

FIFTH DIVISION
January 25, 2013

No. 1-11-0687

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SMG, INC., SPECIALTY FOODS GROUP, INC.)	Appeal from the
and SPECIALTY FOODS HOLDINGS, INC.,)	Circuit Court of
)	Cook County.
Plaintiffs/Counter-Defendants-Appellees,)	
)	
v.)	No. 07 CH 20174
)	
NATHAN’S FAMOUS SYSTEMS, INC.,)	Honorable
)	Leroy K. Martin, Jr.,
Defendant/Counter-Plaintiff-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

¶ 1 HELD: Trial court's order granting summary judgment for plaintiff affirmed because extrinsic evidence is unavailable to interpret contract where language is unambiguous; issuance of debentures did not trigger the notice and termination provisions of licensing agreement, therefore trial court's judgment for plaintiff/counter-defendant affirmed.

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¶ 2 Plaintiff, SMG, Inc. (SMG) filed a complaint for declaratory judgment seeking a declaration that it did not violate the provisions of a license agreement it had with Nathan's Famous Systems, Inc. (Nathan's). Nathan's filed a counterclaim in which it alleged that SMG had in fact violated the license agreement. SMG later amended its pleadings to add a breach of contract claim (the spice claim). The trial court subsequently granted summary judgment in favor of SMG on the breach of contract claim and entered judgment after a bench trial in favor of SMG. Nathan's raises the following issues on appeal: 1) whether the trial court erred when it granted summary judgment to SMG on the "spice claim" - SMG's allegation that Nathan's overcharged it for a proprietary seasoning mix by improperly retaining "discount" or "rebate" payments that Nathan's received from its spice manufacturer, John Morrell & Co. (Morrell); and 2) whether the trial court erred when it determined after trial that SMG's issuance of debentures did not trigger the notice requirement or breach the change of control provision of the parties' license agreement. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Nathan's began in 1916 as a hot dog stand in Coney Island, NY. Today, Nathan's receives fees and royalties from its franchise restaurants and sells its products to supermarkets, groceries and club stores. Nathan's does not manufacture any of its own products but grants licenses to third parties, who then manufacture products using Nathan's proprietary formulas and trademarks. Nathan's in turn receives revenues on the sale of such products through the royalties it receives from its licensees. From 1978 to 1994, Morrell was Nathan's primary manufacturer of hot dogs.

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¶ 5 In 1994, Peter Shea, Morrell's Chief Operating Officer, initiated a buyout of the division of Morrell that manufactured Nathan's hot dogs. Chemical Venture Partners (Chemical) financed the acquisition as Shea's financial partner, forming a new entity, SMG, to accomplish the buyout. SMG is a wholly-owned subsidiary of Specialty Foods Group, Inc., and an indirect subsidiary of Specialty Foods Holdings, Inc.

¶ 6 The Spice Agreement between Nathan's and Morrell

¶ 7 Morrell was Nathan's spice manufacturer pursuant to a 1986 spice license agreement (spice agreement). Under the spice agreement, Nathan's granted Morrell a non-exclusive license to "manufacture, produce and sell" Nathan's Seasonings using Nathan's proprietary formulas and trademarks. As consideration for these and other rights, Morrell agreed to pay Nathan's a royalty equal to 10% of the net sales of Nathan's Seasonings. From 1986 to 1997, Morrell sold Nathan's Seasonings internally and paid royalties to Nathan's based on those sales. Morrell was replaced by SMG as the manufacturer of Nathan's hot dogs in 1994, but Morrell retained its license to manufacture Nathan's Seasonings and has continued to do so.

¶ 8 In 1997, Nathan's and Morrell implemented a structure whereby Nathan's would purchase Nathan's Seasonings directly from Morrell and then Nathan's would sell the spice to SMG and other manufacturers. On March 10, 1997, Nathan's and Morrell executed a letter agreement setting forth the new framework. The 1997 letter contained the following relevant terms regarding pricing and discounts:

"3. Prices and Discounts. NFSI will pay Morrell for the Nathan's Seasonings that NFSI buys in an amount according to the prices

described in Exhibit A, which is appended to this letter agreement (the "Prices"), on such payment terms as the parties mutually agree upon. NFSI will be entitled to a discount from the Prices in the amount of fifty cents (50¢) per pound for each pound of Nathan's Seasonings that NFSI buys from Morrell (the "Discount"). * * *

4. No royalty on sales to NFSI. Under an earlier agreement dated March 17, 1986, as amended dated February 28, 1994 (the "Spice Agreement"), Morrell was granted the right and accepted the obligation to manufacture the Nathan's Seasonings using the Nathan's Spice Formula. Except as specifically described in this letter, the Spice Agreement shall remain in full force and effect. While Morrell agreed to pay NFSI certain royalties on sales to third parties under that Spice Agreement, Morrell will have no responsibility to pay royalties to NFSI on sales made to NFSI."

¶ 9 In 2002, 2005, and 2008, Nathan's and Morrell agreed to increase the per-pound discount to \$.68 per pound, \$.74 per pound, and \$.83 per pound, respectively. In all other respects, the amended agreements were substantially the same as the 1997 letter agreement.

¶ 10 The License Agreement between Nathan's and SMG

¶ 11 In 1994, Shea and Norbitz agreed that Nathan's would grant SMG a 20-year license, and they were the sole negotiators of the License Agreement. The License Agreement, entered into

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on February 28, 1994¹, required SMG to purchase Nathan's Seasonings either directly from Nathan's or from a spice manufacturer designated by Nathan's. Under the License Agreement, Nathan's could charge SMG no more than its "actual cost" of obtaining Nathan's Seasoning from Morrell "before deducting royalties" payable to Nathan's by Morrell. From 1994 to 1997, SMG purchased Nathan's Seasonings directly from Morrell.

¶ 12 Additional terms of the SMG License Agreement provided that "the rights and duties set forth in th[e] Agreement are personal to SMG, and that [Nathan's] has entered into this Agreement in reliance on the business skill, financial capacity, and personal character of the owners of SMG." Under section 4.2(b) of the License Agreement, Nathan's could terminate the Agreement on the occurrence of several events taking place without its prior consent. Those events included the sale, transfer or disposition of substantially all of SMG's business and assets to any third party or the acquisition of 40% or more of its then outstanding voting stock by any third party. Section 4.2(b)(iii) of the License Agreement required SMG to provide any notice required under that section "promptly upon the occurrence" of any such "sale, transfer or other disposition." Under section 3 of the License Agreement, Nathan's was entitled to terminate the License Agreement in the event that SMG failed to perform any of its obligations under the Agreement.

¶ 13 Shea left SMG in 1997, and was replaced by Joe McCloskey, another former Morrell employee. Chemical, which by then had changed its name to Chase Venture Partners, remained the principal owner of SMG after Shea's departure. In 2000, Glencoe Capital, LLC, a private

¹ Unless otherwise terminated, the License Agreement expires on March 1, 2014.

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equity firm, contacted McCloskey to explore a possible sale of SMG to Glencoe. Pursuant to section 4.2(b) of the License Agreement, McCloskey wrote to Nathan's on June 2, 2000, seeking consent to such sale. After meeting with Glencoe and SMG on July 17, 2000, Nathan's consented to the sale and SMG proceeded with the transaction shortly thereafter. SMG also paid Nathan's \$500,000 as consideration for its consent to the Glencoe transaction.

¶ 14 Glencoe held its interest in SMG through its majority ownership of Specialty Foods Group, Inc., which in turn owned SMG Holdings, Inc., and indirectly, SMG. Glencoe indirectly owned 90% of SMG, with management owning the remaining 10%. Glencoe appointed members of SMG's board of directors, and appointed its representatives as the Chairman and CEO of SMG. Glencoe also participated in the long-term strategies of SMG.

¶ 15 In 2003, the owners of SMG took a portion of the company public through a series of transactions in which they created a Canadian income trust called the Specialty Food Group Income Fund, assigned an interest in SFG to the Fund, and issued units in the Fund to the public. Although Glencoe indicated to Nathan's that it would still retain control after the offering and that the offering would not impact SMG and Nathan's relationship, after the offering, Glencoe's indirect ownership of SMG fell to 44%.

¶ 16 Almost immediately after the offering, SFG's financial performance began to decline. In May 2006, the Fund issued approximately \$58 million in convertible secured debentures to a number of investors. The convertible feature of these securities allowed the new investors, upon demand at any time, to obtain the number of units the Fund, or of the shares of SMG Parent, Inc. (the newly formed parent company of SFG), that would provide them with 92% ownership of

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either entity. Additionally, the debentures provided the new investors with the right to appoint four of the six directors of SMG and SFG.

¶ 17 Glencoe made no additional investment as part of the 2006 restructuring, and lost all of its ownership rights, including the right to vote on corporate matters and the right to appoint any members to SFG's Board of Directors. Glencoe also lost any role in the strategic direction of the business.

¶ 18 Disclosures issued by the Fund in connection with the restructuring listed the new investors as the principal holders of the units of the Fund, but did not list Glencoe. The disclosures stated that the restructuring had reduced the interests of SFG's prior investors, including Glencoe, from approximately 43.8% to approximately 3.5%. By December 2007, Glencoe valued its interest in SFG at approximately \$15,000.

¶ 19 The units currently are not tradeable because they are under a cease-trading order. There has not been a unit holder vote to appoint directors since 2006 and SFG is currently retaining all monies generated by the company to repay the debenture holders.

¶ 20 Prior to the restructuring, Norbitz called SMG's CEO, Tom Davis, to get an update on SMG's financial condition on May 3, 2006. Davis indicated that SFG was planning to restructure its debt and equity in order to create an insurgence of approximately \$30 million in new equity into the company. Still seeking additional information about the proposed restructuring, Norbitz and Nathan's CFO met with Davis on June 11, 2006, at which time they were told that the restructuring was a "done deal" and that the new investors would control four of the seven board seats. Norbitz then requested a detailed description of the ownership and control structure of

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SMG and SFG, which Davis agreed to provide. When the requested information had not been received as of June 21, 2006, Norbitz sent a written request, specifically seeking clarification on whether the restructuring had or would result in a change in the ownership or control of the company. Davis responded on June 28, 2006, that the existence of SMG Holdings was a defense to any potential breach of section 4.2 of the License Agreement, stating that at all times since June 1, 2000, SMG, Inc. has and continues to be 100% owned by SMG Holdings, Inc. Further inquiries by Nathan's were not answered by SMG or SFG. Subsequently, at a December 19, 2006, meeting with two representatives of the debenture holders and Davis, Nathan's learned that Davis was leaving the company and that the convertible debentures were equity investments and not debt.

¶ 21 By April 2007, Nathan's concluded that Glencoe had transferred or otherwise disposed of its majority ownership interest in SMG, but that SMG had failed to provide the required notice. As such, on April 11, 2007, Nathan's sent a notice of default to SMG and gave it 30 days to cure the breaches outlined in the letter. After SMG failed to cure the defaults specified in the notice, on July 31, 2007, Nathan's sent a notice to SMG terminating the License Agreement effective July 31, 2008.

¶ 22 Procedural History

¶ 23 SMG filed a declaratory judgment action in the circuit court of Cook County, seeking a declaration that Nathan's could not lawfully terminate the License Agreement on the grounds stated in the April 2007 notice of default. Conversely, Nathan's sought a declaration that it had lawfully terminated the License Agreement as a result of SMG's breach of section 4.2(b) of the

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License Agreement.

¶ 24 After discovery, both parties filed cross motions for summary judgment. Nathan's argued that SMG breached section 4.2(b) by failing to notify Nathan's of either: 1) a transfer or other disposition of SMG's business and assets to a third party, or 2) the acquisition of 40% or more of SMG's voting stock by a third party. Conversely, SMG argued that: 1) no sale, transfer or disposition of the business and assets of SMG had occurred because SMG Holdings continued to own SMG, and 2) no sale of 40% or more of SMG's voting stock had taken place because the debenture holders held no equity in the company. The trial court denied both parties' motions for summary judgment on February 25, 2010.

¶ 25 Meanwhile, SMG amended its pleadings to include a claim for breach of the License Agreement based on an allegation that Nathan's had overcharged it for Nathan's Seasonings by improperly retaining "discount" or "rebate" payments that Nathan's received from Morrell. Subsequently, on September 17, 2010, SMG moved for summary judgment on its spice claim, arguing that since the date of the 1997 letter agreement, Nathan's had improperly treated the per-pound payment from Morrell as a "royalty." SMG argued that because the terms "discount" and "rebate" were used in the 1997 letter agreement and its subsequent amendments, the per-pound payment to Nathan's was not a royalty, and that the License Agreement therefore required Nathan's to include the payment as a component of its "actual cost" to obtain Nathan's Seasoning. SMG further argued that Nathan's failure to do so caused SMG to be overcharged by millions of dollars. SMG argued Nathan's overcharged for the spices it purchased from Nathan's under the agreement. The trial court granted SMG summary judgment on its claim that it was overcharged

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by Nathan's on October 6, 2010, finding that Nathan's violated the License Agreement as a matter of law under the plain language of the contract, and awarded damages to SMG in the amount of \$4,909,701.00 based on this finding.

¶ 26 The remaining issue proceeded to a bench trial, after which the trial court ruled that Nathan's was not entitled to terminate the License Agreement on the grounds that SMG violated section 4.2. The court also found that the restructuring and the issuance of the debentures had not triggered the notice and consent requirements of section 4.2, finding that the debenture holders had not exercised their rights to convert the debentures into units or shares. This timely appeal followed.

¶ 27 ANALYSIS

¶ 28 On appeal, Nathan's contends that: 1) the trial court improperly granted summary judgment to SMG on the "spice claim" - SMG's allegation that Nathan's overcharged it for the seasoning mix by improperly retaining "discount" or "rebate" payments that Nathan's received from Morrell; and 2) the trial court improperly found that SMG's issuance of debentures did not trigger the notice requirement or breach the change of control provision of the parties' license agreement and that Nathan's was therefore not entitled to terminate the license agreement.

¶ 29 Choice of Law Provision

¶ 30 Before turning to the merits of the instant case, we must address a threshold matter. We note that the license agreement specifies that the interpretation of the agreement shall be construed under the laws of the state of New York. SMG relies upon both New York and Illinois law to support its contentions, while Nathan's relies primarily upon New York law.

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¶ 31 An express choice of law provision contained in a contract will be given effect subject to certain limitations. *Potomac Leasing Co. v. Chuck's Pub, Inc.*, 156 Ill. App. 3d 755, 757-58 (1987). The primary limitation involves considerations of public policy. *Potomac Leasing Co.*, 156 Ill. App. 3d at 758. A second recognized limitation to an express choice of law provision is the requirement that there be some relationship between the chosen forum and the parties or the transaction. *Potomac Leasing Co.*, 156 Ill. App. 3d at 759.

¶ 32 Here, there is no argument that the Illinois constitution or statutes state a public policy against applying New York contract law or that Illinois has a materially greater interest in the litigation than New York. SMG is a Kentucky company, with a place of business in Illinois. Nathan's is a New York corporation with its principal place of business in New York, thus New York has a substantial relationship to the parties. Accordingly, we will apply New York law to the interpretation of the parties' contract.

¶ 33 New York Law - Breach of Contract

¶ 34 Because both claims involve breach of contract allegations, we find it instructive to set forth New York law concerning breach of contract claims.

¶ 35 To state a claim for breach of contract under New York law, a plaintiff must allege the existence of a valid, enforceable agreement; performance of the contract by one party; breach of the contract by the other party; and damages. *Bridgeport Music, Inc. v. Universal Music Group, Inc.*, 440 F. Supp. 2d 342, 344-45 (2006). To plead these elements, a plaintiff must identify what provisions of the contract were breached as a result of the acts at issue. *Wolff v. Rare Medium, Inc.*, 171 F. Supp. 2d 354, 358 (2001). Conclusory statements that an agreement was breached

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does not sustain a claim for breach of contract. *Berman v. Sugo, L.L.C.*, 580 F. Supp. 2d 191, 202 (S.D.N.Y.2008). In determining a party's obligations under a contract, the initial interpretation of a contract is a matter of law for the court to decide. *K. Bell & Associates, Inc. v. Lloyd's Underwriters*, 97 F. 3d 632, 637 (1996).

¶ 36 Summary Judgment - The "Spice Claim"

¶ 37 Nathan's first contends that the trial court improperly granted summary judgment in favor of SMG on the "spice claim" - SMG's allegation that Nathan's overcharged it for the seasoning mix by improperly retaining "discount" or "rebate" payments that Nathan's received from Morrell. Nathan's contends that the trial court erred in concluding that the payment provided for in the 1997 letter agreement between Nathan's and Morell was not a royalty, despite evidence showing that this payment was in substance a royalty and both parties to that agreement viewed and treated it as such.

¶ 38 We review the grant of summary judgment *de novo*. *Millennium Park Joint Venture, LCC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). In general, in a nonjury case, "[n]o special findings of fact, certificate of evidence, propositions of law, motion for a finding, or demurrer to the evidence is necessary to support the judgment or as a basis for review." Ill. S. Ct. R. 366(b)(3)(i) (eff. Feb. 1, 1994). Where the parties have filed cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Millennium Park Joint Venture, LCC*, 241 Ill. 2d at 309.

¶ 39 Summary judgment is proper if the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the

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movant is entitled to judgment as a matter of law. *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). In reviewing the grant of summary judgment, the court "must determine whether the record reveals disputed issues of material fact or errors in entering judgment as a matter of law. *Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 115 (1993). Our determination does not depend on the circuit court's reasoning; we may rely on any grounds called for by the record. *Makowski*, 249 Ill. App. 3d at 115.

¶ 40 In this case, SMG alleged in counts III, IV and V that the license agreement was a valid and enforceable contract between the parties, that SMG performed its obligations under the contract, and that Nathan's materially breached several sections of the license agreement; namely: section 2.10(a) by charging SMG a mark-up for Nathan's Seasonings and section 2.10(b) by failing to provide SMG access to pertinent records for purposes of verifying the price of Nathan's Seasonings.

¶ 41 Section 2.10 of the license agreement provides, in pertinent part:

"2.10 Nathan's Seasoning. SMG shall purchase the Nathan's Seasoning only from NFSI or from a manufacturer operating under the grant of a then-current license from NFSI to produce and sell the Nathan's Seasoning (a "Spice Manufacturer"). NFSI or, if a Spice Manufacturer has been designated, the Spice Manufacturer, shall furnish, sell and deliver or cause to be furnished, sold and delivered to SMG, as and when requested by SMG, such quantities of approved seasoning as SMG shall require

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for the manufacture or production of Nathan's Products in accordance with this Agreement. Prices payable by SMG to NFSI shall not exceed:

(a) the lower of: (x) NFSI's actual cost therefor before deducting royalties payable to NFSI by the Spice Manufacturer; and (y) the price paid by NFSI to its Spice Manufacturer under the terms of the license agreement between NFSI and the Spice Manufacturer ; provided, however, that prices payable by SMG for such seasoning shall not at any time exceed the lowest price then being charged therefor to any other producer or supplier of Nathan's Products.

(b) SMG shall, at any reasonable time upon prior appointment, have access to NFSI's pertinent records for the purpose of verifying the prices of the Nathan's Seasoning as provided for herein."

¶ 42 The original spice agreement between Nathan's and Morrell, dated March 17, 1986, provided for royalty payments as follows, in pertinent part:

"2.6 Royalties. In consideration of the rights and licenses herein granted by Nathan's to Morrell, during the term of this Agreement, Morrell shall pay to Nathan's a royalty equal to 10% of Net Sales (as hereinafter defined) by Morrell of Nathan's

Seasoning.

(a) "Net Sales" shall mean Morrell's net selling price to customers as herein provided of Nathan's Seasoning, said net selling price as used herein to mean P.O.B. Plant of manufacture; provided, however, that for purposes of computing the royalty, any use by Morrell or Nathan of Nathan's Seasoning manufactured by Morrell shall be deemed sold at a fair market price which (i) is based on the price charged for similar seasoning by other spice manufacturers, and (ii) is not less than the price charged to Nathan's authorized manufacturers. * * *"

¶ 43 The March 10, 1997, letter at issue was purportedly an amendment to the original spice agreement and set forth a new pricing structure for Nathan's to pay Morrell for the manufacture of the seasonings and included a discount to Nathan's. Additionally, the 1997 letter specifically provided that no royalties would be due to Nathan's going forward. There were subsequent amendments to the spice agreement in 2002, 2005 and 2008 changing the discount amount but keeping the "no royalty" language intact.

¶ 44 Under New York law, a contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners LP v. Presstek, Inc.*, 12 N. Y. 3d 640, 645 (2009). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *MHR Capital Partners*, 12 N. Y. 3d at 645.

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¶ 45 "[A] motion for summary judgment may be granted in a contract dispute only when the contractual language on which the moving party's case rests is found to be wholly unambiguous and to convey a definite meaning." *Travelers Casualty and Surety Co. v. Dormitory Authority - State of New York*, 735 F. Supp. 2d 42, 56 (2010), (quoting *Topps Co., Inc. v. Cadbury Stani S.A.I.C.*, 526 F. 3d 63, 68 (2008)). The initial question for the court on a motion for summary judgment with respect to a contract claim is whether the contract is unambiguous with respect to the question disputed by the parties. *Travelers*, 735 F. Supp. 2d at 56. The key question of whether the contract language is ambiguous is a question of law to be decided by the court. *Sarinsky's Garage Inc. v. Erie Insurance Co.*, 691 F. Supp. 2d 483, 486 (2010).

¶ 46 A contract is ambiguous if the terms could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business. *Morgan Stanley Group Inc. v. New England Insurance Co.*, 225 F. 3d 270, 275 (2000). Under New York law, a contract is not ambiguous simply because the parties encourage different interpretations. *Barton Group, Inc. v. NCR Corp.*, 758 F. Supp. 2d 205, 208 (2010). When a contract is unambiguous, the court must give effect to the intent of the parties as revealed by the language they chose to use. *Barton Group, Inc.*, 758 F. Supp. 2d at 208. In considering a particular provision, however, the court should examine the entire structure of the agreement and attempt to reconcile its various provisions. *Barton Group, Inc.*, 758 F. Supp. 2d at 208.

¶ 47 In this case, the relevant section of the License Agreement between SMG and

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Nathan's (section 2.10) clearly states that the price SMG was required to pay Nathan's for the seasoning was based on the actual price that Nathan's paid before deducting any royalties. In addition, section 2.10 indicated that SMG would have access to Nathan's pertinent records in order to verify the prices for Nathan's Seasonings. The original 1986 spice agreement between Morrell and Nathan's likewise clearly stated a royalty of 10% to be paid to Nathan's, whereas the 1997 letter agreement did not. In fact, the 1997 letter agreement clearly stated no royalties would be paid by Morrell going forward. Nor did the subsequent amendments post-1997 alter the language which eliminated royalty payments by Morrell. We conclude that the 1997 letter agreement clearly amended the original spice agreement and eliminated royalty payments to Morrell and subsequently lowered the amount that SMG owed to Nathan's for the seasoning.

¶ 48 Nathan's urges this court to consider testimony and other extrinsic evidence that both Morrell and Nathan's treated the discount or rebate referenced in the 1997 and subsequent letter agreements as royalties despite the specific language contained in the writings to the contrary. Nathan's also argues that SMG has no standing to question any of the terms contained in its spice agreement with Morrell as SMG was not a party to the spice agreement. We disagree.

¶ 49 It is well settled that if a written agreement contains no obvious or latent ambiguities, neither the parties nor their privies may testify to what the parties meant but failed to state. *Oxford Commercial Corp. v. Landau*, 12 N.Y. 2d 362, 365 (1963). Additionally, it is clear in the case of a fully integrated agreement, where parol evidence is offered to vary its terms, the rule operates to protect all whose rights depend upon the instrument even though they were not parties to it. *Oxford Commercial Corp.*, 12 N.Y. 2d at 365-66.

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¶ 50 Here, the License Agreement clearly stated that the price that SMG was to pay Nathan's for seasonings was directly related to the price Nathan's paid the manufacturer for the seasonings. Thus it is clear that SMG was an intended beneficiary of the spice agreement between Nathan's and Morrell. Moreover, we find that the 1997 letter agreement was not ambiguous in that it clearly made a distinction between a discount in section 3 and a royalty in section 4. Subsequent amendments to the letter agreement retained the same language. Despite Nathan's argument that the parties subsequent performance modified the written language and that they treated the amount as a royalty, the contract language was never changed to reflect the alleged change. The record reflects that Nathan's and Morrell had a business relationship since at least 1986 evidenced by an elaborate licensing agreement drafted and reviewed by their respective attorneys. Several modifications were made to that original agreement over the years; including three after the 1997 amendment. If the parties intended for there to be no distinction between discounts and royalties, they certainly had ample time to amend the agreement to so reflect. We conclude that extrinsic evidence was properly excluded in consideration of the spice claim and that the written language of the contract prevails. The trial court therefore properly granted SMG's summary judgment motion on the spice claim.

¶ 51 Declaratory Judgment Action - Breach of the License Agreement

¶ 52 Nathan's also contends that the trial court improperly found that SMG's issuance of debentures did not trigger the notice requirement or breach the change of control provision of the parties' license agreement and that Nathan's was therefore not entitled to terminate the license agreement. Nathan's argues that SMG's issuance of debentures that gave control of it to third

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parties constituted a sale, transfer or other disposition of substantially all of its business assets to a third party, or an acquisition of 40% or more of SMG's then outstanding voting stock by a third party under section 4.2 of the 1994 license agreement between SMG and Nathan's.

¶ 53 Following a bench trial, the applicable standard of review is whether the trial court's judgment is against the manifest weight of the evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177 (2004). A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary or not based on evidence. *Dargis*, 354 Ill. App. 3d at 177.

¶ 54 Section 4.2 of the license agreement provides as follows:

"4.2 Assignment.

(a) NFSI shall have the right to transfer or assign all or any part of its rights or obligations hereunder to any Person; provided that without SMG's prior written consent, NFSI shall not transfer or assign any of its rights or obligations hereunder to a direct competitor of SMG.

(b) SMG understands and acknowledges that the rights and duties set forth in this Agreement are personal to SMG, and that NFSI has entered into this Agreement in reliance on the business skill, financial capacity, and personal character of the

owners of SMG. Accordingly, NFSI shall have the right to terminate this Agreement, if not later than sixty (60) days after SMG gives NFSI notice of any merger or consolidation of SMG with or into one or more corporations (unless SMG is the surviving corporation) or of the sale, transfer or other disposition, including any transfer by operation of law, of substantially all of SMG's business and assets to, or acquisition of 40% or more of its then outstanding voting stock by, any third party without NFSI's prior written consent, which consent shall not be unreasonably withheld or delayed, NFSI gives SMG written notice that it elects to terminate this Agreement effective twelve (12) months after the effective date of such transaction; provided, however, that (i) SMG shall be permitted to grant a security interest to its lenders in its rights to this Agreement; provided, that in the event the lenders succeed SMG hereunder, the lenders will be required to comply with the terms and provisions hereof, (ii) SMG shall have the right to sell, merge, transfer or otherwise dispose of all or any part of its stock or assets without the prior consent of NFSI if the other Person (or Persons) to whom or with whom SMG is selling, merging, transferring or otherwise disposing meets the following requirements:

- (1) neither such Person, nor any of its directors, officers or key executives, has been convicted of a crime;
 - (2) such Person has total sales of at least substantially equal to SMG at the time of such sale, merger, transfer or other distribution and has a sound record of profitability, liquidity and payments to trade creditors;
 - (3) such Person has management reasonably qualified to operate the business contemplated hereunder; and
 - (4) such Person is not then-currently in violation of any law administered by the U.S. Department of Agriculture, Food and Drug Administration or the Federal Trade Commission, is not then-currently in violation of any regulation, rule or order issued by any such agency, is not then-currently subject to investigation by any such agency, and is not then-currently subject to an order for remedial or injunctive relief by or on behalf of any such agency.
- (iii) if any such sale, merger, transfer or other disposition results in a Change of Control, the Minimum Royalties shall be adjusted pursuant to Section 2.7(b). SMG shall provide written notice to NFSI of any sale, transfer or other disposition referred in to [sic.] this Section 4.2(b), promptly upon the occurrence thereof.”

¶ 55 A debenture represents long-term, unsecured debt of the issuing corporation that is

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convertible into stock under certain specific conditions. *Simons v. Cogan*, 549 A. 2d 300, 303 (1988). A debenture is a credit instrument which does not give its holder an equity interest in the issuing corporation. *Simons*, 549 A. 2d at 303. Under New York law, the traditional view is that the holder of convertible debentures is a mere creditor until conversion. See *e.g.*, *Brooks v. Weiser*, 57 F.R.D. 491, 494 (S.D.N.Y., 1972); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1417 (C.A.3 (Pa.), 1993); *Alexandra Global Master Fund, Ltd. v. Ikon Office Solutions, Inc.*, 2007 WL 2077153 (S.D.N.Y., 2007).

¶ 56 In the instant case, it is undisputed that SMG issued convertible debentures in an effort to increase capital. The record does not reflect that any of the debentures were ever converted into stock, although there was testimony that the issuing agreement granted the debenture holders certain rights, such as selecting some board members. The trial court concluded that the status of the debenture holders was that of creditors with no equity interest in SMG. Accordingly, no triggering event under section 4.2 of the Licensing Agreement occurred and Nathan's was not entitled to terminate the Licensing Agreement. We cannot say the trial court's decision was against the manifest weight of the evidence. We therefore affirm the trial court's judgment.

¶ 57 CONCLUSION

¶ 58 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 59 Affirmed.