

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

- - - - -x

In re: :

DENNIS CARVALHO : BK No. 99-13587
Debtor Chapter 11

DENNIS CARVALHO :
Plaintiff

5. : A.P. No. 99-1108

MICHAEL DiPANNI :
Defendant

- - - - -x

OPINION AND ORDER

APPEARANCES:

John Boyajian, Esq.
Attorney for Debtor/Plaintiff
BOYAJIAN, HARRINGTON & RICHARDSON
182 Waterman Street
Providence, Rhode Island 02906

Kevin Brill, Esq.
Attorney for Defendant
NIXON PEABODY LLP
One Citizens Plaza
Providence, Rhode Island 02903

BEFORE JAMES A. GOODMAN, United States Bankruptcy Judge

Heard on the Debtor's Complaint to enforce the provisions of a personal guaranty purportedly granted to the Debtor by Michael DiPanni. Upon consideration of the evidence, the arguments of counsel and for the reasons set forth below, I find that Michael DiPanni agreed to personally indemnify the Debtor from any and all liability arising out of an Amendment to Agreement of Lease by and between PAMCO and Donald Tatro, and accordingly judgment shall enter against Michael DiPanni for the sum of \$124,792, plus costs.

BACKGROUND

In 1989 Dennis Carvalho and Derrick Wainwright purchased a corporation known as PAMCO, Inc. from Donald Tatro. PAMCO was in the business of making costume jewelry and the shares of PAMCO were divided evenly between Carvalho and Wainwright. On March 17, 1989, PAMCO entered into a three year lease for its business premises at 88 Niantic Avenue, Providence, Rhode Island, with Donald Tatro as the lessor. *See* Exhibit F. Neither Carvalho nor Wainwright were personally liable under the PAMCO/Tatro lease. *Id.*

In August 1990, Michael DiPanni and Stephen Mann purchased 50% of the common stock of PAMCO along with an option to purchase the remaining 50% from Carvalho and Wainwright. At this time, DiPanni was the principal of a company called Vanity Jewelry, Inc., which conducted its business out of an office located on Woonasquatucket Avenue, North Providence, Rhode Island. The third floor of the building where Vanity Jewelry was located was vacant and in an effort to reduce costs, the parties agreed to move PAMCO to the Vanity Jewelry facility on Woonasquatucket Avenue. To accomplish this task,

on August 29, 1990, Carvalho negotiated an amendment to the Lease with Tatro. Under the Amendment, the lease would expire on August 31, 1991, and to induce Tatro to enter into the amendment, Carvalho and Wainwright personally guaranteed the obligations of PAMCO under the lease. *See* Exhibit A.

In early January 1991, PAMCO vacated its Niantic Avenue home and moved to the Woonasquatucket Avenue property with Vanity. It was anticipated that a new tenant would be moving into PAMCO's space, thereby relieving PAMCO of its obligation under the lease. Things did not work according to plan, and the former PAMCO location remained vacant and no payments were made to Tatro under the lease, thereby putting PAMCO in breach of the lease. Tatro filed suit in Providence County Superior Court against PAMCO, Carvalho, and Wainwright. Michael DiPanni hired the law firm of Adler, Pollock & Sheehan (hereinafter "AP&S") to defend PAMCO, Carvalho, and Wainwright in the lawsuit.

On April 9, 1991, DiPanni and Mann purchased the remaining shares of PAMCO from Carvalho and Wainwright. As part of the stock purchase agreement, the parties acknowledged that the litigation with Tatro was pending in Superior Court and as additional consideration for the purchase of the stock, PAMCO and Vanity agreed to indemnify and hold Carvalho and Wainwright harmless "from any and all liability incurred by them in connection with their obligations under the Lease Amendment." Exhibit B, ¶4, p.3. After the transfer of stock, Carvalho ceased his employment with PAMCO.

As the Tatro litigation proceeded in Superior Court, Dennis Carvalho's deposition was noticed and on October 29, 1992, Attorney Bruce Todesco from AP&S sent a letter to Carvalho telling him that they had to meet in preparation for the deposition. *See* Exhibit G. Shortly thereafter, the parties executed an

undated Joint Defense and Indemnification Ratification Agreement (hereinafter “Joint Defense Agreement”) (Exhibit D), which document is the main focus of this litigation.¹ Paragraph one of the Joint Defense Agreement states:

1. Michael DiPanni, on behalf of PAMCO, Inc. and Vanity Jewelry Inc., hereby acknowledges and ratifies ¶4 of the attached Stock Purchase Agreement and covenants to indemnify and hold harmless Carvalho and Wainwright from any and all liability incurred by them in connection with their obligations under the “Amendment to Agreement of Lease” dated August 29, 1990, a copy of which is attached hereto as Ex. B. This indemnification includes the legal costs incurred in the joint defense referenced below and the payment of any judgment awarded to, or settlement accepted by, Donald Tatro.

Exhibit D, ¶1. The Joint Defense Agreement is signed by “Michael DiPanni, individually and on behalf of PAMCO, Inc. and Vanity Jewelry, Inc.” Exhibit D.

¹ We know that the Joint Defense Agreement was executed shortly after Mr. Carvalho received his deposition notice and letter from Mr. Todesco because on November 4, 1992, Mr. Todesco sent a draft of the agreement to Carvalho’s personal attorney, Robert Weick, Esq., for review. See Exhibit C.

On September 28, 1998, after a full trial in the Superior Court, judgment was entered in favor of Donald Tatro against PAMCO and Messrs. Carvalho and Wainwright in the amount of \$124,792. On September 20, 1999, Mr. Carvalho filed a voluntary petition under Chapter 11. Shortly thereafter, on October 12, 1999, this adversary proceeding was filed. The sole issue before the Court is whether the indemnification provided to Mr. Carvalho in the Joint Defense Agreement is an indemnification by PAMCO and Vanity,² or a personal guaranty by Michael DiPanni?

² It appears that both Vanity and PAMCO are defunct corporations, but after the hearing I have serious questions as to how defunct these corporations really were. Mr. DiPanni testified that he made between \$60,000-\$70,000 after the liquidation of Vanity. He also stated in his deposition that at the time of the liquidation his salary from Vanity was \$400,000 per year. He also testified that all of the debts of the corporation were paid at the time he paid himself these sums. Mr. DiPanni apparently forgot about one debt.

DISCUSSION

"Contract interpretation is a question of law; it is only when contract terms are ambiguous that construction of terms becomes a question of fact." *Clark-Fitzpatrick, Inc./Franki Foundation Co. v. Gill*, 652 A.2d 440, 443 (R.I. 1994) (citing *Judd Realty, Inc. v. Tedesco*, 400 A.2d 952 (R.I. 1979)).

It is well settled that courts should not look outside the four corners of a contract when the terms of the contract are clear and unambiguous. *See Clark-Fitzpatrick, Inc. v. Gill*, 652 A.2d 440, 443 (R.I. 1994).

A contract is ambiguous only when it is reasonably and clearly susceptible to more than one interpretation. *See W.P. Associates v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994). I find that Paragraph one of the Joint Defense Agreement is subject to two interpretations.

The first interpretation is that Michael DiPanni, on behalf of PAMCO and Vanity, acknowledges, ratifies and covenants to indemnify Mr. Carvalho. The other and more plausible interpretation is that Michael DiPanni, on behalf of PAMCO and Vanity, acknowledges and ratifies the prior indemnification given to Carvalho in the Stock Purchase Agreement, *see* Exhibit B, p.3 ¶4, and Michael DiPanni individually covenants to indemnify Mr. Carvalho. In support of this interpretation, I heard the testimony of Dennis Carvalho and his personal attorney, Robert Wieck, Esq. In contravention of this interpretation, I heard from Michael DiPanni.

I find the facts as follows. Carvalho testified that at the time he received the letter from Bruce Todesco in October of 1992 (Exhibit G), he knew he could have filed a cross-claim against PAMCO and Vanity in the Tatro litigation. He also stated that the costume jewelry market had taken a downturn due to

cheaper imports and he feared that PAMCO and Vanity were not in a position to live up their indemnity as provided for in the stock purchase agreement. If he participated in the Tatro litigation and did not file a cross-claim, Carvalho wanted the personal guaranty of Michael DiPanni. He stated that Attorney Todesco drafted the Joint Defense Agreement and faxed a copy to his personal attorney, Mr. Wieck. *See* Exhibit C. Wieck testified that he represented Dennis Carvalho and that he took part in negotiating the Joint Defense Agreement with Attorney Todesco. He states that he told Todesco that his client wanted a personal guaranty of Mr. DiPanni in exchange for a joint defense in the Tatro litigation. Wieck stated that Todesco drafted the Joint Defense Agreement and acknowledged that it accomplished the task of providing a personal guaranty. *See* Exhibit C. Thereafter, Wieck advised his client to execute the document. *See* Exhibit D. I find that the testimony of both Messrs. Wieck and Carvalho is credible.

I cannot say the same thing with regard to Mr. DiPanni's testimony. DiPanni had very little recall of the events. He stated that AP&S did not represent him personally, that he usually never read documents before he signed them, and that he does not remember anyone asking him for a personal guaranty. I find that at best Mr. DiPanni cannot remember anything, and at worst he is evasive or misleading. In either case, I find his testimony is not credible.

The disputed language of the Joint Defenses Agreement states:

1. Michael DiPanni, on behalf of PAMCO, Inc. and Vanity Jewelry Inc., hereby acknowledges and ratifies ¶4 of the attached Stock Purchase Agreement and covenants to indemnify and hold harmless Carvalho and Wainwright from any and all liability incurred by them in connection with their obligations under the "Amendment to Agreement of Lease" dated August 29, 1990, a copy of which is attached hereto as Ex. B.

Exhibit D, ¶1. When we look to Paragraph four of the Stock Purchase Agreement, *see* Exhibit B, and read that in conjunction with the Joint Defense Agreement, it makes no sense that PAMCO and Vanity would covenant a second time to indemnify Mr. Carvalho. They had already agreed to an indemnification on account of the Tatro litigation. It does make sense that Michael DiPanni, on behalf of PAMCO and Vanity, would acknowledge and ratify that indemnity. It also makes sense that Michael DiPanni would covenant in his individual capacity to indemnify Carvalho, inducing Carvalho to assist in a joint defense and forebear from filing cross-claims against Vanity and PAMCO. I find that for purposes of the Joint Defense Agreement, Mr. Todesco represented Mr. DiPanni. AP&S had a long-term relationship with Mr. DiPanni and his various companies and Mr. DiPanni saw fit to ensure that AP&S was paid even when Vanity and PAMCO ceased to exist. *See* Exhibit E. I construe any ambiguity in the Joint Defense Agreement against Mr. DiPanni. *See Ferber Co. v. Ondrick*, 310 F.2d 462, 465 (1st Cir. 1962), *cert. denied*, 373 U.S. 911 (1963); *Carner v. Grist Mill '76 Corp.*, 645 F.Supp. 331, 334 (D.R.I. 1986).

Based upon the foregoing, I find that through the Joint Defense Agreement, Michael DiPanni personally indemnified Dennis Carvalho from any and all liability incurred in connection with the Tatro litigation including all legal fees. Accordingly, judgment shall enter in favor of the Debtor against Michael DiPanni in the amount of \$124,732, plus costs. *See* Fed. R. Bankr. P. 7054.

Enter Judgment consistent with this opinion.

Dated at Providence, Rhode Island, this 13th day of

February, 2001.

/s/ James A. Goodman
James A. Goodman
U.S. Bankruptcy Judge*

*For the District of Maine, sitting by designation.