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NEWSLETTER OF THE HOSPITALITY PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

22007 – 2008 Hospitality Case Review: Brief Case Summaries

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This newsletter provides a brief synopsis of a few recent cases in areas of primary importance to our hospitality clients. The cases cover a wide variety of factual scenarios and areas of law. We will continue to update you as to seminal decisions decided in 2008.

ADA update → In *Hensley v. Hanley-Turner*, 2007 WL 1599845 (Cal. 2007), Defendant Waffle Shop owners entered into a settlement agreement relating to various violations of the Americans with Disabilities Act ("ADA"). Pursuant to the agreement, Defendant was required to complete modifications to the restaurant to remedy accessibility violations. When Defendant failed to complete the renovations within the time allotted, a civil contempt proceeding was initiated. The factors considered by a court imposing a civil contempt sanction include (1) the harm from noncompliance, (2) the probable effectiveness of the sanction, (3) the contemnor's financial resources and the burden the sanctions may impose, and (4) the contemnor's willfulness in disregarding the court's order. The court found that sanctions were not warranted because Defendant had made and continued to make a good faith effort to comply with the settlement agreement. The court ultimately concluded that substantial compliance is a defense to civil contempt.

Condemnation update → In *State v. Bristol Hotel Asset Co.*, 2007 WL 2042793 (Tex. App. 2007), the State of Texas, as part of a construction project to widen a highway, made a partial taking of ten feet of land at the front of a hotel owned by Bristol Hotel Asset Co. Due to the State's project and the topography of the hotel property, two of the hotel's three driveways were rendered unusable. For the hotel to continue functioning, both driveways would need complete

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reconstruction. In a condemnation case, the central damage issue is how to measure the market value of the condemned property. The court upheld the condemnation damage award of \$1,260,000 based on expert testimony comparing the fair market value of the hotel before and after the condemnation. In ascertaining the fair market value, the expert priced the hotel property using the "income approach" valuation methodology. The income approach is appropriate when the property would, in the open market, be priced according to the income it already generates. By estimating this future income and applying a capitalization rate, the appraiser can arrive at a present value for an income-producing property. The capitalization rate is the rate of interest investors would require as a return on their money before they would invest in the income-producing property. In arriving at the value of the hotel after condemnation, the expert considered the changes imposed on the property that would concern an investor. These changes included the loss of the hotel's main entrance drive, resultant change in site circulation, the permanent loss of three parking spaces, and the fact that the hotel sign was no longer compliant with set back requirements. Ultimately, the expert concluded that impacts to the hotel would cause an investor buying the hotel to attribute a greater risk to the asset and would likely penalize its value by raising the capitalization rate fifty basis points, or one-half of 1 percent.

Breach of Contract update → In *Ultrasound Imaging Corp. v. Hyatt Corp.*, 2007 WL 2345256 (N.D. Ga. 8/10/07), Plaintiff booked a suite at Defendant's hotel, but when he arrived, the suite was occupied by another guest. Plaintiff had reserved his room by calling the hotel, requesting a room and providing a Visa credit card number to hold the room. Defendant had faxed a confirmation to Plaintiff indicating that the room had been reserved. Plaintiff brought an action seeking damages for Defendant's failure to honor its reservation under various causes of action, including breach of contract, tortious interference with business relations and fraud. Defendant argued that the contract to provide Plaintiff with a room in the hotel was a nonbinding contract according to statutory requirements because it had not been signed by Plaintiff and certain provisions were not in bold type. In its ruling on Defendant's motion to dismiss, the court disagreed with Defendant's position and found that even though the contract to rent a room at the hotel did not meet Georgia's specific statutory requirements, it nevertheless permitted Plaintiff's breach of contract cause of action to proceed on the theory that the statutory requirement constituted just one method, but not the exclusive method, of contract formation. The court further dismissed Plaintiff's tortious interference and fraud claims for failure to properly allege required elements.

Defamation update → In *Balboa Island Village Inn Inc. v. Lemon*, 156 P.3d 339 (Cal. Sup. Ct. 2007), Plaintiff Balboa Island Village Inn filed a defamation action against Defendant, the owner of a cottage located across an alley from the Inn. Defendant, a vocal critic of the Inn, had contacted authorities numerous times to complain about excessive noise and inebriated Inn customers. The Inn alleged that Defendant videotaped customers, verbally harassed customers and employees and told lies about the Inn while collecting signatures for a petition. A lower court found that many of Defendant's statements constituted defamation and issued an injunction prohibiting Defendant from making certain statements. Plaintiff appealed, alleging violations of her First Amendment free-speech rights. The Supreme Court found that a properly limited injunction enjoining defamation, where the injunction is issued to prevent a defendant from repeating statements that have been judicially determined to be defamatory, is legally permissible. The injunction, however, must be limited to the party guilty of said defamation. Further, it must not prevent a defendant from presenting his or her grievances to government officials.

Employment EEOC update → In *Ledbetter v. Goodyear*, 127 S. Ct. 2162 (2007), a female retiree sued her former employer alleging that sex discrimination-based poor performance evaluations she received earlier in her tenure with her employer had resulted in lower pay than her male colleagues through the end of her career. She asserted claims under Title VII and the Equal Pay Act. The Supreme Court held that discrete discriminatory acts triggering the 180-day time limit for filing an Equal Employment Opportunity Commission ("EEOC") charge could only be discriminatory pay decisions. The Court found that discriminatory intent must occur during the 180-day charging period and the mere issuing of paychecks did not constitute discriminatory intent. The Court reasoned that although disparate pay was received during the statutory limitations period, because the payments were the result of intentionally discriminatory pay decisions occurring outside of the limitations period, Plaintiff's action was time barred.

Employment Tip Sharing update → In *Morgan v. Speak Easy, LLC*, 2007 WL 2757170 (N.D. Ill. 2007), Plaintiff, a waiter at Defendant's restaurant, sued his employer for a violation of the Fair Labor Standards Act ("FLSA") and the Illinois Minimum Wage Law. Plaintiff charged Defendant with failing to pay its wait staff minimum wages and with unjust enrichment based on its practice of retaining tips and forcing employees to share tips with senior staff (whom he termed "managers"). The court found that there was a question of

fact as to whether or not Defendant paid Plaintiff adequate minimum wage. With respect to tip sharing, the alleged managers were servers with seniority who served, helped close the restaurant, served as greeters, checked on tables during the dinner service, supervised employees' work and sent employees home. However, senior servers had no authority over employee hiring, firing and scheduling. The court held that such senior servers in this factual context constituted tipped employees and not employers and, therefore, the tip pool was valid. Defendant argued that the tip pool was nevertheless invalid because Defendant did not provide him with notice that it would be taking a tip credit against his wages as required by FLSA. On this point the court found a question of fact and denied summary judgment.

Franchise/UFOC update → In *Travelodge v. Honeysuckle Enterprises*, 244 Fed. Appx. 522 (3d Cir. 2007), Defendant entered into a franchise agreement with Plaintiff but failed to pay certain amounts due under the agreement, claiming that its hotel failed to perform as well as promised by Plaintiff's salesmen. Specifically, Defendant claimed that a salesman promised that his hotel would see a 15% increase in sales. The court found that a Uniform Franchise Offering Circular ("UFOC") had been given to Defendant and that Defendant ultimately signed a franchise agreement that did not include any provision guarantying an increase in sales. The court emphasized that the franchise agreement included an express provision disavowing any covenants or representations not included in the agreement. The court found that a person who signs an agreement is presumed to have read it. The court thereby found Defendant liable for breach of contract and dismissed Defendant's counterclaims for fraud and misrepresentation.

Premise Liability update → In *Freiburger v. Four Seasons*, 2007 WL 1674020 (Ohio Ct. App. 2007), Plaintiff was injured when he fell from a second-tier platform at an indoor driving range at Defendant's golf center. Plaintiff stumbled off the second-tier ledge and into a safety net. While the safety net was provided to catch those falling from the second tier, it did not catch Plaintiff and he suffered serious injuries. The trial court granted Defendant summary judgment, stating that the ledge was an open-and-obvious condition for which Defendant owed no duty to Plaintiff. The appellate court reversed, stating that a jury could find that Defendant voluntarily assumed a separate duty of reasonable care by providing the safety net. Although Defendant did not expressly assure Plaintiff that the net would catch him, the net's purpose was arguably readily apparent and should have caught him. The

court ultimately found that there was a genuine issue of material fact as to whether Defendant owed Plaintiff a separate duty to reasonably maintain the safety net.

FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:



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