

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
* CASE NUMBER 01-44007
PHAR-MOR, INC., *et al.*, *
* CHAPTER 11
*
Debtors. * HONORABLE KAY WOODS
*

M E M O R A N D U M O P I N I O N

On August 18, 2005, this Court entered a Memorandum Opinion (the "August 18 Order") (Docket No. 2594) sustaining, in part, the objection of Debtor Phar-Mor, Inc. ("Debtor" or "Phar-Mor") to Claim No. 0000162 filed by Yaffe & Company ("Yaffe"). Subsequently, Yaffe filed Yaffe & Company's Combined Motion and Memorandum in Support Thereof Pursuant to Bankruptcy Rule 9023 and Rule 59(e) of the Federal Rules of Civil Procedure for Amendment of the August 18, 2005 Order Sustaining in Part Phar-Mor, Inc.'s Objection to Yaffe's Claim #0000162 ("Yaffe's Motion to Amend") (Docket No. 2595). Phar-Mor then filed the Response of Phar-Mor, Inc. *et al.* to Yaffe and Company's Motion for Amendment of the August 18, 2005 Order ("Phar-Mor's Response") (Docket No. 2599).

For the reasons set forth below, this Court declines to grant Yaffe the relief it requests.

FACTS

The facts relevant to this dispute are set forth in the August 18 Order and will not be restated herein.

YAFFE'S ARGUMENT

Yaffe makes its Motion to Amend under FED. R. CIV. P. 59(e) and FED. R. BANKR. P. 9023, citing the purpose of such rules as to "correct manifest errors of law or fact or to present newly discovered evidence." (Yaffe's Motion to Amend, ¶ 5.) Since Yaffe fails to cite or refer the Court to any newly discovered evidence and since Yaffe does not point out any error of fact, this Court assumes that Yaffe's argument is based on what it believes is the Court's error in construing the law relating to damages arising from the rejection of an executory contract under 11 U.S.C. § 365(g).¹

Yaffe argues that the Court erred in limiting Yaffe's damages arising from rejection of the agreement dated March 31, 1994, as amended (the "Agreement"), which provided for Yaffe to perform advertising agency service for Phar-Mor. This Agreement had been amended several times, with the parties referring to at least seven amendments. By virtue of an amendment dated October 11, 2000 (the "October 11 Amendment"), the parties agreed that Yaffe had elected to extend the Agreement through December 31, 2002 and that Phar-Mor had agreed to such extension. Yaffe paid Phar-Mor One Hundred Thousand Dollars (\$100,000.00) for this privilege. The parties further agreed in the October 11 Amendment that: "[Yaffe] shall have the further option to extend the Agreement for each year after 2002 for additional one year periods by tendering to [Phar-Mor] the sum of \$50,000, on or before June 30 of the penultimate year of the Agreement as extended," (October 11 Amendment, ¶ 1.)

Yaffe argues that, "[b]ecause the term of the Agreement

¹Yaffe originally urged and Phar-Mor did not contest that damages for breach of the Agreement should be governed by the law of Michigan.

rejected by the Debtors clearly had a December 31, 2003 termination date, Yaffe's damage claim for its lost profits should cover the same period." (Yaffe's Motion to Amend, ¶ 3.) The gravamen of Yaffe's argument is that the Court should not have limited Yaffe's damages for the period January 1, 2003 through December 31, 2003 to the consideration of Fifty Thousand Dollars (\$50,000.00) paid by Yaffe to extend the term of the Agreement. Yaffe asserts that, in addition to damages for the renewal fee, it is entitled to claim lost profits for this period of time.

PHAR-MOR'S ARGUMENT

Phar-Mor counters that Yaffe has failed to set forth any valid basis for the relief it requests. Phar-Mor states that even "[u]tilizing the most lenient standards, the Order does not contain either, a 'manifest error of law or fact', nor is it 'clearly erroneous, to work manifest injustice,' if not amended." (Phar-Mor's Response at 1.) Phar-Mor cites several cases in support of its position and further points out that "Yaffe supports its claim for double recovery by referencing and emphasizing the terms of the parties' agreement of the 14th day of April, 1999." (Phar-Mor's Response at 4.)

LEGAL ANALYSIS

Although Yaffe complains that this Court has erred in applying the law, it appears that Yaffe is the erring party in relying on the wrong amendment to the Agreement in support of its damages theory. Yaffe cites to (and attached to its Motion to Amend) an April 14, 1999 Amendment - not the October 11 Amendment pursuant to which Yaffe extended the Agreement through December 31, 2003 - as the basis for its additional contractual damages. The

April 14, 1999 Amendment, which was superseded approximately 18 months later by the October 11 Amendment, does provide the following language:

[Yaffe] shall have the option of further extending the Agreement for one year, to December 31, 2001 by notifying [Phar-Mor] in writing of the exercise of this option no later than July 1, 2000 and by paying to [Phar-Mor] on or before December 31, 2000, the sum of \$100,000.

Should [Phar-Mor] terminate the Agreement at any time, then the \$100,000 renewal fee for that year shall be refunded to [Yaffe] on a prorata basis. This remedy shall be in addition to, and not in lieu of, any other remedy [Yaffe] may have, whether such remedy may exist in law or equity.

(April 14, 1999 Amendment, ¶¶ 4 and 5.)

In contrast, the October 11 Amendment does not include any language about refunding the renewal fee on a prorata basis. Nor does it include the express provision that the prorated refund is in addition to and not in lieu of any other remedies. All agreements between the parties were drafted by Yaffe. (Phar-Mor's Response at 4.) The section(s) regarding renewal are substantively changed from the April 14, 1999 Amendment to the October 11 Amendment. The amount of the renewal fee is cut in half from One Hundred Thousand Dollars (\$100,000.00) to Fifty Thousand Dollars (\$50,000.00). The date that Yaffe had to tender payment was moved from on or before December 31 to on or before June 30. Consequently, the elimination of language providing for a prorata refund of the renewal fee as well as additional remedies must be viewed as intentional and significant.

Yaffe's entire argument rests on the allegation that the April 14, 1999 Agreement gives it the right to a refund of the

renewal fee, while additionally claiming lost profits. "Limiting Yaffe's claim for profits through the end of 2002 is not supported by the Agreement, which clearly entitles Yaffe to a refund of the extension fees in addition to its claim for lost profits, and the Court did not cite any authority to the contrary." (Yaffe's Motion to Amend, ¶ 20.) The problem with this argument is that it is not based on fact. While the April 14, 1999 Amendment does permit a refund of the renewal fee in addition to the lost profits, the October 11 Amendment, which governs the extension of the Agreement until the end of 2003, wholly fails to include that remedy. The October 11 Amendment reads, in its entirety on this subject:

Paragraph IX.A shall be amended to reflect that [Yaffe] has elected to extend the Agreement through December 31, 2002, and that [Phar-Mor] has agreed to such extension. In consideration thereof, [Yaffe] shall pay to [Phar-Mor] the sum of \$100,000 on or before December 31, 2000. This payment shall be in lieu of any other payments which may have otherwise been required to extend the Agreement for the years 2001 and 2002 as set forth in the Agreement prior to this Amendment.

Paragraph IX.A, as amended in numbered paragraph 4 of the April 14, 1999 Amendment, shall be further be [sic] amended to provide that [Yaffe] shall have the further option to extend the Agreement for each year after 2002 for additional one year periods by tendering to [Phar-Mor] the sum of \$50,000, on or before June 30 of the penultimate year of the Agreement as extended, together with a notice of intention to extend the Agreement for another year. [Phar-Mor] shall have ten (10) days after receipt of the above payment and notice to either accept the payment, or return same to [Yaffe]. If accepted, the Agreement shall be extended for an additional year; if returned to [Yaffe], the Agreement shall terminate as of the expiration of the then applicable extended term.

Under § 365(g) of the Bankruptcy Code, damages from

rejection of an executory contract are calculated as if the debtor breached the contract "immediately before the filing." Phar-Mor filed its voluntary Chapter 11 petition on September 24, 2001. Under § 365(g) of the Bankruptcy Code, rejection of the Agreement is as if Phar-Mor breached the Agreement on September 23, 2001. By breaching the Agreement before the period of the extended term even began, Yaffe's damages are limited to the consideration it paid for the option to extend the contract term because it is the provision to extend the Agreement that has been breached. At the time Phar-Mor rejected the Agreement in July 2002, Yaffe had paid Fifty Thousand Dollars (\$50,000.00) to Phar-Mor to extend the Agreement and Phar-Mor had accepted such payment. By rejecting the Agreement, Phar-Mor breached the provision for the extension of the Agreement. Under those circumstances, Yaffe's damages are the amount it paid in consideration for the breached provision, *i.e.*, Fifty Thousand Dollars (\$50,000.00). The Court held and continues to hold, that Fifty Thousand Dollars (\$50,000.00) is the measure of Yaffe's damages for the period January 1, 2003 through December 31, 2003.

To the extent this explanation is inconsistent with the August 18 Order, wherein the Court stated: ". . . [T]he silence in the seventh amendment [October 11 Amendment] . . . does not negate the parties' earlier agreement concerning such proration[,] " this Court holds that the August 18 Order is amended to delete that finding. To allow Yaffe to recover the renewal fee and lost profits for the year 2003 (the extension year) would constitute a double recovery - once for the breach of the provision to extend the Agreement and the second (and double) recovery for damages for lost

profits allegedly associated with that period. The Agreement - as set forth in the October 11 Amendment - does not provide Yaffe with a contractual remedy for double recovery although the April 14, 1999 Amendment arguably does so.

In addition, even if, *arguendo*, the April 14, 1999 Amendment language was applicable here, the concept of a refund on a prorata basis doesn't apply when the extended term has not even begun. Blacks Law Dictionary (8th Ed.) defines "pro rata" as follows: "adv. Proportionately; according to an exact rate, measure or interest." Using the common meaning of this term, the implication is that if, during the extended term, Phar-Mor terminated the Agreement, a portion of the renewal fee - in due proportion to the balance of the extended term - would be refunded to Yaffe. Where, as here, the Agreement was breached months before the extended term could take effect, the proper measure of damages is return of the full amount of the consideration paid for exercise of the option to extend because that is the provision of the Agreement that was breached. Since Phar-Mor breached the provision to extend the Agreement, it is a *non sequitur* that Yaffe has damages for lost profits for a period for which the Agreement was never validly extended.

Yaffe contends that, under Michigan law, the non-breaching party is entitled to receive its expectation damages. Here, that is exactly what the Court awarded. It could not have been within Yaffe's expectation that it would receive a refund of the renewal fee and lost profits when Yaffe deleted the additional remedy section from the October 11 Amendment. In *Mount Ida School for Girls v. Rood*, 253 Mich. 482 (Mich. 1931), the Supreme Court of

Michigan approved the rule that: "In Michigan the remedy for the breach of an executory contract which has not been performed is not the balance due on the contract, but the damages that follow from the breach." *Id.* at 483. In the present case, Yaffe is entitled to the damages that follow from Phar-Mor's breach of the section providing for the extension of the Agreement for another year, *i.e.*, the Fifty Thousand Dollar (\$50,000.00) renewal fee, but not its lost profits.

Because Yaffe's Motion to Amend is based on its error of fact (*e.g.*, the April 14, 1999 Amendment vs. the October 11 Amendment), Yaffe's legal argument is misplaced. As a consequence, Yaffe has failed to demonstrate that the August 18 Order of this Court, if not amended, will work manifest injustice. Accordingly, this Court denies Yaffe's Motion to Amend, except as specifically set forth herein.

An appropriate Order will follow.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

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NORTHERN DISTRICT OF OHIO

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O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, Yaffe & Company's Combined Motion and Memorandum in Support Thereof Pursuant to Bankruptcy Rule 9023 and Rule 59(e) of the Federal Rules of Civil Procedure for Amendment of the August 18, 2005 Order Sustaining in Part Phar-Mor, Inc.'s Objection to Yaffe's Claim #0000162 is denied.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY COURT