

No. 1-13-2417

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

GHOSE, INC., JULMOR, INC, and HASHIM SYED,)	
)	
)	Appeal from the
Plaintiffs-Appellants,)	Circuit Court of
)	Cook County
)	
v.)	No. 12 CH 04114
)	
7-ELEVEN, INC.,)	Honorable
)	Franklin U. Valderrama,
Defendant-Appellee.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's dismissal of plaintiffs' class action complaint affirmed where plaintiffs' claim of breach of franchise agreement was based on an interpretation contrary to the plain language of the agreement.

¶ 2 Plaintiffs-appellants, Ghose, Inc., Julmor, Inc., and Hashim Syed (collectively, plaintiffs), on behalf of themselves and others similarly situated, commenced this class action against defendant-appellee, 7-Eleven, Inc., claiming that 7-Eleven breached the terms of their franchise

agreements by improperly including in the calculation of amounts owed to 7-Eleven ("the 7-Eleven Charge") the amount of a discount afforded to retailers under the Illinois Retailers Occupation Tax Act. 35 ILCS 120/1, *et seq.* (West 2012) The trial court granted 7-Eleven's motion to dismiss the complaint finding that the language of the franchise agreements authorized 7-Eleven to include the amount of the discount for purposes of calculating the 7-Eleven Charge. We agree and affirm.

¶ 3

BACKGROUND

¶ 4

The Act imposes a tax on entities engaged in the occupation of selling goods or services at retail. 35 ILCS 120/3 (West 2012). The tax is based on receipts from sales of tangible property or from services rendered by retailers. *Id.* Retailers are required to file returns with the Department of Revenue on a monthly basis. *Id.* Section 3 of the Act further provides for a discount from the tax owed:

"[T]he retailer filing the return under this Section shall, at the time of filing such return, pay to the Department the amount of tax imposed by this Act *less a discount* of 2.1% prior to January 1, 1990 and 1.75% on and after January 1, 1990, or \$5 per calendar year, whichever is greater, which is allowed to reimburse the retailer for the expenses incurred in keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request." *Id.* 120/3 (West 2012) (emphasis added).

¶ 5

Under 7-Eleven franchise agreements, a franchisee leases the store and equipment from 7-Eleven and is licensed to use the 7-Eleven® Service Mark and related trademarks. Although franchisees are responsible for purchasing store inventory, such purchases are generally financed

by 7-Eleven. Amounts advanced by 7-Eleven for the purchase of inventory are reflected in what the franchise agreements refer to as an "Open Account," which, at any given time, reflects the balance of any unpaid sums that 7-Eleven has advanced to the franchisee to run the store.

¶ 6 The agreements require franchisees to report all store activity to 7-Eleven on a daily basis. The franchisee must submit a daily report detailing the store's sales and receipts and make daily deposits of receipts into a bank account designated by 7-Eleven. "Receipts" are defined under the agreement as:

"[A]ll sale proceeds (whether cash, check, credit instrument, or other evidence of receipt), commission revenues on items for which [the franchisee] earn[s] a commission (e.g., lottery tickets and money order blanks), *discounts* or allowances [the franchisee] receive[s], miscellaneous income (including rentals, royalties, fees, commissions and amounts [the franchisee] receive[s] from on-site currency operated machines), and the value of premiums received from [the] operation of the Store."

Amounts deposited by the franchisee are credited against the outstanding balance on the franchisee's Open Account.

¶ 7 Under the agreements, franchisees are entitled to retain net income derived from the store's operations. Franchisees are also able to take weekly or monthly draws against net income. Net income is what remains after calculation of the 7-Eleven Charge--an amount equal to 50% of the gross profit of a 24-hour franchise. Each month, based on the daily reports submitted by franchisees, 7-Eleven prepares financial statements for each store. The monthly financial statements reflect the 7-Eleven Charge as calculated by 7-Eleven.

¶ 8 Several defined terms under the franchise agreements are relevant here. "Gross Profit" is defined as "Net Sales less Cost of Goods Sold." Both "Net Sales" and "Cost of Goods Sold" are also defined under the franchise agreements. Net Sales "means the total value charged to customers and received by the Store for the sale of Inventory and all other products and services sold except (a) sales tax and (b) the value of those products and services for which you earn a commission or fee ***." The agreements define Cost of Goods Sold, in relevant part, as follows:

"*** the Cost Value of Inventory at the beginning of the Accounting Period plus the cost of Purchases during the Accounting Period *** minus the Cost Value of the Inventory at the end of the Accounting Period."

With respect to calculating the Cost of Goods Sold, the franchise agreements provide that 7-Eleven "will credit *discounts* and allowances, not allocated or reasonably traceable to individual Store purchases, to Cost of Goods Sold on the basis of Store sales or Purchases compared with sales or purchases of all affected stores. We will credit *discounts*, allowances and the value of premiums you receive to Cost of Goods Sold" (emphasis added). Thus, according to the terms of the agreements, discounts received by 7-Eleven franchisees are added back in to the Cost of Goods Sold so that in calculating the 7-Eleven Charge, the franchisee and 7-Eleven share the discount. If discounts were not added back to the Cost of Goods Sold, the effect would be to both reduce Gross Profit and allow the franchisee to retain 100% of the benefit of the discount.

¶ 9 The franchise agreements allocate the responsibility for paying taxes associated with the franchise as follows:

"We [7-Eleven] agree to pay all real and personal property taxes related to the Store and 7-Eleven Equipment You [franchisee] agree to be solely

responsible for, and must pay, all other taxes, including, sales, inventory, payroll, occupancy, business and income taxes, and personal property taxes related to the Store and any equipment at the Store other than the 7-Eleven Equipment...."

¶ 9 Under the franchise agreements, 7-Eleven agrees to assist franchisees in preparing and filing tax returns and, in turn, franchisees authorize 7-Eleven to "collect discounts and allowances that were not already deducted from invoices."

¶ 10 Plaintiffs commenced this action on February 6, 2012, challenging 7-Eleven's method of calculating the 7-Eleven Charge under their franchise agreements. The complaint refers to the discount under the Act as the "retailer rebate" and alleges that 7-Eleven's practice of "remitting" only 50% of the "rebate" to franchisees violates the franchise agreements.

¶ 11 7-Eleven moved to dismiss the complaint under section 2-615 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-615 (West 2012). On January 3, 2013, the circuit court issued its Memorandum Opinion and Order granting 7-Eleven's motion. The court reasoned that based on the commonly understood meaning of the word, "discount," the deduction from the retailers occupation tax allowed under the Act was, as the Act refers to it, a "discount" and not a "rebate," as plaintiffs attempted to characterize it in their complaint. Because the franchise agreements specifically provide that 7-Eleven will credit "discounts" to the Cost of Goods Sold, the court found that "[a]pplying the discount to 'Cost of Goods Sold' ultimately yields a 50% split of Gross Profits between the franchisees and 7-Eleven." The court further found its conclusion reinforced by the inclusion of "discounts" in the definition of "receipts" under the franchise agreements. Adopting plaintiffs' construction of the franchise agreement would, in the trial court's view, read the word "discounts" out of this definition.

¶ 12 Plaintiffs filed a motion for reconsideration, which the trial court denied. Plaintiffs timely appealed.

¶ 13 ANALYSIS

¶ 14 A motion to dismiss pursuant to section 2-615 challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). In addressing a 2-615 motion, a court must consider whether the allegations of the complaint, viewed in the light most favorable to the plaintiff, state a claim upon which relief can be granted. *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). Where an exhibit attached to a complaint is the document upon which a plaintiff's claim is founded, the provisions of the exhibit will control if they are contrary to the complaint's allegations. *Kahn v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 580 (2011).

¶ 15 Our review of the trial court's order granting 7-Eleven's motion to dismiss is *de novo*. *Marshall*, 222 Ill. 2d at 429. In particular, we review *de novo* the trial court's interpretation of the franchise agreement. *Hot Light Brands, LLC v. Harris Realty, Inc.*, 392 Ill. App. 3d 493, 498 (2009).

¶ 16 The primary goal of contract interpretation is to give effect to the intent of the parties. *McCarthy Trust v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 535 (2011) (citing *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007)); *Sklodowski v. Countrywide Home Loans*, 358 Ill. App. 3d 696, 700 (2005). A written agreement must be construed as a whole, taking into account the purpose of the contract and the context in which the language is used. *K's Merchandise Mart, Inc. v. Northgate Ltd. Partnership*, 359 Ill. App. 3d 1137, 1142 (2005). "If the words in the contract are clear and unambiguous, they must be given

their plain, ordinary and popular meaning." *Thompson v. Gordon*, 214 Ill. 2d 428, 441 (2011).

"Where the language of a contract is unambiguous, the express provisions govern and there is no need for construction or inquiry as to the intention of the parties." *Wright v. Chicago Title Ins. Co.*, 196 Ill. App. 3d 920, 924 (1990).

¶ 17 Here, based on the clear and unambiguous use of the word "discount" both in the franchise agreement and in the Act, as well as the overall purpose of the agreement to split the gross profit of a franchise between the franchisee and 7-Eleven, the trial court correctly concluded that the discount provided for under the Act was properly included in the calculation of the 7-Eleven Charge. As the trial court recognized, any other result would allow franchisees to retain the benefit of this discount and exclude it from Gross Profits, thus depriving 7-Eleven of its bargained-for split of Gross Profits with its franchisees.

¶ 18 Plaintiffs' characterization of the discount provided for under the Act as a "rebate" cannot withstand analysis. Indeed, plaintiffs' effort to recast the discount as a rebate or a reimbursement is a transparent effort to avoid the plain language of their franchise agreements. The Act contemplates that retailers will automatically apply the statutory discount to the amount of the retailers occupation tax *before* remitting the tax to the Illinois Department of Revenue. 35 ILCS 120/3 (West 2012) ("[T]he retailer *** shall *** pay to the Department the amount of tax imposed by this Act less a discount ***.") The notion of a rebate implies that the retailer remits the full amount of the tax and later receives a rebate or refund of a portion. The Act unambiguously provides for a discount, not a rebate.

¶ 19 The fact that the franchise agreements impose on franchisees the obligation to pay taxes other than real estate and personal property taxes payable by 7-Eleven is irrelevant to the

determination of whether the discount provided for under the Act must be added back into Gross Profits for purposes of calculating the 7-Eleven Charge. The discount afforded retailers under the Act falls under the franchise agreement's provision for discounts "not allocated or reasonably traceable to individual Store purchases," which 7-Eleven is entitled to add back into the Cost of Goods Sold. The fact that franchisees are responsible for paying the tax (less the discount) does not mean that 7-Eleven is not entitled to share in the discount from the tax.

¶ 20 Plaintiffs read into the franchise agreements a requirement that any discount relate to the "actual" Cost of Goods Sold and argue that because the discount from the retailers occupation tax does not decrease the cost of inventory purchased by a franchisee, it is not within the category of discounts in which 7-Eleven is entitled to share. But under the franchise agreement's plain terms, it is unnecessary for a discount to be traceable to discrete purchases of inventory. *Any* discount received by a franchisee, whether traceable to particular purchases or not, increases its gross profit. Thus, those discounts must be shared with 7-Eleven. Furthermore, given that (i) the discounts that will be added back to the Cost of Goods Sold are not limited in any way and (ii) the agreements authorize 7-Eleven to collect discounts not otherwise deducted from invoices, it was unnecessary for 7-Eleven to specifically reference in its franchise agreements the particular discount provided for under the Act. Once 7-Eleven "collects" the discount (by deducting it from the retailers occupation tax), the other provisions of the franchise agreement quoted above authorize 7-Eleven to share in that discount for purposes of calculating the 7-Eleven Charge.

¶ 21 Plaintiffs further contend that in providing for a discount from the retailers occupation tax, the legislature intended to benefit "retailers" like the franchisees and not entities like 7-Eleven. Even if the legislative intent was relevant here, it is beside the point. Whether the

discount from the tax must be credited to the Cost of Goods Sold is a matter governed by the plain and unambiguous language of the franchise agreement, not the provisions of the Act.

Further, as 7-Eleven points out, it provides services to franchisees in connection with tax payments and if, as plaintiffs argue, the discount was intended to offset the costs of complying with the Act, then it is entirely consistent for 7-Eleven to share in that discount.

¶ 22 Plaintiffs vaguely refer to the franchise agreements as "contracts of adhesion" whose terms were drafted by 7-Eleven, thus suggesting that they should be construed against the drafter. But this rule, known as *contra proferentem*, is relevant only if ordinary principles of contract interpretation are insufficient to ascertain the intent of contracting parties. *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 165-66 (2002). The rule "is not an interpretive one at all. Instead of seeking to divine the intent of the parties, the rule merely assigns the risk of an unresolvable ambiguity to the party responsible for creating it." *Id.* at 166. But where, as here, the plain and unambiguous meaning of the contract can be determined from the language used by the parties, the rule has no application.

¶ 23 We reject plaintiffs' contention that the term "discounts" is ambiguous. The fact that the term is unmodified and undefined does not render it ambiguous. Nor does the fact that plaintiffs interpret the term differently than 7-Eleven give rise to an ambiguity. *McCarthy Trust*, 408 Ill. App. 3d at 535; *Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App. 3d 882, 888 (1995). Rather, as commonly understood, the discount provided to retailers under the Act is clearly within the purview of discounts in which 7-Eleven is entitled to share under the franchise agreements.

¶ 24 In their reply brief, plaintiffs advance the argument that because the 7-Eleven Charge is calculated on a daily basis and the discount under the Act is calculated monthly, the statutory

discount cannot factor into the 7-Eleven Charge. Our examination of the record reveals that plaintiffs did not advance this argument in the trial court. It is, therefore, waived. *Cambridge Engineering v. Mercury Partners*, 378 Ill. App. 3d 437, 453 (2007). Further, plaintiffs' conduct in waiting until their reply brief to raise this argument runs afoul of Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); *Vancura v. Katris*, 238 Ill. 2d 352, 369-73 (2010). We will not, therefore, consider this argument as a basis for challenging the trial court's dismissal of plaintiffs' complaint.

¶ 25 Finally, plaintiffs argue that the trial court should not have dismissed their complaint with prejudice, but should have afforded them the opportunity to file an amended pleading. But given our interpretation of the unambiguous terms of the franchise agreements, it is evident that no amendment could give rise to a claim that 7-Eleven breached the agreements by including the discount to the retailers occupation tax in the calculation of the 7-Eleven Charge. See *Wright v. Chicago Title Insurance Co.*, 196 Ill. App. 3d 920, 924 (1990) (breach of contract claim properly dismissed where plaintiff's allegations inconsistent with terms of contract). Thus, the trial court properly granted dismissal of plaintiffs' complaint with prejudice.

¶ 26 CONCLUSION

¶ 27 The trial court correctly concluded that 7-Eleven was entitled to share in the discount from the retailers occupation tax provided for under the Act. Therefore, we affirm the dismissal of plaintiffs' complaint.

¶ 28 Affirmed.