the] merits." Judgment of dismissal was entered by the district court, and based upon that judgment, Sukup argues that the Dykes' claims against it were discharged.

[11] [12] A dismissal with prejudice and on the merits executed by both parties is "a final determination and is equivalent to an adjudication on the merits" regarding the claims asserted or which could have been asserted by the parties to that lawsuit, subject to certain exceptions not applicable in this case.[1] *Butkovich v. O'Leary,* 303 Minn. 535, 536, 225 N.W.2d 847, 848 (1975). Thus, a stipulation of dismissal and the resulting judgment operates as a bar to a subsequent lawsuit by either party to the original lawsuit, which asserts claims raised or which could have been raised in the original lawsuit. *See, e.g., Favorite v. Minneapolis St. Ry. Co.,* 253 Minn. 136, 139, 91 N.W.2d 459, 462 (1958) (concluding that "dismissal

with prejudice was binding upon the parties and stood as a bar to the bringing of another action on the same cause"); *cf. Coleman v. Franken,* 767 N.W.2d 453, 467 n. 18 (Minn.2009) (barring claims on certain ballots because parties had stipulated to dismiss with prejudice any claims regarding those ballots); *see also* 1A David F. Herr & Roger S. Haydock, *Minnesota Practice—Civil Rules Ann.* § 41.7 (4th ed. 2003) (explaining that a stipulation to dismiss with prejudice is effective to bar subsequent actions).

[13] Applying these principles to the facts of this case, we conclude that the legal effect of the dismissal of the Superior lawsuit, including the Dykes' counterclaim "with prejudice and on [the] merits," was an adjudication of the Dykes' claims against Superior for claims raised or which could have been raised in the original lawsuit. *See Favorite,* 253 Minn. at 139, 91 N.W.2d at 462. Consequently, the judgment of dismissal with prejudice and on the merits was an adjudication that extinguished and discharged the right of the Dykes to bring claims against Superior in a subsequent lawsuit, which were raised or could have been raised in the original lawsuit.

[14] The question remaining is whether the judgment that bars the Dykes from bringing a subsequent lawsuit against Superior also extends to bar the Dykes' claims against Sukup. Based on the record before us, we are unable to resolve that question. The parties have not briefed whether a judgment of dismissal that extinguished the Dykes' claims against Superior would bar the Dykes' claims against Sukup. Thus, we must remand the case to the district court to consider the legal effect of the judgment of dismissal on the Dykes' claims against Sukup. *See Hart v. Cessna Aircraft Co.,* 276 N.W.2d 166, 167 (Minn.1979).

[15] In summary, we affirm the court of appeals' decision to reverse the district court's dismissal of the Dykes' claim against Sukup. We reverse, however, the ***584** court of appeals' determination that the mediated agreement released the Dykes' claims against Superior, and its order of remand to the district court. Our reversal is predicated on our conclusion that the mediated agreement did not manifest an intent to release Superior. Finally, we are unable to determine on this record the legal effect of the judgment of dismissal of the Dykes' claims against Sukup, and therefore we remand to the district court to make that determination.[2]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Footnotes

1 The exceptions are fraud, collusion, mistake of fact or law, or where the trial court determines the dismissal was improvidently made and in equity and good conscience should not be allowed to stand. *Butkovich v. O'Leary,* 303 Minn. 535, 536, 225 N.W.2d 847, 848 (1975).

2 Amicus curiae Minnesota Defense Lawyers Association (MDLA) argues that if the Dykes are allowed to pursue their claims against Sukup, the court should provide instructions to the district court upon remand to ensure that Sukup does not pay more than its fair share. Specifically, the MDLA contends that the jury instructions should include a special verdict interrogatory that requires the jury to allocate the percentage of fault attributable to the Dykes, Sukup, and Superior; and that the district court should be instructed that Sukup's liability should be no greater than the percentage of fault determined by the jury. The MDLA concedes that those issues were not raised by either party at the district court or court of appeals, and therefore were not properly preserved for appeal. Generally, issues not presented to the trial court may not be raised for the first time on appeal. *See Domtar, Inc. v. Niagara Fire Ins. Co.,* 563 N.W.2d 724, 741 n. 10 (Minn.1997). We have reserved the right in rare cases to examine such an issue not considered by the trial court as the interests of justice may require. Minn. R. Civ.App. P. 103.04; *see also Greene v. Comm'r of Minn. Dep't of Human Servs.,* 755 N.W.2d 713, 725 n. 9 (Minn.2008). We decline to reach the issues raised by the MDLA.

End of Document

431 N.W.2d 900
Court of Appeals of Minnesota.

BADGER EQUIPMENT COMPANY, Appellant,
v.
William BRENNAN, et al., Tri-State Insurance Company of Minnesota, Respondents.

No. C1-88-1031. | Nov. 29, 1988.

Employer filed complaint against employee, employee's son, and their insurer, claiming to be third-party beneficiary under settlement agreement and alleging breach of contract. Insurer counterclaimed against employer, alleging abuse of process, interference with contract, malicious prosecution, and bad faith. The District Court, Winona County, S.A. Sawyer, J., held that employer was not entitled to be reimbursed for medical expenses paid pursuant to employer's ERISA plan from proceeds of personal injury settlement of covered employee's minor dependent. Employer appealed. The Court of Appeals, Foley, J., held that: (1) employer was not entitled to proceeds from settlement, and (2) employer was not third-party beneficiary of settlement agreement.

Affirmed.

West Headnotes (5)

[1] **Subrogation**
Extent of Right to Subrogation

366Subrogation
366k33Extent of Right to Subrogation
366k33(1)In General

Employer with subrogation claim for medical expenses paid on behalf of covered employee's minor dependent under employee benefit plan was not entitled to proceeds from settlement received by minor dependent for personal injuries; settlement did not include payment for medical expenses and employee who had duty to pay for minor son's medical expenses and who signed subrogation agreement could still bring action to recover medical expenses on behalf of employer.

1 Cases that cite this headnote

[2] **Subrogation**
Defenses and Grounds of Opposition

366Subrogation
366k37Defenses and Grounds of Opposition
366k38In General

Employee's settlement with insurer, applying only to claims not subject to subrogation by employer, was proper and in no way prejudiced employer where employer was notified of settlement negotiations and the type of settlement intended, and was invited to obtain any court order it felt necessary for its own protection with regard to settlement; employer possessed not only right to intervene an employee's suit but also right to maintain action in its own name to enforce its subrogation rights.

Cases that cite this headnote

[3] **Subrogation**
Agreements for Subrogation

366Subrogation
366k27Agreements for Subrogation

Later subrogation agreement controlled over an earlier agreement; later agreement was drafted by employer, was more specific, and substituted for generic subrogation agreement contained in plan which applied to all employees.

Cases that cite this headnote

[4] **Subrogation**
Agreements for Subrogation

366Subrogation
366k27Agreements for Subrogation

Because ERISA plan was silent as to priority of payment and ERISA did not by its terms automatically grant employer a priority to payment received from third party, this ambiguity would be applied against employer as drafter, and state law would be applied to preclude subrogation where insured's total recovery was less than his actual loss. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

5 Cases that cite this headnote

[5] **Contracts**
Agreement for Benefit of Third Person

95Contracts
95IIConstruction and Operation
95II(B)Parties
95k185Rights Acquired by Third Persons
95k187Agreement for Benefit of Third Person
95k187(1)In General

An employer which had paid the medical expenses of an employee's minor dependent, pursuant to an employee benefit plan containing subrogation provisions, was not a third-party beneficiary of the settlement reached between the dependent and the tort-feasor's insurer; there was no intent on the part of the parties to the settlement to benefit the employer, and the release did not discharge a duty owed by the employer and was not for the direct benefit of the employer. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

1 Cases that cite this headnote

901** ***Syllabus by the Court

1. The trial court did not err in refusing to award employer proceeds from a settlement received by a covered employee's dependent under employer's ERISA plan where the minor dependent received a settlement for his personal injuries and not for his medical expenses, and where employee, who had a duty to pay for his minor son's medical expenses and who signed a subrogation agreement, can still bring an action to recover those medical expenses on behalf of employer.

2. The trial court did not err in refusing to recognize employer as a third party beneficiary where there was no intent to make employer a beneficiary under the contract, and where the performance of the contract by the promisor did not discharge a duty owed by the promisee to employer.

Attorneys and Law Firms

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Heard, considered and decided by SCHUMACHER, P.J., and FOLEY and HUSPENI, JJ.

Opinion

OPINION

FOLEY, Judge.

This appeal is from a summary judgment granted to respondents William Brennan, Roger Brennan and Tri-State Insurance Company of Minnesota. Appellant Badger Equipment Company paid for medical expenses for Roger Brennan, son of William Brennan. Roger collected a settlement from Tri-State for his personal injuries, not for medical expenses. The trial court held that Badger was not entitled to be reimbursed from Roger's personal injury settlement proceeds. We affirm.

FACTS

William Brennan is an employee of Badger and is covered by an employee benefit plan which operates under the Employee Retirement Income Security Act of

1974 (ERISA). The plan provides medical benefits for covered employees and their dependents.

On July 25, 1983, William's son Roger was injured while riding a motorcycle which was owned by Patrick Klinger. Roger was covered under Badger's plan as a dependent. As a result of the accident, Roger incurred medical bills and attorney fees in excess of $14,000, of which the plan paid $10,194.74.

The Brennans brought a cause of action in negligence against Klinger for allowing Roger, who was then a minor, to ride his motorcycle. In their complaint, Roger sought recovery for personal injuries and William sought recovery for medical expenses.

Prior to bringing the action against Klinger, William signed a subrogation agreement wherein he agreed to reimburse Badger if he were to receive a settlement that included an award for medical expenses that Badger had paid. There was also a separate generic subrogation agreement contained in the plan that applied to all employees. Upon receipt of the complaint, Klinger tendered the claim to Tri-State, his insurer, which answered the complaint and defended him.

The Brennans and Tri-State negotiated a settlement prior to November 12, 1985. Since Roger was a minor, a petition for minor settlement was filed. Badger was given notice of the petition and intervened. Badger claimed that the entire amount of the settlement ($8,500) should be returned to Badger's plan because of a subrogation clause in the plan. Because the parties were unable to agree on the distribution of the settlement, the petition for minor settlement was withdrawn.

***902** On February 5, 1986, Roger reached the age of majority. On March 30, 1986, he entered into a *Naig*-type settlement with Tri-State. The settlement awarded Roger $7,000, released Klinger for any claims which Roger may have had against him, and specifically reserved Badger's interest as subrogor or otherwise.

On March 24, 1987, Badger filed a complaint against the Brennans and Tri-State, claiming that Badger was a third party beneficiary under the settlement reached between Roger and Tri-State and, as such, was entitled to the money which it had paid for Roger's medical expenses. Badger also brought an action against Tri-State alleging breach of contract and claiming that Tri-State's payment to Roger was in derogation of Badger's rights because Badger had given notice to Tri-State that it was the appropriate payee in the event of settlement. Tri-State denied the claims and counterclaimed against Badger alleging abuse of process, interference with contract, malicious prosecution, and bad faith.

The trial court granted the motions for summary judgment brought by the Brennans and Tri-State and found that Badger was not entitled to any of the settlement proceeds which Roger had received from Tri-State because the proceeds compensated Roger for his personal injuries, and not for his medical expenses.

ISSUES

1. Did the trial court err in concluding that Badger did not have any claim to the settlement proceeds received by Roger for his personal injuries?

2. Did the trial court err in concluding that Tri-State, as the insurer of the alleged tortfeasor Klinger, did not have a duty when it entered into the *Naig*-type release with Roger to protect the rights of Badger, which was asserting the subrogation claim against Klinger?

ANALYSIS

On appeal from summary judgment, it is the function of the appellate court to determine whether genuine issues of material fact exist and whether the trial court erred in its application of the law. *Hunt v. IBM Mid America Employees Federal Credit Union,* 384 N.W.2d 853, 855 (Minn.1986). *See also* Minn.R.Civ.P. 56.03. Further, where only questions of law are at issue, we are free to conduct an independent review of the case. *Service Oil, Inc. v. Triplett,* 419 N.W.2d 502, 503 (Minn.Ct.App.1988), *pet. for rev. denied* (Minn. April 20, 1988).

[1] 1. Badger claims it is entitled to the settlement proceeds Roger received for his personal injuries. The settlement included payment for personal injuries only, and not for medical expenses. Since Roger was a minor at the time of the accident, William had a duty to pay for his medical expenses. In *Faber v. Roelofs,* 298 Minn. 16, 212 N.W.2d 856 (1973), the supreme court addressed the difference between claims by parents for medical expenses and claims by children for their injuries:

> This court has long recognized that the responsible parent of an injured child has a right of action for the

> injured child's medical expenses. * * * Although the parent's action is subject to any defenses that could be urged against the child, * * * the parent's action and the child's action are essentially separate. Prosser, Torts (4 ed.) § 125. For example, *a judgment against the child does not bar a later action by the father for medical expenses incurred as a result of his child's injury.*

Id. at 25, 212 N.W.2d at 862 (emphasis added).

Here, William had a duty to pay for Roger's medical expenses while Roger was a minor, and he did. When Roger reached the age of majority, he received a settlement from Tri-State for his personal injuries. William still has a cause of action against Tri-State for medical expenses, and Badger has all of the rights which it had before Roger's settlement for his personal injuries.

Badger argues that we should hold Roger responsible for reimbursing the medical ***903** expenses which it paid and cites to several foreign jurisdictions in support of its position. While we acknowledge that other jurisdictions have held minors responsible for reimbursing medical expenses, we do not adopt that view upon these facts. We do not agree that Roger's settlement for his personal injuries should be turned over to Badger since the settlement did not include payment for medical expenses and since Badger is still able to recover its expenses in a different suit.

The Naig-Type Settlement

[2] The parties refer to the settlement here as a *Naig*-type settlement. The Minnesota Supreme Court discussed this type of settlement in *Naig v. Bloomington Sanitation,* 258 N.W.2d 891 (Minn.1977):

> If an employee settles only those claims not subject to subrogation by the employer, the employer in no way is prejudiced by the settlement. It possesses not only the right to intervene in the employee's suit but also the right to maintain actions in its own name to enforce its subrogation rights and recover expenses for medical treatment.

Id. at 894.

Badger claims that it is entitled to recover the money which it paid for Roger's medical expenses. The agreement Roger signed specifies that the settlement was for his injuries:

> FOR THE SOLE CONSIDERATION OF $7,000.00 Dollars, * * * the undersigned hereby releases and forever discharges Patrick Klinger, * * * and all other persons * * * who might be claimed to be liable, * * * from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and *particularly on account of all injuries,* * * *.

(Emphasis added.)

The release was signed by Roger only, and not by William. The release also provided that Badger was not losing its right to make a claim for its own losses:

> It is specifically understood and agreed by and between the parties hereto that the release above described does not release or otherwise discharge any claim or cause of action or interest therein as subrogor or otherwise of the Badger Construction Equipment Company. It is understood and agreed that said interest is reserved and excepted from the release hereinabove described.

The trial court noted that Badger was notified of the settlement negotiations and of the intent to obtain a *Naig*-type settlement, and that Badger was invited to obtain any court order which it felt necessary for its own protection with regard to the settlement. The trial court also observed that Badger did not choose to exercise that right and should not now complain that its interests have been violated. Accordingly, the *Naig*-type settlement was proper.

The Subrogation Agreements

Badger argues that because two subrogation agreements exist which were signed by William, it should be entitled to the money Roger received. The first subrogation agreement is found in the employee plan, and provides in part:

> In the event of any payment for services under this Plan, the Plan shall to the extent of such payment, be subrogated to all the rights of recovery of the Covered Person arising out of any claim or cause of action which may accrue because of the alleged negligent conduct of a third party. Any such Covered Person hereby agrees to reimburse the Plan for any benefits so paid hereunder, out of any monies recovered from such third party as the result of judgment * * *.

Approximately six months after Roger's accident, Badger drafted a more specific subrogation agreement that William signed. This more specific agreement provides in part:

> In consideration of payments made or to be made by Badger Equipment Company ("Badger") under its Employee Benefits Plan, to or for the benefit of the undersigned, William B. Brennan, Jr., on account of injuries sustained by Roger A. ***904** Brennan, minor son of the undersigned, as a result of a motorcycle accident on July 25, 1983, the undersigned hereby acknowledges and agrees that Badger is and shall be subrogated to all rights of recovery of the undersigned arising out of any claim or cause of action accruing to the undersigned as a result of the said accident against any third party.

[3] Badger argues that both of these subrogation agreements govern here. The Brennans contend that the second subrogation agreement signed by only William is a substitute agreement and has modified the original subrogation agreement. In *Olson v. Penkert,* 252 Minn. 334, 90 N.W.2d 193 (1958), the Minnesota Supreme Court held:

> Parties can alter their contract by mutual consent, and this requires no new consideration, for it is merely the substitution of a new contract for the old one, and this is of itself a sufficient consideration for the new.

Id. at 347, 90 N.W.2d at 203. Accordingly, the later subrogation agreement signed by William controls. It was drafted by Badger, it was more specific, and it substituted for the generic subrogation agreement contained in the plan that applied to all employees.

Even if we were to consider both subrogation agreements valid, we have held that Roger's settlement compensated him for personal injuries only, and not for his medical expenses.

ERISA

Badger argues that the employee plan operates under ERISA and, as such, state subrogation law is preempted. ERISA provides for preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1982).

Minnesota subrogation law is discussed in *Westendorf by Westendorf v. Stasson,* 330 N.W.2d 699 (Minn.1983). There, the Minnesota Supreme Court held:

> Absent express contract terms to the contrary, subrogation will not be allowed where the insured's total recovery is less than the insured's actual loss.

Id. at 703.

In a factually similar case, the Minnesota Supreme Court held in *Hunt by Hunt v. Sherman,* 345 N.W.2d 750 (Minn.1984), that chapter 18 of ERISA preempted application of state subrogation law, as set forth in *Westendorf,* to a self-funded employee benefit plan whereby contributions on behalf of employees were pooled to provide medical benefits for the plan participants in accord with the collective bargaining agreement between the employees and their employers.

Although *Hunt* was factually similar, the *plan* in *Hunt* is not similar to Badger's plan. In *Hunt,* the subrogation agreement stated the order for payment:

> *This plan shall be reimbursed* to the extent of any payments made by the plan to or on behalf of a

> participant or his dependants. If *any balance* then remains from such recovery, it *shall be applied to reimburse the participant.*

Id. at 751 (emphasis added).

Here, it is clear that there is no order for priority of payment in either of the subrogation agreements, whereas *Hunt* provided that the plan would be paid first and any remaining proceeds would be paid to the participant.

[4] ERISA clearly applies here as it did in *Hunt.* ERISA, however, does not by its terms automatically grant the employer a priority to payments received from a third party. 29 U.S.C. § 1001 *et seq.* (1982). Accordingly, because the Badger plan is silent as to the priority of payment, we will construe this ambiguity against the drafter, and absent a specific provision regarding priority of payment, we will apply Minnesota subrogation law as articulated in *Westendorf.* Even if we elected not to apply state subrogation law, we have held that Badger is not entitled to Roger's personal injury proceeds.

2. Next, Badger argues that it had the rights of a third party beneficiary because ***905** Tri-State was aware of Badger's claims by virtue of knowing Badger had intervened when the settlement was sought to be approved. We disagree.

[5] A third party may only recover on a contract for his benefit where he can establish an intent to make the third party a beneficiary of the contract, and that the performance of the contract by the promisor discharges a duty owed by the promisee to the third party. *Buchman Plumbing Co., Inc. v. Regents of the University of Minnesota,* 298 Minn. 328, 334-35, 215 N.W.2d 479, 483-484 (1974). Here, the facts establish that Tri-State and the Brennans had no intent to benefit Badger. The release did not discharge a duty owed by Badger, nor was it for the direct benefit of Badger. Further, there is no contractual relationship between Badger and Tri-State, and Badger has no claim to be a third party beneficiary where Tri-State and Roger settled the personal injury portion of their dispute through a *Naig*-type settlement without expressing an intent to benefit Badger. Further, Tri-State concedes that the *Naig*-type settlement made with Roger discharged all of the claims between them *except* for the medical expenses asserted by Badger in its intervention action, and the language in the release specifically preserves the claim of Badger.

Lastly, the terms of the subrogation portion of the ERISA plan created by Badger does not give Badger a priority to the payments made in a settlement. The language in the plan states that it shall be

> subrogated to all the rights of recovery of the Covered Person arising out of any claim or cause of action which may accrue because of the alleged negligent conduct of a third party.

In the *Hunt* case, the language used by the employer required that the proceeds of any settlement be used first to reimburse the plan before giving the balance to the employee. That language is not in the Badger plan, nor is it in the subrogation agreement signed by William.

Tri-State has admitted that it settled the nonmedical portion of the Brennans' claim without prejudicing Badger. It did not ignore the rights of Badger or make payment of proceeds which belonged to Badger. William has not given up his right to make a claim for medical expenses, and Badger has conceded that it is aware that the Brennan's have pledged their full cooperation in any lawsuit that may be pursued by Badger.

DECISION

AFFIRMED.

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115 A.D.3d 1047
Supreme Court, Appellate Division, Third Department, New York.

Douglas AGOR et al., Appellants,
v.
BOARD OF EDUCATION, Northeastern Clinton Central School District, et al., Respondents.

March 6, 2014.

Synopsis
Background: Retired teachers and their spouses brought action against school district, alleging district's failure to reimburse them for Medicare Part B premiums constituted a breach of their collective bargaining agreements (CBA). District moved to dismiss for failure to state a claim. The Supreme Court, Clinton County, Ryan, J., granted motion. Plaintiffs appealed.

Holdings: The Supreme Court, Appellate Division, Peters, P.J., held that:

[1] CBA provision was ambiguous as to what was encompassed by "health insurance coverage";

[2] CBA provisions were ambiguous as to their duration; and

[3] Insurance Moratorium Law did not provide a basis for abrogating plaintiffs' vested contractual rights.

Reversed.

West Headnotes (7)

[1] **Contracts**
Ambiguity in general

95Contracts
95IIConstruction and Operation
95II(A)General Rules of Construction
95k176Questions for Jury
95k176(2)Ambiguity in general

In determining the obligations of parties to a contract, the threshold determination as to whether an ambiguity exists is a question of law to be resolved by the court.

Cases that cite this headnote

[2] **Contracts**
Existence of ambiguity

95Contracts
95IIConstruction and Operation
95II(A)General Rules of Construction
95k143Application to Contracts in General
95k143(2)Existence of ambiguity

A contract is ambiguous if the language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion.

Cases that cite this headnote

[3] **Contracts**
Ambiguity in general
Pretrial Procedure
Contracts; sales

95Contracts
95IIConstruction and Operation
95II(A)General Rules of Construction
95k176Questions for Jury
95k176(2)Ambiguity in general
307APretrial Procedure
307AIIIDismissal
307AIII(B)Involuntary Dismissal
307AIII(B)5Particular Actions or Subject Matter, Defects in Pleading
307Ak643Contracts; sales

If the court concludes that a contract is ambiguous, it cannot be construed as a matter of law, and dismissal for failure to state a claim is not appropriate. McKinney's CPLR 3211(a)(7).

Cases that cite this headnote

[4] **Labor and Employment**
Benefits
Pretrial Procedure
Labor and employment; injuries to employees

231HLabor and Employment
231HXIILabor Relations
231HXII(E)Labor Contracts
231Hk1268Construction
231Hk1280Benefits
307APretrial Procedure
307AIIIDismissal
307AIII(B)Involuntary Dismissal
307AIII(B)5Particular Actions or Subject Matter, Defects in Pleading
307Ak647Labor and employment; injuries to employees

Provision in collective bargaining agreement (CBA) in place at time of teachers' retirements, which stated that retirees were entitled to no-cost health insurance coverage, was ambiguous as to what was encompassed by "health insurance coverage," and thus breach of contract claims of retired teachers and their spouses, based on school district's failure to provide Medicare Part B reimbursements, should not have been dismissed for failure to state a claim.

Cases that cite this headnote

[5] **Labor and Employment**
Benefits
Pretrial Procedure
Labor and employment; injuries to employees

231HLabor and Employment
231HXIILabor Relations
231HXII(E)Labor Contracts
231Hk1268Construction
231Hk1280Benefits
307APretrial Procedure
307AIIIDismissal
307AIII(B)Involuntary Dismissal
307AIII(B)5Particular Actions or Subject Matter, Defects in Pleading
307Ak647Labor and employment; injuries to employees

Provisions in collective bargaining agreements (CBA) applicable at times of former teachers' retirements regarding retiree health insurance, including reimbursement of Medicare Part B premiums, were ambiguous as to their duration, and thus breach of contract claims of retired teachers and their spouses, based on school district's failure to provide Medicare Part B reimbursements, should not have been dismissed for failure to state a claim.

Cases that cite this headnote

[6] **Labor and Employment**
Welfare Plans
Labor and Employment
Benefits

231HLabor and Employment
231HVIIPension and Benefit Plans
231HVII(G)Eligibility, Participation, and Coverage
231Hk546Vesting
231Hk549Welfare Plans
231Hk549(1)In general
231HLabor and Employment
231HXIILabor Relations
231HXII(E)Labor Contracts
231Hk1268Construction
231Hk1280Benefits

Insurance Moratorium Law, which prevented school districts from eliminating or reducing retiree health insurance benefits unless a corresponding diminution of benefits or contributions was effected from corresponding group of active employees, did not allow school district to modify retired employees' health benefits coverage because a corresponding modification was made in current collective bargaining agreement (CBA) for active employees, since CBA in effect at time employees retired gave them vested contractual rights to health care benefits.

Cases that cite this headnote

[7] **Education**
Pensions and benefits

Labor and Employment
Purpose

141EEducation
141EIIPublic Primary and Secondary Schools
141EII(C)Officers and Employees
141Ek427Compensation
141Ek430Pensions and benefits
231HLabor and Employment
231HXIILabor Relations
231HXII(E)Labor Contracts
231Hk1237Constitutional and Statutory Provisions
231Hk1239Purpose

Insurance Moratorium Law's primary purpose was to prevent school districts from eliminating or reducing retiree health insurance benefits that were voluntarily conferred as a matter of school district policy, not rights negotiated in the collective bargaining context.

Cases that cite this headnote

Attorneys and Law Firms

***486** Richard E. Casagrande, New York State United Teachers, Latham (Marilyn Raskin–Ortiz of counsel), for appellants.

Harris Beach, PLLC, Albany (Douglas Gerhardt of counsel), for respondents.

Before: PETERS, P.J., LAHTINEN, STEIN and EGAN JR., JJ.

Opinion

PETERS, P.J.

Appeal from an order of the Supreme Court (Ryan, J.), entered September 4, 2012 in Clinton County, which granted defendants' motion to dismiss the complaint.

Plaintiffs are former teachers and spouses of former teachers who retired from defendant Northeastern Clinton Central School District between 1996 and 2010.[1] The collective bargaining agreement (hereinafter CBA) in effect from July 1996 to June 2002 provided, as relevant here, that "[e]mployees who retire on or after July 1, 1996 with [15] or more years of service to the District shall be entitled to District provided individual or family health insurance coverage, as applicable, at no cost to the retiree." The two successive CBAs in effect from July 2002 to June 2010 contained that same provision with regard to retiree health insurance coverage, as well as a separate provision expressly addressing Medicare reimbursement that stated, "as of July 1, 2003, [teachers] who retire from Northeastern Clinton [Central School District] with 25 years of consecutive service in the [D]istrict shall be entitled to Medicare reimbursement for themselves and their spouse[s], while the retired employee is still living."

In 2010, after plaintiffs had retired, a successor CBA was executed between the District and the collective bargaining unit representing the District's teachers which, among other things, provided that employees retiring on or after July 1, 2010 shall not be provided with Medicare reimbursement upon retirement. Shortly thereafter, defendant Board of Education, Northeastern Clinton Central School District adopted a resolution which, among other things, eliminated Medicare reimbursements for District retirees who were not already in receipt of such reimbursements as of July 1, 2010. After receiving notice of the resolution, plaintiffs commenced this action for breach of contract and for a declaratory judgment, claiming that they ***487** are entitled to Medicare Part B reimbursement under the CBAs in effect at the time of the employees' retirement. Prior to answering, defendants moved to dismiss the complaint for failure to state a cause of action (*see* CPLR 3211[a][7]). Supreme Court granted the motion and dismissed the complaint, prompting this appeal.

[1] [2] [3] In determining the obligations of parties to a contract, the threshold determination as to whether an ambiguity exists is a question of law to be resolved by the court (*see Greenfield v. Philles Records,* 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166 [2002]; *Williams v. Village of Endicott,* 91 A.D.3d 1160, 1162, 936 N.Y.S.2d 759 [2012]; *Hudock v. Village of Endicott,* 28 A.D.3d 923, 924, 814 N.Y.S.2d 286 [2006]). "A contract is ambiguous if the language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion" (*Pozament Corp. v. Aes Westover, LLC,* 27 A.D.3d 1000, 1001, 812 N.Y.S.2d 154 [2006] [citation omitted]; *accord Vectron Intl., Inc. v. Corning Oak Holding, Inc.,* 106 A.D.3d 1164, 1165, 964 N.Y.S.2d 724 [2013]; *see W.W.W. Assoc. v. Giancontieri,* 77 N.Y.2d 157, 162–163, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]). "If the court concludes that a contract is ambiguous, it cannot be construed as a matter of law, and dismissal under CPLR 3211(a)(7) is not appropriate" (*Telerep, LLC v. U.S. Intl. Media, LLC,* 74 A.D.3d 401, 402, 903 N.Y.S.2d 14 [2010] [citation omitted]; *see*

Vectron Intl., Inc. v. Corning Oak Holding, Inc., 106 A.D.3d at 1165, 964 N.Y.S.2d 724).

[4] Supreme Court improperly concluded that the 1996–2002 CBA unambiguously failed to grant retirees rights to Medicare Part B reimbursements. As noted, that CBA provides health insurance coverage to a qualifying retiree "at no cost to the retiree." Notably, the CBA does not define what is encompassed by "health insurance coverage" and contains no reference to Medicare reimbursements (*cf. Williams v. Village of Endicott,* 91 A.D.3d at 1162, 936 N.Y.S.2d 759). While the subsequent CBAs at issue here contain language specifically addressing Medicare Part B reimbursements, this does not necessarily indicate that such reimbursement was not contemplated by the parties in the 1996–2002 CBA. It is equally plausible that such language was included in the subsequent CBAs to clarify that the District's provision of health insurance "at no cost to the retiree" included reimbursements for Medicare Part B. Thus, the claims of those plaintiffs who retired under the terms of the 1996–2002 CBA and their spouses should not have been dismissed on the basis that such agreement did not grant them any rights to Medicare Part B reimbursement.

[5] Moreover, the provisions in each of the CBAs regarding retiree health insurance, including reimbursement of Medicare Part B premiums, are ambiguous as to their duration. Indeed, the retiree health insurance provisions at issue here contain no language indicating the duration for which the District undertook to provide benefits to its retirees. Furthermore, given that employees are no longer represented by the union upon retirement and, therefore, are not involved in subsequent negotiations, a construction that would limit the right to coverage to the duration of the agreement could potentially "render[ ] the benefit inconsequential, ... as the plaintiffs no longer would be in a position to negotiate with the [District] over future benefits" (*Kolbe v. Tibbetts,* 22 N.Y.3d 344, 353–354, 980 N.Y.S.2d 903, 3 N.E.3d 1151 [2013] [internal quotation marks and citation omitted]; *see* ***488** *Matter of Warner v. Board of Educ., Cobleskill–Richmondville Cent. Sch. Dist.,* 108 A.D.3d 835, 837, 968 N.Y.S.2d 714 [2013], *lv. denied* 22 N.Y.3d 859, 2014 WL 113896 [2014]; *Della Rocco v. City of Schenectady,* 252 A.D.2d 82, 84, 683 N.Y.S.2d 622 [1998], *lvs. dismissed* 93 N.Y.2d 999, 1000, 695 N.Y.S.2d 745, 717 N.E.2d 1082 [1999]; *Myers v. City of Schenectady,* 244 A.D.2d 845, 847, 665 N.Y.S.2d 716 [1997], *lv. denied* 91 N.Y.2d 812, 672 N.Y.S.2d 848, 695 N.E.2d 717 [1998]). That each successive CBA sets forth the obligations of the District with respect to not only those individuals retiring thereunder, but also those who had retired under prior agreements, may suggest that the terms and conditions of health insurance for former retirees were being renegotiated at the expiration of each CBA and, therefore, that the level of benefits granted to retirees under any given CBA was limited to the duration of that agreement. On the other hand, it is just as plausible that each successive CBA carried over the obligations of the District with respect to those who retired under prior CBAs in recognition that the District was contractually bound by those prior agreements to provide such coverage. As the CBA provisions in question are susceptible to differing but reasonable interpretations, an ambiguity exists that requires consideration of extrinsic evidence relevant to the parties' intent (*see Kolbe v. Tibbetts,* 22 N.Y.3d at 355, 980 N.Y.S.2d 903, 3 N.E.3d 1151; *Vectron Intl., Inc. v. Corning Oak Holding, Inc.,* 106 A.D.3d at 1167, 964 N.Y.S.2d 724; *Williams v. Village of Endicott,* 91 A.D.3d at 1163, 936 N.Y.S.2d 759). Thus, at this pre-answer stage of the litigation, defendants' motion to dismiss the complaint should have been denied (*see Vectron Intl., Inc. v. Corning Oak Holding, Inc.,* 106 A.D.3d at 1167, 964 N.Y.S.2d 724; *Telerep, LLC v. U.S. Intl. Media, LLC,* 74 A.D.3d at 402–403, 903 N.Y.S.2d 14).

[6] [7] The additional argument advanced by defendants—that, regardless of any contractual right to Medicare Part B reimbursements, the Insurance Moratorium Law (*see* L. 2009, ch. 504, part B, § 14) authorizes the District to modify plaintiffs' coverage because a corresponding modification was made for active employees in the 2010–2014 CBA—was recently rejected by the Court of Appeals in *Kolbe v. Tibbetts* (*supra*). As the Court there noted, the statute's "primary purpose was to prevent school districts from eliminating or reducing retiree health insurance benefits that were *voluntarily conferred* as a matter of school district policy, not rights negotiated in the collective bargaining context.... It was not meant to eviscerate contractual obligations and decades of contract law" (*Kolbe v. Tibbetts,* 22 N.Y.3d at 358, 980 N.Y.S.2d 903, 3 N.E.3d 1151 [internal quotation marks and citation omitted]).

ORDERED that the order is reversed, on the law, with costs, motion denied and matter remitted to the Supreme Court to permit defendants to serve an answer within 20 days of the date of this Court's decision.

LAHTINEN, STEIN and EGAN JR., JJ., concur.

Parallel Citations

115 A.D.3d 1047, 981 N.Y.S.2d 485, 301 Ed. Law Rep. 950, 2014 N.Y. Slip Op. 01496

Footnotes

1 Plaintiffs Linda Brubaker and James Brubaker withdrew as plaintiffs to the action.

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61 A.D.3d 666, 877 N.Y.S.2d 163, 243 Ed. Law Rep. 845, 2009 N.Y. Slip Op. 02771

Rocco Spano, Appellant
v
Kings Park Central School District et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
April 7, 2009

CITE TITLE AS: Spano v Kings Park Cent. School Dist.

HEADNOTES

Civil Service
Retirement and Pension Benefits

Issue of whether plaintiff had completed 10 years of service and was thus eligible for retirement bonus pursuant to collective bargaining agreement (CBA) could not be determined as matter of law—plaintiff's employment included 18 months of service in temporary capacity before he was hired as permanent employee—CBA provided that employee was eligible to receive retirement bonus when he or she "has completed 10 years of service" with employer; CBA defined "10 years of completed service" as "continuous service," but was silent on issue of whether "continuous service" included service in temporary or substitute capacity.

Labor Unions
Breach of Duty of Fair Representation
Where employer determined that plaintiff was not eligible for retirement bonus because he had not completed 10 years of service pursuant to collective bargaining agreement, there was triable issue of fact as to whether union breached its duty of fair representation in adopting position that plaintiff was not eligible for retirement bonus, rather than asserting that plaintiff's 18 months of temporary or substitute service counted toward his "continuous service"; plaintiff's failure to request that union file grievance on his behalf, request which apparently would have been futile, did not negate existence of triable issue of fact. ***667**

Administrative Law
Failure to Exhaust Administrative Remedies

In breach of contract action premised upon employer's determination that plaintiff had not completed 10 years of service and was thus ineligible for retirement bonus pursuant to collective bargaining agreement (CBA), employer was not entitled to summary judgment on grounds that plaintiff failed to exhaust his administrative remedies and lacked standing to enforce terms of CBA—since there was question of fact as to whether union's conduct constituted breach of its duty of fair representation, there was concomitant question of fact as to whether that conduct prevented plaintiff from exhausting remedies provided in CBA, thus affording him standing to sue employer for breach of CBA and overcoming employer's defense of failure to exhaust administrative remedies; although employer contended that plaintiff could have processed his grievance by himself without assistance from union, there was triable issue of fact as to whether such steps would have been futile, in light of statements to plaintiff indicating that union would not be supporting him at any stage of grievance process.

Ahern & Ahern, Kings Park, N.Y. (Dennis P. Ahern of counsel), for appellant.
Ingerman Smith, LLP, Hauppauge, N.Y. (Michael G. McAlvin of counsel), for respondent Kings Park Central School District.
Nancy E. Hoffman, Albany, N.Y. (Paul S. Bamberger of counsel), for respondent CSEA, Local 1000 AFSCME, AFL-CIO.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Spinner, J.), dated September 25, 2007, as, upon, in effect, converting the defendants' separate motions pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against each of them into motions for summary judgment dismissing the complaint insofar as asserted against each of them, granted the motions, and denied, as academic, that branch of the plaintiff's cross motion which was to compel arbitration.

Ordered that the order is modified, on the law, (1) by deleting the provisions thereof granting those branches of the defendants' converted motions which were for summary judgment dismissing the first, second, third, fifth, sixth, and seventh causes of action insofar as asserted against each of them and substituting therefor provisions denying those branches of the motions, and (2) by deleting the provision thereof denying, as academic, that branch of the plaintiff's cross motion which was to compel arbitration and substituting therefor a provision denying that branch of the plaintiff's cross motion on the merits; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the plaintiff.

In January 1995 the plaintiff began working for the defendant Kings Park Central School ****2** District (hereinafter Kings Park) as a temporary or substitute custodian. In August 1996 the plaintiff was hired as a permanent custodian with union benefits, and began paying dues to the defendant CSEA, Local 1000, AFSCME, AFL-CIO (hereinafter CSEA). The plaintiff took a one-year unpaid leave of absence from May 26, 2001 through May 20, 2002.

In November 2005 the plaintiff attended a CSEA meeting, at which Rebecca Sobotkin, the CSEA unit president, announced that, pursuant to the collective bargaining agreement (hereinaf ***668** ter CBA) between Kings Park and CSEA, Kings Park would pay a $13,000 retirement bonus to any employee with 10 years of service who notified Kings Park by March 1, 2006, of his or her intent to retire by January 1, 2007. The CBA provided, in pertinent part, that: "A retirement bonus shall be granted eligible employees covered by this contract. An eligible employee is one covered by this contract who is eligible to retire . . . and has completed 10 years of service in Kings Park School District. . . . Ten years of completed service means continuous service except that persons on an approved leave . . . shall neither lose accrued time nor gain time because of said leave."

On February 28, 2006, based on his belief that he qualified for the retirement bonus, the plaintiff submitted a letter notifying Kings Park of his intent to retire, effective December 29, 2006. The plaintiff subsequently learned from Kings Park that he did not qualify for the bonus, since his first 18 months on the job, which he spent in a temporary or substitute capacity, did not count toward the service requirement, and therefore he would be credited with only 9 years and 4 months of service. The plaintiff made an inquiry about rescinding his retirement, but was told that he could not do so.

Sobotkin advised the plaintiff that CSEA would not oppose Kings Park's determination regarding the bonus. According to Sobotkin, the plaintiff did not request that CSEA file a grievance on his behalf. Instead, in January 2007, the plaintiff commenced this action against Kings Park and CSEA, seeking, inter alia, damages for breach of contract and fraud against Kings Park, rescission of his retirement, reinstatement of his employment with Kings Park, and, in effect, damages for breach of the duty of fair representation against CSEA.

At a hearing pursuant to General Municipal Law § 50-h, the plaintiff gave the following testimony. The plaintiff first learned that he was not eligible for the retirement bonus in April 2006 when he asked a Kings Park employee in charge of payroll for a letter confirming that he would receive the bonus, and was informed that he had not yet accrued 10 years of service. The plaintiff subsequently asked Sobotkin to assist him in obtaining a written confirmation of his entitlement to the bonus, but she advised him that he would have to obtain the letter on his own. The plaintiff did not speak to anyone at Kings Park about the bonus again until October 2006 when he was informed by the secretary to the school superintendent that the superintendent "wanted to get [him] the [bonus] by using the 18 months that [he] put in as a temp, but that the union was against it." When the plaintiff asked Sobotkin why CSEA was "fighting" the ***669** superintendent's effort to get him the bonus, she replied: "I have to fight it because if I give it to you, I have to give it to everybody else." Although Sobotkin acknowledged that there was currently no one else in the plaintiff's situation, she explained that she did not want to "set a precedent." The plaintiff was subsequently advised that the superintendent had determined that he was not entitled to the retirement bonus. In November 2006 Sobotkin informed the plaintiff that CSEA did not intend to challenge the superintendent's determination. ****3**

Kings Park moved to dismiss the complaint insofar as asserted against it on the grounds, among others, that the plaintiff failed to exhaust his administrative remedies and lacked standing to assert claims arising under the CBA. CSEA moved to dismiss the complaint insofar as asserted against it on the ground, among others, that it did not breach its duty of fair representation. The plaintiff cross-moved, inter alia, to compel arbitration with Kings Park. The Supreme Court, in effect, converted the defendants' motions into motions for summary judgment dismissing the complaint insofar as asserted against each of them (*see* CPLR 3211 [c]), granted the motions, and denied the plaintiff's cross motion as academic. The plaintiff appeals.

The Supreme Court concluded that the defendants were entitled to summary judgment dismissing the complaint since, as a matter of law, the plaintiff had not completed 10 years of service pursuant to the CBA, and therefore was not eligible for the retirement bonus. We disagree. When a contract, "read as a whole to determine its purpose and intent," plainly manifests the intent of the parties, relief may be granted by way of summary judgment (*W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 162 [1990]). Where, however, the contractual provision relied upon is ambiguous, "the resolution of the ambiguity is for the trier of fact" (*State of New York v Home Indem. Co.,* 66 NY2d 669, 671 [1985]; *see Nappy v Nappy,* 40 AD3d 825, 826 [2007]). Here, the CBA provided, in relevant part, that an employee is eligible to receive a retirement bonus when he or she "has completed 10 years of service in Kings Park School District." The CBA defined "10 years of completed service" as "continuous service." The CBA did not define "continuous service," and contained no language indicating that "continuous service" included only service as a permanent employee. Accordingly, the CBA was ambiguous, since it was silent on the issue of whether "continuous service" included service in a temporary or substitute capacity. Indeed, according to the school superintendent, Kings Park's determination that "continuous service" referred only to per ***670** manent service was not based on any language in the CBA, but was made "pursuant to past practice." Similarly, according to Sobotkin, CSEA's position that the plaintiff was not eligible for the retirement bonus was based solely on its decision to honor Kings Park's "longstanding interpretation" of the CBA. Thus, the issue of whether the plaintiff was an eligible employee under the CBA cannot be determined as a matter of law, and the defendants, therefore, were not entitled to summary judgment on that ground.

The Supreme Court further concluded, in effect, that CSEA was entitled to summary judgment on the ground that it did not breach its duty to the plaintiff to provide fair representation. In order to establish a breach of the duty of fair representation against a union, a member must show that "the union's conduct was arbitrary, discriminatory, or in bad faith" (*Lundgren v Kaufman Astoria Studios,* 261 AD2d 513, 514 [1999]; *see Hickey v Hempstead Union Free School Dist.,* 36 AD3d 760, 761 [2007]; *Ponticello v County of Suffolk,* 225 AD2d 751, 752 [1996]). We conclude that CSEA failed to make a prima facie showing that it did not breach its duty of fair representation. The papers submitted by CSEA in support of its motion included a transcript of the plaintiff's testimony at the hearing held pursuant to General Municipal Law § 50-h, which itself revealed the existence of a triable issue of fact as to whether CSEA acted arbitrarily in adopting the position that the plaintiff was not eligible for the retirement bonus, rather than asserting, on the plaintiff's behalf, that his 18 months as a temporary or substitute custodian counted toward his "continuous service," which would have been an eminently reasonable interpretation of the relevant provision of the CBA. Under the circumstances of this case, including Sobotkin's affirmative statements to the plaintiff that it was CSEA's position that the plaintiff was ineligible for the retirement bonus and that the union would not challenge Kings Park's refusal to pay him the bonus, the plaintiff's alleged failure to specifically request that CSEA file a grievance on his behalf—a request which apparently would ****4** have been futile—does not negate the existence of a triable issue of fact as to whether CSEA breached its duty of fair representation.

Contrary to Kings Park's contention, it was not entitled to summary judgment on the grounds that the plaintiff failed to exhaust his administrative remedies and lacked standing to enforce the terms of the CBA. Generally, an employee covered by a collective bargaining agreement which provides for a grievance procedure must exhaust administrative remedies prior to ***671** seeking judicial remedies (*see Matter of Plummer v Klepak,* 48 NY2d 486, 489-490 [1979]). In this case, the CBA set forth a four-step grievance procedure, and the plaintiff did not complete any of the steps in that procedure. Moreover, an individual union member normally lacks standing to enforce the terms of a collective bargaining agreement between the union and the employer (*see Hickey v Hempstead Union Free School Dist.,* 36 AD3d at 761; *Berlyn v Board of Educ. of E. Meadow Union Free School Dist.,* 80 AD2d 572 [1981], *affd* 55 NY2d 912 [1982]). Nonetheless, a union employee may maintain a direct action against an employer, despite a failure to exhaust available administrative remedies, where the employee can prove that "the union as bargaining agent breached its duty of fair representation in the handling of the employee's grievance," including situations where "the union refuses to press . . . the individual's claim" (*Jackson v Regional Tr. Serv.,* 54 AD2d 305 [1976]; *see Vaca v Sipes,* 386 US 171, 186 [1967]; *Matter of Board of Educ., Commack Union Free School Dist. v Ambach,* 70 NY2d 501, 508 [1987]; *Hickey v Hempstead Union Free School Dist.,* 36 AD3d at 761). Here, since there exists a question of fact as to whether the CSEA's conduct constituted a breach of its duty of fair representation, there exists a concomitant question of fact as to whether that conduct prevented the plaintiff from exhausting the remedies provided in the CBA (*see Vaca v Sipes,* 386 US at 185), thus affording him standing to sue Kings Park for a breach of the CBA and overcoming Kings Park's defense of failure to exhaust administrative remedies. Although Kings Park contends that the plaintiff could have processed his grievance by himself without assistance from CSEA (*see Matter of Lewis v Klepak,* 65 AD2d 637 [1978]), we perceive a triable issue of fact as to whether such steps would have been futile, in light of Sobotkin's statements to the plaintiff indicating that CSEA would not be supporting him at any stage of the grievance process.

The Supreme Court properly awarded summary judgment to the defendants dismissing the fourth cause of action, which, inter alia, sought to recover punitive damages. To the extent that this cause of action was based upon a breach of contract, punitive damages would be available only upon "an extraordinary showing of a disingenuous or dishonest failure to carry out [the] contract" (*Gordon v Nationwide Mut. Ins. Co.,* 30 NY2d 427, 437 [1972]), which the plaintiff cannot make here. To the extent that the fourth cause of action was based upon fraud, punitive damages are not available in the absence of a showing, which the plaintiff cannot make here, that the defendants acted in a malicious, vindictive, or reckless manner (*see* ***672** *Reinah Dev. Corp. v Kaaterskill Hotel Corp.,* 59 NY2d 482, 488 [1983]). Furthermore, punitive damages are not available against Kings Park, as it is a political subdivision of the State (*see Sharapata v Town of Islip,* 56 NY2d 332 [1982]).

In light of our determination, that branch of the plaintiff's cross motion which was to compel arbitration should not have been denied as academic. Nonetheless, denial of that branch of the cross motion on the merits was appropriate, since the plaintiff's "use of the courts is 'clearly inconsistent with [his] later claim that the parties were obligated to settle their differences by arbitration' " (*Stark v Molod Spitz DeSantis & Stark, P.C.,* 9 NY3d 59, 66 [2007], quoting *Flores v Lower E. Side Serv. Ctr., Inc.,* 4 NY3d 363, 372 [2005]).

The parties' remaining contentions are without merit or need not be reached in light of our ****5** determination. Prudenti, P.J., Mastro, Fisher and Dillon, JJ., concur. [*See* 2007 NY Slip Op 33211(U).]

End of Document

87 A.D.2d 145, 451 N.Y.S.2d 159

Village Savings Bank, Respondent,
v.
Maria B. Caplan et al., Appellants

Supreme Court, Appellate Division, Second Department, New York
June 7, 1982

CITE TITLE AS: Village Sav. Bank v Caplan

SUMMARY

Appeals from (1) an order of the Supreme Court at Special Term (George D. Burchell, J.), entered December 18, 1980 in Westchester County, which granted a motion by plaintiff for summary judgment and appointed a referee, and (2) a judgment of foreclosure and sale of the Supreme Court (Anthony J. Ferraro, J.), entered April 20, 1981 in Westchester County.

HEADNOTES

Mortgages
Foreclosure

Tax Escrow Accounting System

([1]) It was error to grant mortgagee bank summary judgment in a foreclosure action against defendant mortgagors for failure to comply with requests for increased monthly tax payments under the tax escrow paragraph of their mortgage, since defendants deny acquiescence in the bank's "fully accrued" system, which utilizes several escrow accounts for various taxes payable during the year and results in higher average tax reserve balances and/or monthly escrow payments than would be required under a single account system and, further, the mortgage, tax reserve statement and truth in lending statement signed by defendants are ambiguous with reference to whether they can accommodate a fully accrued system; the issue of acquiescence cannot be decided on the record and the interpretation of the mortgage is not a pure question of law, but must be decided by the trier of fact.

APPEARANCES OF COUNSEL

Public Citizen Litigation Group (*Alan B. Morrison* of counsel) and *Golenbock & Barrell* (*Michael C. Silberberg* and *Geri S. Krauss* of counsel), for appellants (one brief).
Taylor, McCullough, Geoghegan & Friedman (*James Staudt* of counsel), for respondent.
Leopold S. Rassnick for Savings Banks Association of New York State, *amicus curiae*.

OPINION OF THE COURT

Lazer, J.

The issue in this mortgage foreclosure action is the mortgagee's right to establish a "fully accrued" system of collecting tax escrow payments under which either the required tax reserve or the monthly escrow payments--or both-- may be well in excess of the sums required under a system keyed to the monthly collection of one twelfth of the ***146** annual real estate taxes. On the facts before us, we believe that Special Term's grant of summary judgment of foreclosure was error and that a trial is necessary.

In May, 1973, Maria and David Caplan financed the purchase of a home in Briarcliff Manor by borrowing $60,000 from the Village Savings Bank. Paragraph 16 of the resulting mortgage provided: "In addition to the above payments, the Mortgagor, or any subsequent owner of the premises herein described, shall pay to the Mortgagee on the first day of each month until the whole of the principal and interest is fully paid one-twelfth of the annual taxes, water rates, sewer rates and special assessments, all as estimated by the Mortgagee and full irrevocable authority is hereby given to the Mortgagee to pay the same. If the amounts paid by the Mortgagor are insufficient to pay for all the aforesaid items, the Mortgagor agrees to pay the deficiency on demand; and failure to pay any deficiency within thirty (30) days of such demand shall constitute a default under this Mortgage."

A truth in lending statement signed by the Caplans at the time of execution of their loan commitment stated that "[i]n addition to the regular monthly payment for principal and interest, an additional payment equal to 1/12th of the estimated annual taxes will be required."

However, another paper signed by Mrs. Caplan at the mortgage closing set forth the estimated tax reserve required to start the tax escrow account as follows:

"ESTIMATED TAX RESERVE

"Town Tax	3	Months	$135.00
"School Tax	6	Months	$786.00
"Village Tax	7	Months	$336.00
"TO START TAX RESERVE ACCOUNT			$1257.00"

The same document also estimated the total taxes for the year 1973 at $2,688 and declared: "Note: Monthly payment required for taxes may vary from time to time. The foregoing is an estimate." The statement fixed the monthly payments at $224.92, or 92 more than one twelfth of the estimated annual taxes. The Caplans complied with the statement by depositing a sum of $1,257 in the tax reserve account at the closing. ***147**

In March, 1978, the bank requested that the Caplans increase their monthly tax payments to $485.92. By that time, the Caplans were paying $350.92 monthly, a sum which represented approximately one twelfth of the annual tax bill, and they continued to tender the same sum. In a letter to the Caplans dated September 17, 1978, the bank noted that it had been accepting that amount for the past two years. In June, 1979, the Caplans sent the bank an extra payment of $220, representing the difference between the 1978 and 1979 tax bills. Either in September or November, 1978, the bank began returning the Caplans' checks as insufficient and ultimately commenced this foreclosure action for failure to comply with the tax escrow paragraph. Special Term granted the bank's motion for summary judgment and the Caplans have appealed.

In its affidavits in support of the motion, the bank declared that it utilized a "fully accrued" system in estimating tax payment requirements. A bank officer explained the system as follows: "'Fully accrued' simply means that at any given time, with respect to each of the various tax payments, the account balance is such that if you add to it the monthly escrow payments which the customer will make between that given time and the date each of the various taxes will come due in the future, the sum will be sufficient to pay those taxes."

Under the system thus established, the bank created five separate accounts-- one for each payment due to the tax authorities. Where a specific tax was payable to the tax receiver in two installments, a separate account was created for each installment. Payment of any specific tax installment from the account established for it left untouched the sums available for tax payments in the other accounts. Thus, for example, the June installment of village taxes would be paid solely from the account established for the June installment, despite the fact that five or six months worth of deposits might at that time be at hand in the December village tax account, as well as various sums in the school and town tax accounts. The Caplans contend that under such a system, the total amount in escrow or the amount of the monthly escrow payments will always exceed the amounts required under a single account ***148** system keyed to monthly payments of one twelfth of the taxes.

The Caplans illustrate this by pointing out that the bank demanded $485.92 monthly in March, 1978 to defray total taxes of $4,180.27 for the coming year, a sum which could be payable in 12 monthly installments of $348.35. Tables submitted by the Caplans in opposition to the summary judgment motion indicate that the bank's system of collection would have resulted in 1978 tax reserve balances ranging from $389 to $2,394 and 1979 balances of from $1,899 to $3,021, while a single account system based on monthly deposits of one twelfth of the annual taxes would have produced reserve totals of between $74 and $1,161 for 1978 and $73 to $1,198 in 1979. While part of the bank's increased escrow demands may be attributable to the $505 shortfall in its tax reserve, based on tax increases after the original $1,257 deposit, what actually took place between the parties is unclear from the papers. It is apparent, however, that under a fully accrued system the average tax reserve balances or the monthly escrow payments, and perhaps both, exceed those required under a single account setup.

The bank argues, however, that its fully accrued system is consonant with the mortgage terms, the method is necessary since the taxes fall due in different amounts at odd intervals during the year, the Caplans consented to it when signing the closing statement, and the Caplans' conduct subsequent to the making of the mortgage until their default constituted acquiescence in the system. The Caplans reply that the mortgage terms, the tax reserve statement, and the truth in lending statement do not set forth any system for computing the tax escrow account and both the mortgage and the truth in lending statement only require monthly payments of one twelfth of the estimated taxes. They also insist they did not acquiesce in the fully accrued system and that the use of separate accounts for each tax installment unnecessarily inflates their monthly payments to the advantage of the bank.

Resolution of this appeal depends "on what rights and obligations the parties are found to have intended to create as manifested by the words they used in their written ***149** agreement, with parol evidence admissible to clarify ambiguities, if any, under recognized canons of construction" (*Matter of Surrey Strathmore Corp. v Dollar Sav. Bank of N.Y.*, 36 NY2d 173, 176). If a contract is clear and unambiguous, it is the responsibility of the court to interpret its provisions (*Teitelbaum Holdings v Gold*, 48 NY2d 51; 4 Williston, Contracts [3d ed], § 601). But, if there is ambiguity in the terminology used and determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such question of interpretation is to be determined by the trier of fact (*Hartford Acc. & Ind. Co. v Wesolowski*, 33 NY2d 169, 172; Restatement, Contracts 2d, § 212, subd [2]). In that situation, the surrounding circumstances of the parties at the time of the contract's execution will be considered (*Rogers v Niforatos*, 57 AD2d 984; *Mister Filters v Weber Environmental Systems*, 44 AD2d 639). Thus, where the intent must be determined by disputed evidence or inferences outside the written record of the contract, summary judgment is inappropriate (see *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 291; *Ackerman, Inc. v Mohawk Cabinet Co.*, 37 AD2d 655).

Here, the mortgage must be read together with the tax reserve statement and the truth in lending statement, since all were executed at substantially the same time and related to the same subject matter (see *Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197; *Flemington Nat. Bank & Trust Co. v Domler Leasing Corp.*, 65 AD2d 29, 32, affd 48 NY2d 678). The bank's primary reliance, of course, is on the tax reserve statement which Mrs. Caplan signed and which sets forth the amounts deposited in advance for each type of tax and contains the notation: "Monthly payment required for taxes may vary from time to time. The foregoing is an estimate." In our view, however, the intent of the parties cannot be gleaned merely from the face of this one document (cf. *Teitelbaum Holdings v Gold*, 48 NY2d 51, *supra*). The tax reserve statement does not indicate that the bank intends to maintain five separate accounts no matter the excessiveness of the amount of the payments or the amount of the reserve which might result. While the ***150** statement demonstrates how the original reserve amount was arrived at, it does not hint that the maintenance of five separate accounts is a mandatory method of computation for the amount of the monthly payments or the tax reserve. Since the monthly payment fixed in the statement was one twelfth of the tax total, it would have required considerable analytical foresight by the Caplans at the closing to anticipate how the reserve actually came to be handled.

Whether the bank's method of tax escrow collection is wholly consonant with the mortgage provision declaring that an additional payment equal to one twelfth of the estimated annual taxes will be required of the borrower is debatable. Since the mortgage and accompanying documents are absolutely silent as to the maintenance of separate reserve accounts, there is an ambiguity, the resolution of which can be aided by considering the conduct of the parties subsequent to the execution of the mortgage (see *Sattler v Hallock*, 160 NY 291; *Webster's Red Seal Pubs. v Gilberton World-Wide Pubs.*, 67 AD2d 339; *Hart v Hellman Co.*, 17 AD2d 438, affd 13 NY2d 633). The bank contends that any ambiguity has been resolved by the defendants' acquiescence in the system established and, in its brief, the bank asserts that the required monthly payments were increased several times since the inception of the mortgage. Although the record reveals that the monthly tax payments were increased to $350.92 sometime in 1976, neither party refers to any previous increases, and Mr. Caplan denies paying the full amount "for many years". In addition, the bank has not furnished the figures for the real estate taxes for the years prior to 1978, the amounts demanded for those years, or the amounts paid by the Caplans prior to September, 1976. It is apparent, then, that the issue of acquiescence cannot be decided on the current record and that interpretation of this mortgage no longer is a pure question of law but must be decided by the trier of fact (see *Janos v Peck*, 21 AD2d 529, affd 15 NY2d 509).

This conclusion is not altered by our decision in *Ball v Jamaica Sav. Bank* (49 AD2d 595, affd 39 NY2d 843). There, the parties executed a mortgage which provided, in relevant part (p 596): "'10. In addition to said payments, and at the sole option of the party of the first part, [the ***151** bank], the party of the second part [plaintiffs] shall pay to the party of the first part on the first day of each and every month after the date hereof and until the bond or note extended by this agreement if [*sic*] fully paid, a sum equal to the taxes, assessments and other like charges, plus the premiums on insurance required by the party of the first part, next due and payable on or against said mortgaged premises (all as estimated by the party of the first part) less all sums already paid therefor divided by the number of months to elapse before one month prior to the date when such premiums, taxes, assessments, and other like charges will become due and payable. Full irrevocable authority is hereby given the party of the first part by the party of the second part to pay such charges out of such escrow. If at any time any premium, tax, assessment, or other charge becomes due and payable and the escrow then on hand is insufficient to pay the same, the party of the second part shall pay such deficiency immediately on demand.'"

The *Ball* mortgagors contended, *inter alia*, that the escrow accounts-- apparently computed on a basis similar to the one here--were excessive. Although the majority of this court affirmed the judgment for the Jamaica Savings Bank without comment, it is evident that the quoted paragraph provides more support for the maintenance of separate tax accounts than does the instant mortgage. In a dissent, Justice Shapiro viewed the clause as ambiguous and concluded it should be construed against the bank. We view *Ball* as distinguishable because the details of its mortgage clause--especially the "next due and payable" terminology--may have permitted the majority of our court to construe it as sanctioning a fully accrued system. The instant mortgage merely refers to "one-twelfth of the annual taxes". In any event, *Ball* affirmed a judgment after a nonjury trial in which the record established that the plaintiffs had acquiesced in the method of collection for 32 months.

Matter of Surrey Strathmore Corp. v Dollar Sav. Bank of N.Y. (36 NY2d 173, *supra*) also is distinguishable. In *Surrey*, the mortgagor unsuccessfully sought to require the mortgagee to pay interest on the tax escrow account on an ***152** apartment complex. The case did not address the issue of the method of escrow account computation and the mortgage contained a clause not found in the Caplans' mortgage.

Since the documents before us are ambiguous with reference to whether they can accommodate a fully accrued system and the Caplans deny acquiescence, there should be a reversal and denial of summary judgment.

Damiani, J. P., Mangano and Brown, JJ., concur.

Appeal from an order of the Supreme Court, Westchester County, entered December 18, 1980, dismissed. (See *Matter of Aho*, 39 NY2d 241, 248.)

Judgment of the same court, entered April 20, 1981, reversed, order entered December 18, 1980 vacated, and plaintiff's motion for summary judgment is denied.

Defendants are awarded one bill of $50 costs and disbursements. ***153**

106 S.Ct. 1348
Supreme Court of the United States

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al., Petitioners
v.
ZENITH RADIO CORPORATION et al.

No. 83-2004. | Argued Nov. 12, 1985. | Decided March 26, 1986.

American manufacturers of television sets brought suit against Japanese manufacturers alleging that the Japanese manufacturers had illegally conspired to drive the American manufacturers from the American market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by the Japanese manufacturers in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. The United States District Court for the Eastern District of Pennsylvania, 513 F.Supp. 1100, granted summary judgment in favor of the Japanese manufacturers. The United States Court of Appeals for the Third Circuit, 723 F.2d 238, affirmed in part and reversed in part, and the Japanese manufacturers petitioned for certiorari. The Supreme Court, Justice Powell, held that: (1) American television manufacturers could not recover antitrust damages against Japanese television manufacturers for any conspiracy by the Japanese manufacturers to charge higher than competitive prices in the American market since such conduct could not injure the American manufacturers who stood to gain from any such conspiracy, and (2) in order to survive a motion for summary judgment by Japanese manufacturers, American manufacturers were required to establish a material issue as to whether the Japanese manufacturers entered into an illegal conspiracy which caused the American manufacturers to suffer cognizable injury; because the factual context rendered the claims of the American manufacturers implausible, the American manufactures were required to offer more persuasive evidence to support their claims than would otherwise be necessary.

Reversed and remanded.

Justice White filed a dissenting opinion in which Justice Brennan, Justice Blackmun and Justice Stevens joined.

West Headnotes (4)

[1] **Antitrust and Trade Regulation**
Antitrust and Foreign Trade

29TAntitrust and Trade Regulation
29TXVIAntitrust and Foreign Trade
29Tk945In General
(Formerly 265k12(7))

American television manufacturers could not recover antitrust damages from Japanese television manufacturers based solely on an alleged cartelization of the Japanese market since American antitrust laws do not regulate the competitive conditions of other nations' economies.

110 Cases that cite this headnote

[2] **Antitrust and Trade Regulation**
Particular Cases

29TAntitrust and Trade Regulation
29TXVIIAntitrust Actions, Proceedings, and Enforcement
29TXVII(B)Actions
29Tk959Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk963Injury to Business or Property
29Tk963(3)Particular Cases
(Formerly 265k28(2))

American television manufacturers could not recover antitrust damages against Japanese television manufacturers for any conspiracy by the Japanese manufacturers to charge higher than competitive prices in the American market since such conduct could not injure the American manufacturers who stood to gain from any such conspiracy; furthermore, the American manufacturers could not recover for a conspiracy to impose nonprice restraints that had the effect of either raising market prices or limiting output.

1656 Cases that cite this headnote

[3] **Federal Civil Procedure**
Burden of Proof

170AFederal Civil Procedure
170AXVIIJudgment
170AXVII(C)Summary Judgment
170AXVII(C)3Proceedings
170Ak2542Evidence
170Ak2544Burden of Proof

In order to survive a motion for summary judgment by Japanese manufacturers of television sets, American manufacturers were required to establish a material issue as to whether the Japanese manufacturers entered into an illegal conspiracy which caused the American manufacturers to suffer cognizable antitrust injury; because the factual context rendered implausible the claims of the American manufacturers that the Japanese manufacturers had conspired to increase prices in Japan while reducing them in the United States, the American manufacturers were required to offer more persuasive evidence to support their claims than would otherwise be necessary.

33414 Cases that cite this headnote

[4] **Federal Civil Procedure**
Burden of Proof

170AFederal Civil Procedure
170AXVIIJudgment
170AXVII(C)Summary Judgment
170AXVII(C)3Proceedings
170Ak2542Evidence
170Ak2544Burden of Proof

To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

34396 Cases that cite this headnote

****1349 *574 *Syllabus*[*]**

Petitioners are 21 Japanese corporations or Japanese-controlled American corporations that manufacture and/or sell "consumer electronic products" (CEPs) (primarily television sets). Respondents are American corporations that manufacture and sell television sets. In 1974, respondents brought an action in Federal District Court, alleging that petitioners, over a 20-year period, had illegally conspired to drive American firms from the American CEP market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. Respondents claim that various portions of this scheme violated, *inter alia,* §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, and § 73 of the Wilson Tariff Act. After several years of discovery, petitioners moved for summary judgment on all claims. The District Court then directed the parties to file statements listing all the documentary evidence that would be offered if the case went to trial. After the statements were filed, the court found the bulk of the evidence on which respondents relied was inadmissible, that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy, and that any inference of conspiracy was unreasonable. Summary judgment therefore was granted in petitioners' favor. The Court of Appeals reversed. After determining that much of the evidence excluded by the District Court was admissible, the Court of Appeals held that the District Court erred in granting a summary judgment and that there was both direct and circumstantial evidence of a conspiracy. Based on inferences drawn from the evidence, the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded ****1350** by excess profits obtained in the Japanese market.

Held: The Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. Pp. 1354-1362.

(a) The "direct evidence" on which the Court of Appeals relied-petitioners' alleged supracompetitive pricing in Japan, the "five company ***575** rule" by which each Japanese producer was permitted to sell only to five American distributors, and the "check prices" (minimum prices fixed by agreement with the Japanese Government for CEPs exported to the United States) insofar as they established minimum prices in the United States-cannot by itself give respondents a cognizable claim against petitioners for antitrust damages. P. 1354.

(b) To survive petitioners' motion for a summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. If the factual context renders respondents' claims implausible, *i.e.,* claims that make no economic sense, respondents must offer more persuasive evidence to support their claims than would otherwise be necessary. To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Thus, respondents here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. Pp. 1355-1357.

(c) Predatory pricing conspiracies are by nature speculative. They require the conspirators to sustain substantial losses in order to recover uncertain gains. The alleged conspiracy is therefore implausible. Moreover, the record discloses that the alleged conspiracy has not succeeded in over two decades of operation. This is strong evidence that the conspiracy does not in fact exist. The possibility that petitioners have obtained supracompetitive profits in the Japanese market does not alter this assessment. Pp. 1357-1359.

(d) Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect. There is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage conspiracies. P. 1360.

(e) The Court of Appeals erred in two respects: the "direct evidence" on which it relied had little, if any, relevance to the alleged predatory pricing conspiracy, and the court failed to consider the absence of a plausible motive to engage in predatory pricing. In the absence of any rational motive to conspire, neither petitioners' pricing practices, their conduct in the Japanese market, nor their agreements respecting prices and distributions in the American market sufficed to create a "genuine issue for trial" under Federal Rule of Civil Procedure 56(e). On remand, the Court of Appeals may consider whether there is other, unambiguous evidence of the alleged conspiracy. Pp. 1360-1362.

723 F.2d 238 (CA3 1983), reversed and remanded.

***576** POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post,* p. ---.

Attorneys and Law Firms

Donald J. Zoeller argued the cause for petitioners. With him on the briefs were *John L. Altieri, Jr., Harold G. Levison, Peter J. Gartland, James S. Morris, Kevin R. Keating, Charles F. Schirmeister, Ira M. Millstein, A. Paul Victor, Jeffrey L. Kessler, Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Donald F. Turner,* and *Henry T. Reath.*

Charles F. Rule argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Wallace, Charles S. Stark, Robert B. Nicholson, Edward T. Hand, Richard P. Larm, Abraham D. Sofaer,* and *Elizabeth M. Teel.*

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* Briefs of *amici curiae* urging reversal were filed for the Government of Japan by *Stephen M. Shapiro;* and for the American Association of Exporters and Importers et al. by *Robert Herzstein* and *Hadrian R. Katz.*

Briefs of *amici curiae* were filed for the Government of Australia et al. by *Mark R. Joelson* and *Joseph P. Griffin;* and for the Semiconductor Industry Association by *Joseph R. Creighton.*

Opinion

Justice POWELL delivered the opinion of the Court.

This case requires that we again consider the standard district courts must apply ****1351** when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. ***577** *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238 (CA3 1983); 513 F.Supp. 1100 (ED Pa.1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that constitute the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

A

Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs)-for the most part, television sets. Petitioners include both Japanese manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974,[1] claiming that petitioners had illegally conspired to drive ***578** American firms from the American CEP market. According to respondents, the gist of this conspiracy was a " 'scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States.' " 723 F.2d, at 251 (quoting respondents' preliminary pretrial memorandum). These "low prices" were allegedly at levels that produced substantial losses for petitioners. 513 F.Supp., at 1125. The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. Respondents claimed that various portions of this scheme violated §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, § 73 of the Wilson Tariff Act, and the Antidumping Act of 1916.

After several years of detailed discovery, petitioners filed motions for summary judgment on all claims against them. The District Court directed the parties to file, with preclusive effect, "Final Pretrial Statements" listing all the documentary evidence that would be offered if the case proceeded to trial. Respondents filed such a statement, and petitioners responded with a series of motions challenging the admissibility of respondents' evidence. In three detailed opinions, the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible.[2]

****1352** The District Court then turned to petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged ***579** conspiracy. At bottom, the court found, respondents' claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. 513 F.Supp., at 1125-1127. After reviewing the evidence both by category and *in toto,* the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under § 1 of the Sherman Act and the Wilson Tariff Act. Because the Sherman Act § 2 claims, which alleged that petitioners had combined to monopolize the American CEP market, were functionally indistinguishable from the § 1 claims, the court dismissed them also. Finally, the court found that the Robinson-Patman Act claims depended on the same supposed conspiracy as the Sherman Act claims. Since the court had found no genuine issue of fact as to the conspiracy, it entered judgment in petitioners' favor on those claims as well.[3]

*580 B

The Court of Appeals for the Third Circuit reversed.[4] The court began by examining the District Court's evidentiary rulings, and determined that much of the evidence excluded by the District Court was in fact admissible. 723 F.2d, at 260-303. These evidentiary rulings are not before us. See 471 U.S. 1002, 105 S.Ct. 1863, 85 L.Ed.2d 157 (1985) (limiting grant of certiorari).

On the merits, and based on the newly enlarged record, the court found that the District Court's summary judgment decision was improper. The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," 723 F.2d, at 304, but it found that "the legal problem ... is different" when "there is direct evidence of concert of action." *Ibid.* Here, the court concluded, "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." *Id.,* at 304-305. Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. *Id.,* at 305. Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

1. The Japanese market for CEPs was characterized by oligopolistic behavior, ****1353** with a small number of producers meeting regularly and exchanging information on price and other matters. *Id.,* at 307. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese Government imposed significant barriers to entry. *Ibid.*

2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to ***581** operate at something approaching full capacity in order to make a profit. *Ibid.*

3. Petitioners' plant capacity exceeded the needs of the Japanese market. *Ibid.*

4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. *Id.,* at 310. The parties refer to these prices as the "check prices," and to the agreements that require them as the "check price agreements."

5. Petitioners agreed to distribute their products in the United States according to a "five company rule": each Japanese producer was permitted to sell only to five American distributors. *Ibid.*

6. Petitioners undercut their own check prices by a variety of rebate schemes. *Id.,* at 311. Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check-price agreements.

Based on inferences from the foregoing conclusions,[5] the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial.

***582** The court found it unnecessary to address petitioners' claim that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign. The claim, in essence, was that because MITI required petitioners to enter into the check-price agreements, liability could not be premised on those agreements. The court concluded that this case did not present any issue of sovereign compulsion, because the check-price agreements were being used as "evidence of a low export price conspiracy" and not as an independent basis for finding antitrust liability. The court also believed it was unclear that the check prices in fact were mandated by the Japanese Government, notwithstanding a statement to that effect by MITI itself. *Id.,* at 315.

We granted certiorari to determine (i) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment, and (ii) whether petitioners could be held liable under the antitrust laws for a conspiracy in part compelled by a foreign sovereign. 471 U.S. 1002, 105 S.Ct. 1863, 85 L.Ed.2d 157 (1985). We reverse on the first issue, but do not reach the second.

II

[1] [2] We begin by emphasizing what respondents' claim is *not.* Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. ****1354** *United States v. Aluminum Co. of America,* 148 F.2d 416, 443 (CA2 1945) (L. Hand, J.); 1 P. Areeda & D. Turner, Antitrust Law ¶ 236d (1978).[6] Nor can respondents recover damages for ***583** any conspiracy by

petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, *United States v. Trenton Potteries Co.,* 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940), but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488-489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five-company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents. See 723 F.2d, at 304-305.

***584** Respondents nevertheless argue that these supposed conspiracies, if not themselves grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level.[7] The thrust of respondents' argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting ****1355** monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

The Court of Appeals found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing,[8] ***585** if proved,[9] would be a *per se* violation of § 1 of the Sherman Act. 723 F.2d, at 306. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

III

[3] To survive petitioners' motion for summary judgment,[10] respondents must establish that there is a genuine issue of materialfact ***586** as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed.Rule Civ.Proc. 56(e);[11] *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288-289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. *Supra,* at 1354. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," ****1356** *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S., at 489, 97 S.Ct., at 697, because they actually tended to benefit respondents. *Supra,* at 1354. Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

Second, the issue of fact must be "genuine." Fed.Rules Civ.Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c),[12] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *DeLuca v. Atlantic Refining Co.,* 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943, 70 S.Ct. 423, 94 L.Ed. 581 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (1983); Clark, Special Problems ***587** in Drafting and Interpreting Procedural Codes and Rules, 3 Vand.L.Rev. 493, 504-505 (1950). Cf. *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed.Rule Civ.Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed.Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Cities Service, supra,* 391 U.S., at 289, 88 S.Ct., at 1592.

It follows from these settled principles that if the factual context renders respondents' claim implausible-if the claim is one that simply makes no economic sense-respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Cities Service* is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U.S., at 278-279, 88 S.Ct., at 1587. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.,* at 277, 88 S.Ct., at 1586. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.,* at 280, 88 S.Ct., at 1588.

[4] Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." ***588** *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.,* at 764, 104 S.Ct., at 1470. See also *Cities Service, supra,* 391 U.S., at 280, 88 S.Ct., at 1588. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764, 104 S.Ct., at 1471. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that ****1357** could not have harmed respondents. See *Cities Service, supra,* 391 U.S., at 280, 88 S.Ct., at 1588.

Petitioners argue that these principles apply fully to this case. According to petitioners, the alleged conspiracy is one that is economically irrational and practically infeasible. Consequently, petitioners contend, they had no motive to engage in the alleged predatory pricing conspiracy; indeed, they had a strong motive *not* to conspire in the manner respondents allege. Petitioners argue that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed. This argument requires us to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.

IV

A

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, ***589** the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

> "Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses." R. Bork, The Antitrust Paradox 145 (1978).

See also McGee, Predatory Pricing Revisited, 23 J.Law & Econ. 289, 295-297 (1980). As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off." Easterbrook, Predatory Strategies and Counterstrategies, 48 U.Chi.L.Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful. See, *e.g.,* Bork, *supra,* at 149-155; Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 699 (1975); Easterbrook, *supra;* Koller, The Myth of Predatory Pricing-An Empirical Study, ***590** 4 Antitrust Law & Econ.Rev. 105 (1971); McGee, Predatory Price Cutting: The *Standard Oil (N.J.) Case,* 1 J.Law & Econ. 137 (1958); McGee, Predatory Pricing Revisited, 23 J.Law & Econ., at 292-294. See also *Northeastern Telephone Co. v. American Telephone & Telegraph Co.,* 651 F.2d 76, 88 (CA2 1981) ("[N]owhere in the recent outpouring of literature on the subject do commentators suggest that [predatory] pricing is either common or likely to increase"), cert. denied, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982).

These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to ****1358** charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits ***591** what they earlier gave up in below-cost prices. See *Northeastern Telephone Co. v. American Telephone & Telegraph Co., supra,* at 89; Areeda & Turner, 88 Harv.L.Rev., at 698. Two decades after their conspiracy is alleged to have commenced,[13] petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of petitioners. 6 App. to Brief for Appellant in No. 81-2331 (CA3), pp. 2575a-2576a. Moreover, those shares, which together approximate 40% of sales, did not decline appreciably during the 1970's. *Ibid.* Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. 723 F.2d, at 316.[14] Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing-that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.[15]

***592 **1359** The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel.[16] Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial-as would likely be necessary ***593** in order to drive out the competition[17] -petitioners would most likely have to sustain their cartel for years simply to break even.

Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and-as indicated above-the facts actually are to the contrary: RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.[18]

B

In *Monsanto,* we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. *Monsanto,* 465 U.S., at 762-764, 104 S.Ct., at 1470. ***594** Respondents, petitioners' competitors, seek to hold petitioners liable for ****1360** damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five company rule) whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices.[19] But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto, supra,* at 763-764, 104 S.Ct., at 1470. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp. v. ITT Grinnell Corp.,* 724 F.2d 227, 234 (CA1 1983).

In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained, *supra,* at 1357-1359, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the ***595** gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators. See Easterbrook, The Limits of Antitrust, 63 Texas L.Rev. 1, 26 (1984). Finally, unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.

V

As our discussion in Part IV-A shows, petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains. Cf. *Cities Service,* 391 U.S., at 279, 88 S.Ct., at 1587. The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." 723 F.2d, at 304. The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

****1361** The "direct evidence" on which the court relied was evidence of *other* combinations, not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' ***596** claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the check-price agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market-the so-called five company rule. That practice may have facilitated a horizontal territorial allocation, see *United States v. Topco Associates, Inc.,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), but its natural effect would be to raise market prices rather than reduce them.[20] Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, ***597** the conduct does not give rise to an inference of conspiracy. See *Cities Service, supra,* 391 U.S., at 278-280, 88 S.Ct., at 1587-1588. Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below-market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth. Even had they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial." Fed.Rule Civ.Proc. 56(e).[21]

****1362** On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "ten[d] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically ***598** senseless conspiracy. *Monsanto,* 465 U.S., at 764, 104 S.Ct., at 1471. In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated.

VI

Our decision makes it unnecessary to reach the sovereign compulsion issue. The heart of petitioners' argument on that issue is that MITI, an agency of the Government of Japan, required petitioners to fix minimum prices for export to the United States, and that petitioners are therefore immune from antitrust liability for any scheme of which those minimum prices were an integral part. As we discussed in Part II, *supra,* respondents could not have suffered a cognizable injury from any action that *raised* prices in the American CEP market. If liable at all, petitioners are liable for conduct that is distinct from the check-price agreements. The sovereign compulsion question that both petitioners and the Solicitor General urge us to decide thus is not presented here.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, with whom Justice BRENNAN, Justice BLACKMUN, and Justice STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), and *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962). After surveying the massive record, including very ***599** significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§ 1 and 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that ****1363** "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Ante,* at 1356 (quoting *Cities Service, supra,* 391 U.S., at 289, 88 S.Ct., at 1592). I also agree that " '[o]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.' " *Ante,* at 1356 (quoting *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following critique of the Third Circuit's opinion:

> "[T]he Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude ***600** that petitioners' price-cutting behavior was independent and not conspiratorial." *Ante,* at 1353.

In a similar vein, the Court summarizes *Monsanto Co. v. Spray-Rite Service Corp., supra,* as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible...." *Ante,* at 1360. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury.[1] These holdings in no way undermine ***601** the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

II

In defining what respondents must show in order to recover, the Court makes assumptions ****1364** that invade the factfinder's province. The Court states with very little discussion that respondents can recover under § 1 of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Ante,* at 1355, n. 8. This statement is premised on the assumption that "[a]n agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." *Ibid.* In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court.

The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below "the level necessary to sell their products or ... some appropriate measure of cost." *Ibid.* First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasingexports ***602** to this country resulted in depressed prices here, which harmed respondents.[2] Second, the DePodwin Report indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.[3]

***603 **1365** The DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents.[4]

***604** The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth. See, *e.g., ante,* at 1360. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, see Part III-B, *infra,* I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

III

In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [T]he 'direct evidence' on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." *Ante,* at 1361. The Court's position is without substance.

A

The first claim of error is that the Third Circuit treated evidence regarding price fixing in Japan and the so-called five company rule and check prices as " 'direct evidence' of a conspiracy that injured respondents." *Ante,* at 1354 (citing *In re Japanese Electronics Products Antitrust Litigation,* 723 F.2d 238, 304-305 (CA3 1983)). The passage from the Third ***605** Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. *Ibid.* The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five company rule could support a finding of antitrust injury to respondents.[5] The Third ****1366** Circuit twice specifically noted that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. *Id.,* at 306, 310-311. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five company rule was not a simple price-raising device:

> "[A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *Id.,* at 311.
> I see nothing erroneous in this reasoning.

B

The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But ***606** the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by petitioners. *Ibid.* The Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors ... that suggest that such conduct is irrational." *Ante,* at 1360, n. 19. But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales. I agree with the Third Circuit that the answer to this question is "yes."

It is misleading for the Court to state that the Court of Appeals "did not disturb the District Court's analysis of the factors that substantially undermine the probative value of [evidence in the DePodwin Report respecting below-cost sales]." *Ibid.* The Third Circuit held that the exclusion of the portion of the DePodwin Report regarding below-cost pricing was erroneous because "the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely." 723 F.2d, at 282. In short, the Third Circuit found DePodwin's affidavit sufficient to create a genuine factual issue regarding the correctness of his conclusion that petitioners sold below cost over a long period of time. Having made this determination, the court saw no need-nor do I-to address the District Court's analysis point by point. The District Court's criticisms of DePodwin's ***607** methods are arguments that a factfinder should consider.

IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm ****1367** the judgment below and remand this case for trial.

Parallel Citations

106 S.Ct. 1348, 7 ITRD 2057, 89 L.Ed.2d 538, 54 USLW 4319, 1986-1 Trade Cases P 67,004, 4 Fed.R.Serv.3d 368

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed.2d 499.

1 NUE had filed its complaint four years earlier, in the District Court for the District of New Jersey. Zenith's complaint was filed separately in 1974, in the Eastern District of Pennsylvania. The two cases were consolidated in the Eastern District of Pennsylvania in 1974.

2 The inadmissible evidence included various government records and reports, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 505 F.Supp. 1125 (ED Pa.1980), business documents offered pursuant to various hearsay exceptions, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 505 F.Supp. 1190 (ED Pa.1980), and a large portion of the expert testimony that respondents proposed to introduce. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 505 F.Supp. 1313 (ED Pa.1981).

3 The District Court ruled separately that petitioners were entitled to summary judgment on respondents' claims under the Antidumping Act of 1916. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 494 F.Supp. 1190 (ED Pa.1980). Respondents appealed this ruling, and the Court of Appeals reversed in a separate opinion issued the same day as the opinion concerning respondents' other claims. *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 319 (CA3 1983).

Petitioners ask us to review the Court of Appeals' Antidumping Act decision along with its decision on the rest of this mammoth case. The Antidumping Act claims were not, however, mentioned in the questions presented in the petition for certiorari, and they have not been independently argued by the parties. See this Court's Rule 21.1(a). We therefore decline the invitation to review the Court of Appeals' decision on those claims.

4 As to 3 of the 24 defendants, the Court of Appeals affirmed the entry of summary judgment. Petitioners are the 21 defendants who remain in the case.

5 In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales "generally were at prices which produced losses, often as high as twenty-five percent on sales." 723 F.2d, at 311. The court did not identify any direct evidence of below-cost pricing; nor did it place particularly heavy reliance on this aspect of the expert evidence. See n. 19, *infra.*

6 The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 704, 82 S.Ct. 1404, 1413, 8 L.Ed.2d 777 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). The effect on which respondents rely is the artificially depressed level of prices for CEPs in the United States.

Petitioners' alleged cartelization of the Japanese market could not have caused that effect over a period of some two decades. Once petitioners decided, as respondents allege, to reduce output and raise prices in the Japanese market, they had the option of either producing fewer goods or selling more goods in other markets. The most plausible conclusion is that petitioners chose the latter option because it would be more profitable than the former. That choice does not flow from the cartelization of the Japanese market. On the contrary, were the Japanese market perfectly competitive petitioners would still have to choose whether to sell goods overseas, and would still presumably make that choice based on their profit expectations. For this reason, respondents' theory of recovery depends on proof of the asserted price-cutting conspiracy in this country.

7 Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy-whether there is one conspiracy or several-respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. *Associated General Contractors of California, Inc. v. Carpenters,* 459 U.S. 519, 538-540, 103 S.Ct. 897, 908-909, 74 L.Ed.2d 723 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488-489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); see also Note, Antitrust Standing, Antitrust Injury, and the Per Se Standard, 93 Yale L.J. 1309 (1984). That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury.

8 Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the

market, or perhaps to deter potential entrants from coming in. *E.g., Southern Pacific Communications Co. v. American Telephone & Telegraph Co.,* 238 U.S.App.D.C. 309, 331-336, 740 F.2d 980, 1002-1007 (1984), cert. denied, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985). In such cases, "predatory pricing" means pricing below some appropriate measure of cost. *E.g., Barry Wright Corp. v. ITT Grinnell Corp.,* 724 F.2d 227, 232-235 (CA1 1983); see *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 698, 701, 702, n. 14, 87 S.Ct. 1326, 1333, 1335, 1336, n. 14, 18 L.Ed.2d 406 (1967).

There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level.

9 We do not consider whether recovery should *ever* be available on a theory such as respondents' when the pricing in question is above some measure of incremental cost. See generally Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 709-718 (1975) (discussing cost-based test for use in § 2 cases). As a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one. See Part IV-A, *infra.*

10 Respondents argued before the District Court that petitioners had failed to carry their initial burden under Federal Rule of Civil Procedure 56(c) of demonstrating the absence of a genuine issue of material fact. See *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Cf. *Catrett v. Johns-Manville Sales Corp.,* 244 U.S.App.D.C. 160, 756 F.2d 181, cert. granted, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985). That issue was resolved in petitioners' favor, and is not before us.

11 Rule 56(e) provides, in relevant part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

12 See n. 10, *supra.*

13 NUE's complaint alleges that petitioners' conspiracy began as early as 1960; the starting date used in Zenith's complaint is 1953. NUE Complaint ¶ 52; Zenith Complaint ¶ 39.

14 During the same period, the number of American firms manufacturing television sets declined from 19 to 13. 5 App. to Brief for Appellant in No. 81-2331 (CA3), p. 1961a. This decline continued a trend that began at least by 1960, when petitioners' sales in the United States market were negligible. *Ibid.* See Zenith Complaint ¶¶ 35, 37.

15 Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time. Judge Easterbrook, commenting on this case in a law review article, offers the following sensible assessment:

"The plaintiffs [in this case] maintain that for the last fifteen years or more at least ten Japanese manufacturers have sold TV sets at less than cost in order to drive United States firms out of business. Such conduct cannot possibly produce profits by harming competition, however. If the Japanese firms drive some United States firms out of business, they could not recoup. Fifteen years of losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the defendants should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from defendants themselves. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation-recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition." Easterbrook, The Limits of Antitrust, 63 Texas L.Rev. 1, 26-27 (1984) (footnotes omitted).

16 The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors

from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

17 The predators' losses must actually *increase* as the conspiracy nears its objective: the greater the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.

18 The same is true of any supposed excess production capacity that petitioners may have possessed. The existence of plant capacity that exceeds domestic demand does tend to establish the ability to sell products abroad. It does not, however, provide a motive for selling at prices lower than necessary to obtain sales; nor does it explain why petitioners would be willing to *lose* money in the United States market without some reasonable prospect of recouping their investment.

19 Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp., at 1356-1363. Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. See 723 F.2d, at 277-282. We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors, discussed in Part IV-A, *supra,* that suggest that such conduct is irrational.

20 The Court of Appeals correctly reasoned that the five company rule might tend to insulate petitioners from competition with each other. 723 F.2d, at 306. But this effect is irrelevant to a conspiracy to price predatorily. Petitioners have no incentive to underprice each other if they already are pricing *below* the level at which they could sell their goods. The far more plausible inference from a customer allocation agreement such as the five company rule is that petitioners were conspiring to *raise* prices, by limiting their ability to take sales away from each other. Respondents-petitioners' competitors-suffer no harm from a conspiracy to raise prices. *Supra,* at 1354. Moreover, it seems very unlikely that the five company rule had any significant effect of any kind, since the "rule" permitted petitioners to sell to their American subsidiaries, and did not limit the number of distributors to which the subsidiaries could resell. 513 F.Supp., at 1190.

21 We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.*, at 763-764, 104 S.Ct., at 1470. See *supra,* at 1356.

1 The Court adequately summarizes the quite fact-specific holding in *Cities Service. Ante,* at 1356.

In *Monsanto,* the Court held that a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is not, *standing alone,* sufficient to create a jury question. 465 U.S., at 763-764, 104 S.Ct., at 1470. To understand this holding, it is important to realize that under *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), it is permissible for a manufacturer to announce retail prices in advance and terminate those who fail to comply, but that under *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), it is impermissible for the manufacturer and its distributors to agree on the price at which the distributors will sell the goods. Thus, a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is lawful under *Colgate, unless* the termination is pursuant to a shared understanding between the manufacturer and its distributors respecting enforcement of a resale price maintenance scheme. *Monsanto* holds that to establish liability under *Dr. Miles,* more is needed than evidence of behavior that is consistent with a distributor's exercise of its prerogatives under *Colgate.* Thus, "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U.S., at 764, 104 S.Ct., at 1471. *Monsanto* does *not* hold that if a terminated dealer produces some further evidence of conspiracy beyond the bare fact of postcomplaint termination, the judge hearing a motion for summary judgment should balance all the evidence pointing toward conspiracy against all the evidence pointing toward independent action.

2 Dr. DePodwin summarizes his view of the harm caused by Japanese cartelization as follows:

"When we consider the injuries inflicted on United States producers, we must again look at the Japanese television manufacturers' export agreement as part of a generally collusive scheme embracing the Japanese domestic market as well. This scheme increased the supply of television receivers to the United States market while restricting supply in the Japanese market. If Japanese manufacturers had competed in both domestic and export markets, they would have sold more in the domestic market and less in the United States. A greater proportion of Japanese production capacity would have been devoted to domestic sales. Domestic prices would have been lower and export prices would have been higher. The size of the price differential between domestic and export markets would have diminished practically to the vanishing point. Consequently, competition among Japanese producers in both markets would have resulted in reducing exports to the United States and United States prices would have risen. In addition, investment by the United States industry would have increased. As it was, however, the influx of sets at depressed prices cut the rates of return on television receiver production facilities in the United States to so low a level as to make such investment uneconomic.

"We can therefore conclude that the American manufacturers of television receivers would have made larger sales at higher prices in the absence of the Japanese cartel agreements. Thus, the collusive behavior of Japanese television manufacturers resulted in a very severe injury to those American television manufacturers, particularly to National Union Electric Corporation, which produced a preponderance of television sets with screen sizes of nineteen inches and lower, especially those in the lower range of prices." 5 App. to Brief for Appellants in No. 81-2331 (CA3), pp. 1629a-1630a.

3 The DePodwin Report has this, among other things, to say in summarizing the harm to respondents caused by the five company rule, exchange of production data, price coordination, and other allegedly anti-competitive practices of petitioners:

"The impact of Japanese anti-competitive practices on United States manufacturers is evident when one considers the nature of competition. When a market is fully competitive, firms pit their resources against one another in an attempt to secure the business of individual customers. However, when firms collude, they violate a basic tenet of competitive behavior, i.e., that they act independently. United States firms were confronted with Japanese competitors who collusively were seeking to destroy their established customer relationships. Each Japanese company had targeted customers which it could service with reasonable assurance that its fellow Japanese cartel members would not become involved. But just as importantly, each Japanese firm would be assured that what was already a low price level for Japanese television receivers in the United States market would not be further depressed by the actions of its Japanese associates.

"The result was a phenomenal growth in exports, particularly to the United States. Concurrently, Japanese manufacturers, and the defendants in particular, made large investments in new plant and equipment and expanded production capacity. It is obvious, therefore, that the effect of the Japanese cartel's concerted actions was to generate a larger volume of investment in the Japanese television industry than would otherwise have been the case. This added capacity both enabled and encouraged the Japanese to penetrate the United States market more deeply than they would have had they competed lawfully." *Id.,* at 1628a-1629a.

For a more complete statement of DePodwin's explanation of how the alleged cartel operated, and the harms it caused respondents, see *id.,* at 1609a-1642a. This material is summarized in a chart found *id.,* at 1633a.

4 In holding that Parts IV and V of the Report had been improperly excluded, the Court of Appeals said:

"The trial court found that DePodwin did not use economic expertise in reaching the opinion that the defendants participated in a Japanese television cartel. 505 F.Supp. at 1342-46. We have examined the excluded portions of Parts IV and V in light of the admitted portions, and we conclude that this finding is clearly erroneous. As a result, the court also held the opinions to be unhelpful to the factfinder. What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs' conspiracy theory. Considering the complexity of the economic issues involved, it simply cannot be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue." *In re Japanese Electronics Products Antitrust Litigation,* 723 F.2d 238, 280 (CA3 1983).

The Court of Appeals had similar views about Parts VI and VII.

5 I use the Third Circuit's analysis of the five company rule by way of example; the court did an equally careful analysis of the parts the cartel activity in Japan and the check prices could have played in an actionable conspiracy. See generally *id.,* at 303-311.

In discussing the five-company rule, I do not mean to imply any conclusion on the validity of petitioners' sovereign compulsion defense. Since the Court does not reach this issue, I see no need of my addressing it.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No.: 76/685,731
Filed: January 14, 2008
For the mark: MASA
Published in the Trademark Official Gazette on August 23, 2011

Masayoshi Takayama,

Plaintiff,

v. Concurrent Use No. 94002596

D'Amico Holding Company,

Defendant.

DECLARATION OF BRADLEY J. WALZ

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine, or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this document declares that:

1. I am a shareholder with the law firm of Winthrop & Weinstine, P.A. and I am one of the attorneys representing D'Amico Holding Company ("D'Amico") in the above-captioned matter.

2. This Declaration is submitted in support of Defendant's Response to Plaintiff's Motion for Summary Judgment and is based upon my personal knowledge.

3. Attached as Exhibit 1 is a true and correct copy of the TESS ("Trademark Electronic Search System") and Assignment database printouts showing current status and title for the MASA & Design mark, Reg. No. 3,380,250.

4. Attached as Exhibit 2 is a true and correct copy of the TESS and Assignment database printouts showing current status and title for the MASA mark, Reg. No. 3,855,043.

5. Attached as Exhibit 3 is a true and correct copy of an archived Web page from Plaintiff's website located at the <masanyc.com> domain name on September 1, 2004, which was obtained from the website located at the <archive.org> domain name on April 21, 2014.

6. Attached as Exhibit 4 is a true and correct copy of an archived Web page from Plaintiff's website located at the <masanyc.com> domain name on February 7, 2005, which was obtained from the website located at the <archive.org> domain name on April 21, 2014.

7. Attached as Exhibit 5 are true and correct copies of Web pages from Plaintiff's website located at the <masanyc.com> domain name, which were obtained on April 21, 2014.

8. Attached as Exhibit 6 is a true and correct copy the TESS and Assignment database printouts showing current status and title for the BAR MASA mark, Application Serial No. 77/438,476.

9. Attached as Exhibit 7 is a true and correct copy the TESS and Assignment database printouts showing current status and title for the SHABOO mark, Reg. No. 3,772,819.

10. Attached as Exhibit 8 is a true and correct copy the TESS and Assignment database printouts showing current status and title for the TETSU mark, Application Serial No. 85/926,220.

11. Attached as Exhibit 9 is a true and correct copy the TESS and Assignment database printouts showing current status and title for the TETSU TEPPAN GRILL mark, Application Serial No. 85/927,932.

12. Attached as Exhibit 10 is a true and correct copy the TESS and Assignment database printouts showing current status and title for the KAPPO MASA mark, Application Serial No. 85/927,940.

13. Attached as Exhibit 11 is a true and correct copy the TESS and Assignment database printouts showing current status and title for the BUTCHER'S PLACE mark, Application Serial No. 85/355,984.

14. Attached as Exhibit 12 is a true and correct copy of an article from the Los Angeles Times dated December 7, 2009 titled "Masa Takayama brings Bar Masa and Shaboo to Las Vegas," which was obtained from <latimesblogs.latimes.com/dailydish> on April 12, 2014.

15. Attached as Exhibit 13 is a true and correct copy of an article from the Review Journal dated December 26, 2012 titled "Aria's Tetsu offers seasonally fresh flavors," which was obtained from <reviewjournal.com/entertainment> on April 12, 2014.

16. Attached as Exhibit 14 is a true and correct copy of an article from Grub Street dated June 14, 2012 titled "Masa Takayama Debuts New Restaurant Menu at CB1 Meeting," which was obtained from <grubstreet.com> on April 21, 2014.

17. Attached as Exhibit 15 is a true and correct copy of the Notice of Approval of Extension Request for Application Serial No. 85/355,984 for the BUTCHER'S PLACE mark, which was obtained from the Trademark Status & Document Retrieval ("TSDR") database on April 21, 2014.

18. Attached as Exhibit 16 is a true and correct copy of the Request for Extension of Time to File a Statement of Use for Application Serial No. 85/355,984 for the BUTCHER'S PLACE mark, which was obtained from the Trademark Status & Document Retrieval ("TSDR") database on April 21, 2014.

FURTHER YOUR DECLARANT SAYETH NOT

Date: April 22, 2014

Bradley J. Walz

9002980v1

Exhibit 1

United States Patent and Trademark Office

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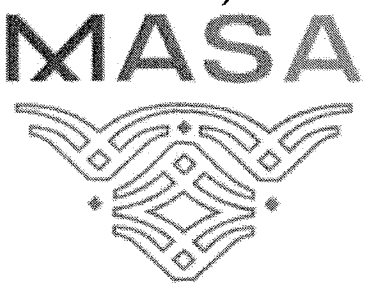
Record 1 out of 1

TSDR | ASSIGN Status | TTAB Status ***(Use the "Back" button of the Internet Browser to return to TESS)***



Word Mark	MASA
Translations	The foreign wording in the mark translates into English as flour or dough.
Goods and Services	IC 043. US 100 101. G & S: Restaurant and bar services. FIRST USE: 20051122. FIRST USE IN COMMERCE: 20051122
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	26.07.14 - Diamonds, exactly three diamonds; Three diamonds 26.07.21 - Diamonds that are completely or partially shaded 26.17.09 - Bands, curved; Bars, curved; Curved line(s), band(s) or bar(s); Lines, curved 26.17.25 - Other lines, bands or bars
Trademark Search Facility Classification Code	SHAPES-BAR-BANDS Designs with bar, bands or lines SHAPES-COLORS-3-OR-MORE Design listing or lined for three or more colors SHAPES-DIAMONDS Diamond shaped designs including shaded or more than one diamond
Serial Number	77054435
Filing Date	November 30, 2006
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	November 27, 2007
Registration Number	3380250
Registration Date	February 12, 2008
Owner	(REGISTRANT) D'Amico Holding Company CORPORATION MINNESOTA 211 North First Street

	Minneapolis MINNESOTA 55401
Attorney of Record	Stephen R. Baird
Description of Mark	The color(s) orange, light orange, yellowy-orange, and yellow is/are claimed as a feature of the mark. The mark consists of the color orange appears in the letter "M," lighter orange appears in the first letter "A," yellowy-orange in the letter "S," and yellow in the second letter "A." The stylized design appears in a yellowy-orange color.
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR).
Live/Dead Indicator	LIVE

United States Patent and Trademark Office

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No assignment has been recorded at the USPTO

For Serial Number: 77054435

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350. v.2.3.4
Web interface last modified: Jul 8, 2013 v.2.3.4

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Exhibit 2

Trademarks > Trademark Electronic Search System (TESS)

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 Record 1 out of 2

 (Use the "Back" button of the Internet Browser to return to TESS)

MASA

Word Mark	MASA
Translations	The foreign wording in the mark translates into English as "MASS".
Goods and Services	IC 043. US 100 101. G & S: Restaurant and bar services. FIRST USE: 20051122. FIRST USE IN COMMERCE: 20051122
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	78654116
Filing Date	June 20, 2005
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	December 26, 2006
Registration Number	3855043
Registration Date	September 28, 2010
Owner	(REGISTRANT) D'Amico Holding Company CORPORATION MINNESOTA 211 North First Street Minneapolis MINNESOTA 55401
Attorney of Record	Stephen R. Baird
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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Assignments on the Web > Trademark Query

No assignment has been recorded at the USPTO

For Serial Number: 78654116

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350. v.2.3.4
Web interface last modified: Jul 8, 2013 v.2.3.4

Exhibit 3

Under construction

Masa Restaurant
Time Warner Center
10 Columbus Circle, 4th Floor
New York, NY 10019

Reservation: 212.823.9800

Exhibit 4

雅
MASA

Location

10 Columbus Circle,
Time Warner Center, 4/F
New York, NY 10019
(Cross Streets: Broadway and 59th Street)

Chef Masa Drink Menu Style Gift Ideas General Information Home

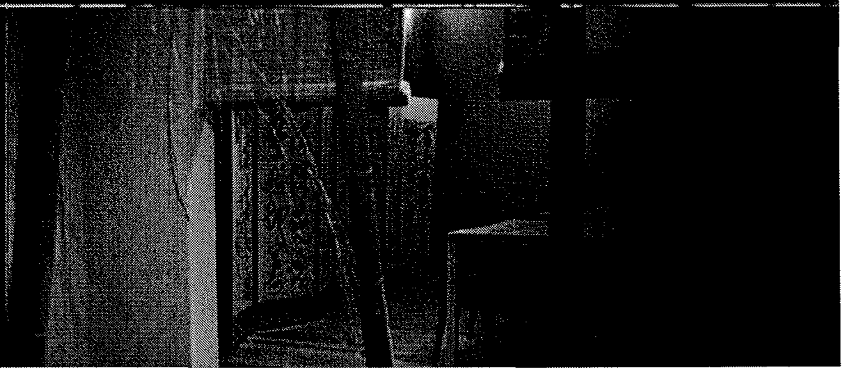
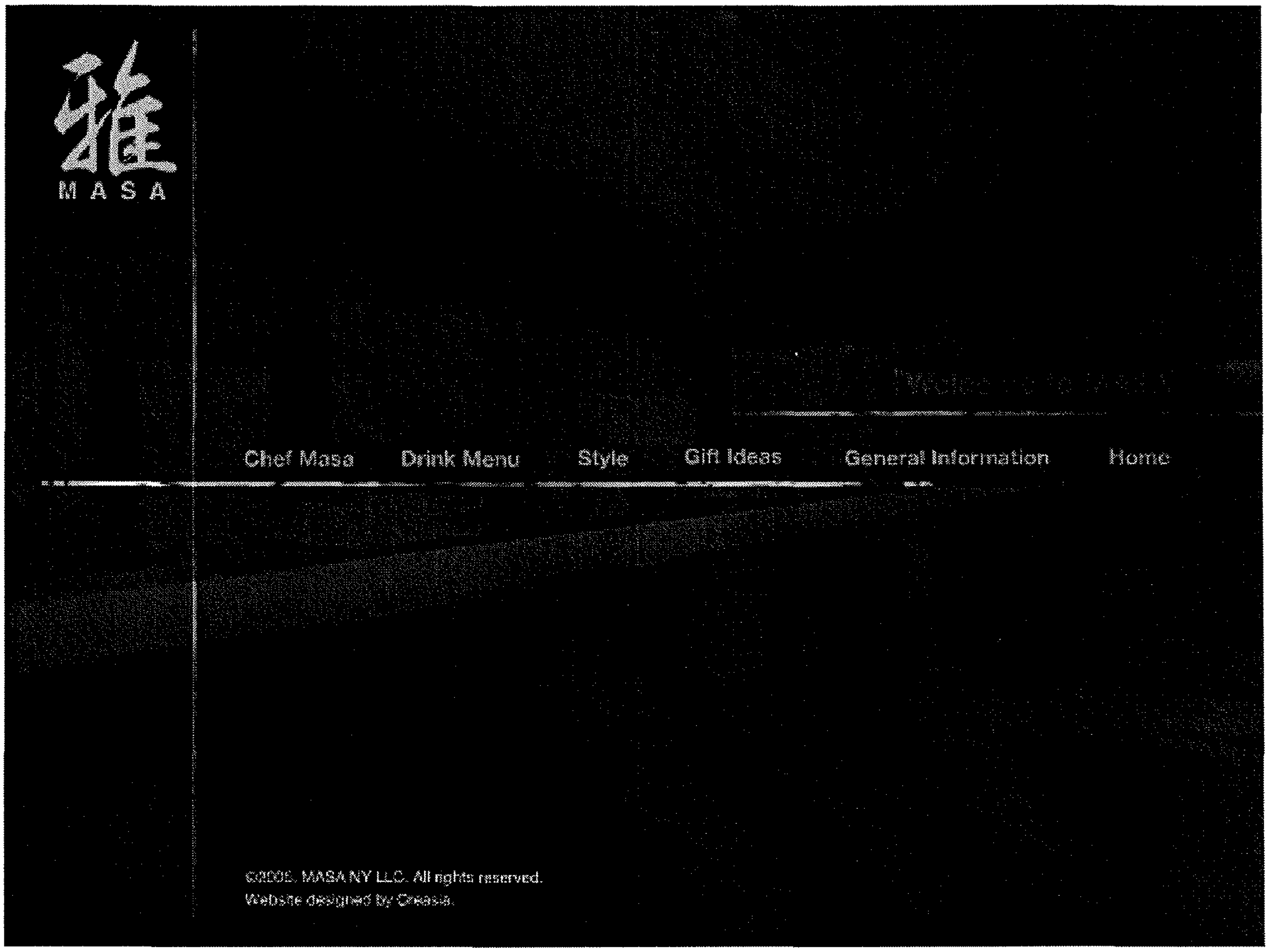


Exhibit 5


雅
MASA
Chef Masa
Drink Menu
Style
Gift Ideas
General Information
Home
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Website designed by Creasia.

Location

10 Columbus Circle,
Time Warner Center, 4/F
New York, NY 10019
(Cross Streets: Broadway and 59th Street)

Chef Masa Drink Menu Style Gift Ideas General Information Home

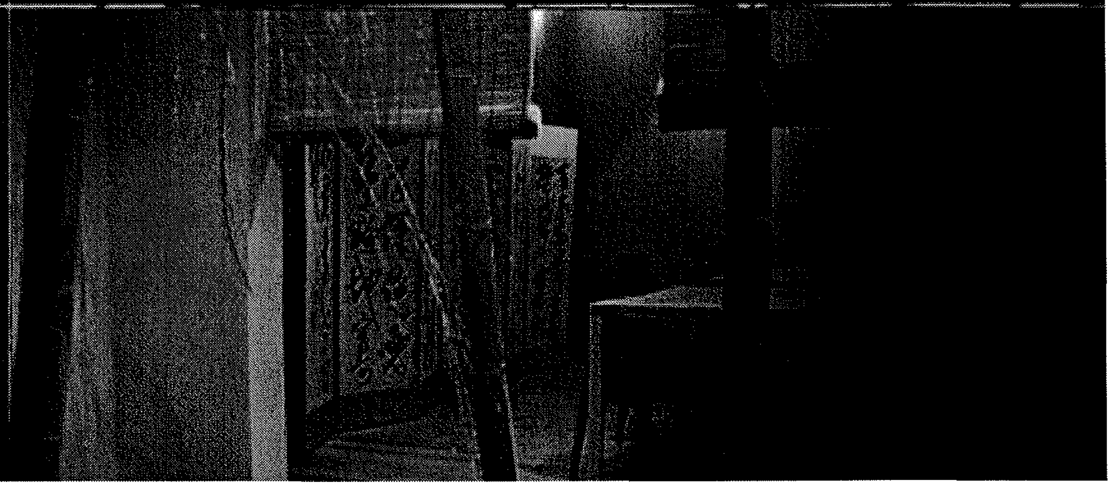

Exhibit 6

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Start List At: OR Jump to record: **Record 27 out of 33**

TSDR | ASSIGN Status | TTAB Status ***(Use the "Back" button of the Internet Browser to return to TESS)***

BAR MASA

Word Mark	BAR MASA
Goods and Services	IC 043. US 100 101. G & S: JAPANESE AND SUSHI RESTAURANT AND BAR SERVICES. FIRST USE: 20040300. FIRST USE IN COMMERCE: 20040300
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77438476
Filing Date	April 2, 2008
Current Basis	1A
Original Filing Basis	1A
Owner	(APPLICANT) **Masayoshi** Takayama INDIVIDUAL JAPAN 301 W. 57th Street New York NEW YORK 10019
Attorney of Record	Edward R. Schwartz
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "BAR" APART FROM THE MARK AS SHOWN
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

TESS HOME | NEW USER | STRUCTURED | FREE FORM | BROWSE DICT | SEARCH OG | TOP | HELP | PREV LIST | CURR LIST | NEXT LIST | FIRST DOC | PREV DOC | NEXT DOC | LAST DOC

United States Patent and Trademark Office

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Assignments on the Web > Trademark Query

No assignment has been recorded at the USPTO

For Serial Number: 77438476

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350. v.2.3.4
Web interface last modified: Jul 8, 2013 v.2.3.4

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Exhibit 7

SHABOO

Word Mark	SHABOO
Translations	The word "SHABOO" has no meaning in a foreign language.
Goods and Services	IC 035. US 100 101 102. G & S: RESTAURANT SERVICES. FIRST USE: 20050300. FIRST USE IN COMMERCE: 20050300
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77622929
Filing Date	November 26, 2008
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	May 12, 2009
Registration Number	3772819
Registration Date	April 6, 2010
Owner	(REGISTRANT) Takayama, **Masayoshi** INDIVIDUAL JAPAN 10 Columbus Circle, 4th Floor New York NEW YORK 100191214
Attorney of Record	Edward R. Schwartz
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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No assignment has been recorded at the USPTO

For Serial Number: 77622929

Exhibit 8

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Start List At: OR Jump to record: **Record 7 out of 33**

TSDR ASSIGN Status TTAB Status ***(Use the "Back" button of the Internet Browser to return to TESS)***

TETSU

Word Mark	TETSU
Translations	The English translation of TETSU in the mark is iron.
Goods and Services	IC 043. US 100 101. G & S: Restaurant Services. FIRST USE: 20120801. FIRST USE IN COMMERCE: 20120801
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85926220
Filing Date	May 8, 2013
Current Basis	1A
Original Filing Basis	1A
Owner	(APPLICANT) Takayama, **Masayoshi** INDIVIDUAL JAPAN 10 Columbus Circle, 4th Floor New York NEW YORK 100191214
Attorney of Record	Edward R. Schwartz
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

Assignments on the Web > **Trademark Query**

No assignment has been recorded at the USPTO

For Serial Number: 85926220

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350. v.2.3.4
Web interface last modified: Jul 8, 2013 v.2.3.4

Exhibit 9

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Logout Please logout when you are done to release system resources allocated for you.

Start List At: OR Jump to record: **Record 6 out of 33**

TSDR | ASSIGN Status | TTAB Status *(Use the "Back" button of the Internet Browser to return to TESS)*

TETSU TEPPAN GRILL

Word Mark	TETSU TEPPAN GRILL
Translations	The English translation of TETSU in the mark is iron.
Goods and Services	IC 043. US 100 101. G & S: Restaurant Services. FIRST USE: 20120801. FIRST USE IN COMMERCE: 20120801
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85927932
Filing Date	May 9, 2013
Current Basis	1A
Original Filing Basis	1A
Owner	(APPLICANT) Takayama, **Masayoshi** INDIVIDUAL JAPAN 10 Columbus Circle, 4th Floor New York NEW YORK 100191214
Attorney of Record	Edward R. Schwartz
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "TEPPAN GRILL" APART FROM THE MARK AS SHOWN
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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No assignment has been recorded at the USPTO

For Serial Number: 85927932

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Web interface last modified: Jul 8, 2013 v.2.3.4

Exhibit 10

KAPPO MASA

Word Mark	KAPPO MASA
Translations	The English translation of MASA in the mark is dough.
Goods and Services	IC 043. US 100 101. G & S: Restaurant Services
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85927940
Filing Date	May 9, 2013
Current Basis	1B
Original Filing Basis	1B
Owner	(APPLICANT) Takayama, **Masayoshi** INDIVIDUAL JAPAN 10 Columbus Circle, 4th Floor New York NEW YORK 100191214
Attorney of Record	Edward R. Schwartz
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "KAPPO" APART FROM THE MARK AS SHOWN
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

No assignment has been recorded at the USPTO

For Serial Number: 85927940

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350. v.2.3.4
Web interface last modified: Jul 8, 2013 v.2.3.4

Exhibit 11

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BUTCHER'S PLACE

Word Mark	BUTCHER'S PLACE
Goods and Services	IC 043. US 100 101. G & S: RESTAURANT SERVICES
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85355984
Filing Date	June 24, 2011
Current Basis	1B
Original Filing Basis	1B
Published for Opposition	November 22, 2011
Owner	(APPLICANT) **Masayoshi** Takayama INDIVIDUAL JAPAN 10 Columbus Circle, Fourth Floor New York NEW YORK 100191214
Attorney of Record	Edward R. Schwartz
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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No assignment has been recorded at the USPTO

For Serial Number: 85355984

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Web interface last modified: Jul 8, 2013 v.2.3.4

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Exhibit 12

Los Angeles Times | FOOD

Daily Dish

THE INSIDE SCOOP ON FOOD IN LOS ANGELES

Masa Takayama brings Bar Masa and Shaboo to Las Vegas

December 7, 2009 | 5:46pm

When asked why open a restaurant in Las Vegas, Masayoshi Takayama says, "Why not?" To the chef lauded for producing refined Japanese dishes of subtle genius in a Shinto-like space (it screams Vegas, doesn't it?), touché.

Michelin three-star chef Takayama -- who opened Ginza Sushi-ko in L.A. in the '80s, transplanted his temple of sushi from a mid-Wilshire strip mall to a second-floor aerie off Rodeo Drive (where Urasawa is now) in the '90s and moved to New York to open Masa and Bar Masa in 2004 -- is set to debut his first Vegas venture on Dec. 17: another Bar Masa and Shaboo, a shabu-shabu restaurant.

He joins fellow three-star chef Pierre Gagnaire of Paris (who has opened Twist, his first restaurant in the U.S.) as well as Jean-Georges Vongerichten and Michael Mina, in the $8.5-billion CityCenter on the Vegas Strip.

"It's a new, gigantic building where I get to create my idea, my style," Takayama says. "It's more than the food. Very different from Ginza Sushi-ko style." It's also very different from Bar Masa in New York; the Las Vegas outpost -- inside the Aria Resort & Casino -- is about three times the size, decorated in high Strip style with 15-foot doors of teak and copper, curved red leather banquettes and arched ceilings.

Takayama calls it coming full circle. On his first trip to Los Angeles from Tokyo, he got off the plane and drove directly to Las Vegas to see "flat land."

The menu for Bar Masa in Las Vegas will recall the one in New York, with Japanese small plates such as spicy cod roe pasta with purple shiso flowers; duck with foie gras; sizzling spicy octopus; or grilled eel with rice. (He says his fish will still be from the Tsukiji market in Tokyo.)

The more-intimate 52-seat Shaboo is located inside Bar Masa, serving *omakase* (tasting menu) shabu-shabu at tables equipped with individual induction heating elements for cooking beef flown in from Chiba prefecture.

-- Betty Hallock

Rendering of Bar Masa / Richard Bloch Architect

Weekend Escape: It's a wild life at Carrizo Plain National Monument

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In Case You Missed It...

A Tribune Web site

Exhibit 13

Aria's Tetsu offers seasonally fresh flavors

By ELLEN STERLINGSPECIAL TO LAS VEGAS REVIEW-JOURNAL December 26, 2012 - 2:00am

Tetsu, off the main lobby of the Aria resort-casino, 3730 Las Vegas Blvd. South, opened in August to serve as a companion to barMASA, chef Masa Takayama's adjacent restaurant.

"We bring the market inside, using only fresh ingredients, and we cook on a teppan grill at the table, using only two knives to handle the food. We concentrate on the flavor of the food, not on putting on a show for the diners," says executive chef Bonifacio dela Cruz.

The menu at Tetsu is seasonal, and the selections are displayed fresh on ice on a produce/protein table so diners may see the day's offerings.

Food is brought in from wherever it is available. For example, lobsters are imported from Scotland, oysters from Washington and shishito peppers from Fresno, Calif. Fried rice is made from a combination of black and white rice.

Food is served on stones heated to 150 degrees.

Cocktails are available from barMASA, and Tetsu has 100 varieties of sake by the bottle, 13 by the glass and a wine list with 600 selections.

Tetsu is open from 5 to 11 p.m. Thursday through Tuesday. It seats 38 people around four blackjack-style tables with the teppan in the middle and two larger communal tables seating 19 and 20 people.

Here is a sample of the fall menu:

Seafood: jalapeno calamari ($9), spicy octopus ($9), Santa Barbara shrimp ($16 apiece), rock oyster ($12 apiece), scallops ($11 apiece)

Entrees: filet mignon from Snake River Farms (4 ounces, $44; 6 ounces, $66; 8 ounces, $88), Australian Wagyu rib-eye (4 ounces, $44; 6 ounces, $60; 8 ounces, $80; 10 ounces, $100), duck breast ($30), hibachi chicken ($22), lobster (1.5 pounds, $62), Scottish salmon (6 ounces, $26), Mediterranean turbot with kale (8 ounces, $38)

Teppan vegetables: eggplant, zucchini, spinach, kale, button mushroom, shallots ($3 each); shiitake mushroom ($6); asparagus ($5)

Side dishes: Wagyu garlic fried rice ($14); Wagyu yakisoba, noodles ($14); vegetable fried rice ($9); vegetable yakisoba ($9)

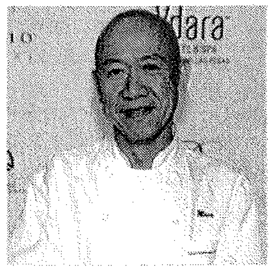
Desserts: yuzu sorbet ($9), truffle ice cream (market price).

Information: 590-7111

Exhibit 14

Masa Takayama Debuts New Restaurant Menu at CB1 Meeting

6/14/12 at 2:50 PM



Takayama.
Photo: Denise Truscello/Wire Images/Getty

Chef Masa was in Tribeca last night to make the case for a liquor license at his upcoming restaurant Tetsu. Tribeca Citizen has been all over this opening from the beginning, and reports back on the meeting details: The spot, at 78 Leonard, will have 124 seats spread out over three floors (à la carte on the ground floor, a lounge on the mezzanine, and omakase menus in the cellar) and is tentatively scheduled to open around Thanksgiving. Masa also brought along a very detailed sample menu that lists dishes like sizzling razor clam with seabeans ($34) , grilled bluefin tuna steak ($38), corn risotto with uni ($48, or $68 with summer truffles), and something called "nothing special just squid legs" ($16). [Tribeca Citizen]

By Alan Sytsma
FILED UNDER: COMING SOON, MASA, MASA TAKAYAMA, NOTHING SPECIAL JUST SQUID LEGS, TETSU, TRIBECA

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LES Boozing: Yunnan Kitchen, Zoë Now Serving the Hooch

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Exhibit 15

From: TMOfficialNotices@USPTO.GOV
Sent: Saturday, January 25, 2014 00:11 AM
To: pto@cph.com
Subject: Official USPTO Notice of Approval of Extension Request: U.S. Trademark SN 85355984: BUTCHER'S PLACE: Docket/Reference No. 67948/T605

NOTICE OF APPROVAL OF EXTENSION REQUEST

Serial Number: 85355984
Mark: BUTCHER'S PLACE
Owner: Masayoshi Takayama
Extension Request Number: 4
Docket/Reference Number: 67948/T605
Notice of Allowance Date: Jan 17, 2012

The USPTO issued a Notice of Allowance on **Jan 17, 2012** for the trademark application identified above. Applicant's **FOURTH** request for Extension of Time to File a Statement of Use has been **GRANTED**.

PLEASE NOTE:

1. Applicant must continue to file extension requests every six (6) months calculated from the date the Notice of Allowance was issued until a Statement of Use is filed, or the USPTO will hold the application abandoned.
2. Applicant may only request a total of five (5) extensions of time.
3. Applicant may **NOT** file a Statement of Use more than thirty-six (36) months from the date the Notice of Allowance was issued.

For further information, including information on filing and maintenance requirements for U.S. trademark applications and registrations and required fees, please consult the USPTO website at http://www.uspto.gov/ or call the Trademark Assistance Center at 1-800-786-9199.

To check the status of an application, go to http://tarr.uspto.gov/.

To view this notice and other documents for this application on-line, go to http://tdr.uspto.gov/search.action?sn=85355984. NOTE: This notice will only be available on-line the next business day after receipt of this e-mail.

Exhibit 16

PTO Form 1581 (Rev 9/2005)
OMB No. 0651-0054 (Exp. 09/30/2014)

Request for Extension of Time to File a Statement of Use (15 U.S.C. Section 1051(d))

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85355984
LAW OFFICE ASSIGNED	LAW OFFICE 105
MARK SECTION	
MARK	BUTCHER'S PLACE
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	BUTCHER'S PLACE
OWNER SECTION	
NAME	Masayoshi Takayama
STREET	10 Columbus Circle, Fourth Floor
CITY	New York
STATE	New York
ZIP/POSTAL CODE	10019-1214
COUNTRY	United States
GOODS AND/OR SERVICES SECTION	
INTERNATIONAL CLASS	043
CURRENT IDENTIFICATION	RESTAURANT SERVICES
GOODS OR SERVICES	KEEP ALL LISTED
EXTENSION SECTION	
EXTENSION NUMBER	4
ONGOING EFFORT	product or service research or development
ALLOWANCE MAIL DATE	01/17/2012
STATEMENT OF USE	NO

PAYMENT SECTION	
NUMBER OF CLASSES	1
SUBTOTAL AMOUNT	150
TOTAL AMOUNT	150
SIGNATURE SECTION	
SIGNATURE	/Edward R. Schwartz/
SIGNATORY'S NAME	Edward R. Schwartz
SIGNATORY'S POSITION	Attorney of Record, California Bar Member
DATE SIGNED	01/07/2014
SIGNATORY'S PHONE NUMBER	626-795-9900
FILING INFORMATION	
SUBMIT DATE	Tue Jan 07 13:50:06 EST 2014
TEAS STAMP	USPTO/ESU-209.203.70.34-2 0140107135006587330-85355 984-500264cc029305a569e30 f82a8fe0b6c5828b6e6644b2d b1cefd021b25dbbfd46d-CC-7 7-20140102123332848808

PTO Form 1581 (Rev 9/2005)
OMB No. 0651-0054 (Exp. 09/30/2014)

SOU Extension Request
(15 U.S.C. Section 1051(d))

To the Commissioner for Trademarks:

MARK: BUTCHER'S PLACE
SERIAL NUMBER: 85355984

The applicant, Masayoshi Takayama, having an address of
10 Columbus Circle, Fourth Floor
New York, New York 10019-1214
United States
requests a six-month extension of time to file the Statement of Use under 37 C.F.R. Section 2.89 in this application. The Notice of Allowance mailing date was 01/17/2012.

For International Class 043:
Current identification: RESTAURANT SERVICES

The applicant has a continued bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with all of the goods and/or services listed in the Notice of Allowance or as subsequently modified for this specific class.

This is the fourth extension request. The applicant has made the following ongoing efforts to use the mark in commerce on or in connection with each of those goods and/or services covered by the extension request: product or service research or development

A fee payment in the amount of $150 will be submitted with the form, representing payment for 1 class.

Declaration

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements may jeopardize the validity of the form or any resulting registration, declares that he/she is properly authorized to execute this form on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /Edward R. Schwartz/ Date Signed: 01/07/2014
Signatory's Name: Edward R. Schwartz
Signatory's Position: Attorney of Record, California Bar Member

Signatory's Phone: 626-795-9900

RAM Sale Number: 85355984
RAM Accounting Date: 01/08/2014

Serial Number: 85355984
Internet Transmission Date: Tue Jan 07 13:50:06 EST 2014
TEAS Stamp: USPTO/ESU-209.203.70.34-2014010713500658
7330-85355984-500264cc029305a569e30f82a8
fe0b6c5828b6e6644b2db1cefd021b25dbbfd46d
-CC-77-20140102123332848808

TEAS ROUTING SHEET

To: INTENT TO USE UNIT

Work Loc: INTENT TO USE SECTION

Doc Type: Extension Request for SOU

Serial Number: 85355984

Mark: BUTCHER'S PLACE

Mail Date: 2014/01/07

Examiner Number: 81847

Examiner Name:
TWOHIG, SHANNON MARIE

L.O. Assigned: LAW OFFICE 105

Special Instruction(s):

Transaction	Fee Code	Transaction Date	Fee per Class	Number of Classes	Total Fee
Extension Request for SOU	7004	20140107	$150	1	$150

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No.: 76/685,731
Filed: January 14, 2008
For the mark: MASA
Published in the Trademark Official Gazette on August 23, 2011

Masayoshi Takayama,

Plaintiff,

v. Concurrent Use No. 94002596

D'Amico Holding Company,

Defendant.

CERTIFICATE OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Jo Ellen Briley, of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 22nd day of April, 2014, she e-mailed a true and correct copy of Defendant's:

1. Response to Plaintiff's Motion for Summary Judgment; and
2. Declaration of Bradley J. Walz.

in the above-captioned action to the last known e-mail address, to-wit:

David A. Plumley
david.plumley@cph.com

Jo Ellen Briley

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