STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
CUYAHOGA COUNTY	)	CASE NO. CV-98-360749

THEODORE M. GARVER et al.,	)	
	)	
Plaintiffs	)	
	)	
vs	)	**FINDINGS OF FACT**
	)	**AND CONCLUSIONS OF LAW**
AQUATIC AMUSEMENT	)	
ASSOCIATES LTD., et al.,	)	
	)	
Defendants	)	

MICHAEL J. RUSSO, JUDGE:

FINDINGS OF FACT

1. Defendant Herbert Ellis ("Ellis") is a resident of the State of New York and was at all times relevant to this litigation the principal of Defendant Aquatic Amusements Associates, Ltd. ("Aquatic").

2. Aquatic is a New York corporation engaged in the business of the design and construction of water parks and the manufacture and sale of equipment used in pools and other water-based amusements at water parks and community aquatic centers.

3. At all times relevant to this litigation, Dirk Bastenhof, a resident of the Netherlands, was the owner of United States Patent No. 4,558,474 (the "474 Patent") which covers certain equipment that generates waves in wave pools.

4. At all times relevant to this litigation, Aquatic was the exclusive licensee within the United States of the 474 Patent.

5. All witnesses concurred that the hallmark of equipment covered by Claim 5 of the 474 Patent is the ability of the machine to produce many different patterns of waves in wave pools (described as "variable" or "multiple" wave patterns). This distinguishes machinery covered by the 474 Patent from earlier machinery which was only capable of making a single type of wave pattern in a wave pool (sometimes referred to as a "diamond wave" pattern).

6. Plaintiffs' expert witness Randall Moser testified that although equipment covered by the 474 Patent could also be used to make single wave patterns, it would be uneconomical to do so and that the purpose of installing equipment covered by the 474 Patent was to enable the operator of the wave pool to produce variable or multiple wave patterns.

7. The 474 Patent was only valid in the United States. Aquatic acquired no patent protection rights in Canada for the 474 Patent and therefore never had any right to prevent any competitor from selling machinery in Canada that could create multiple wave patterns in wave pools.

8. In 1986, Aquatic, as licensee of Bastenhof, brought a patent infringement lawsuit against Plaintiffs in this case Gary Zuercher ("Zuercher") and Theodore Garver ("Garver") (collectively "Plaintiffs") and others in the United States District Court for the Northern District of Ohio, Eastern Division, alleging that Plaintiffs and others had infringed the 474 Patent.

9. As a part of the settlement of that patent infringement litigation, Plaintiffs, who were agents of the corporate defendants in that case, admitted that the 474 Patent was valid and that it had been infringed.

10. The settlement of the patent infringement litigation referenced above gave rise to the contracts that are in dispute in this case. Specifically, as a part of that settlement, Aquatic purchased the assets of the infringing corporations and executed consulting agreements with Zuercher and Garver.

11. A copy of the consulting agreement that relates to Zuercher was marked and admitted into evidence as Joint Exhibit 1, and a copy of the consulting agreement relating to Garver was marked and admitted into evidence as Joint Exhibit 2.

12. The parties stipulated that the only paragraphs of the consulting agreements under which Plaintiffs seek breach of contract damages is Paragraph 3(c) of each consulting agreement. Further, Plaintiffs seek their attorney fees and expenses pursuant to Paragraph 4 of each agreement.

13. Paragraph 3(c) of each consulting agreement provides for payments to Zuercher and Garver of a flat fee per sale ("consulting fee") made by Aquatic of pneumatic wave generation equipment covered by Claim 5 of the 474 Patent (and other specified equipment) in the United States and Canada. The consulting fee per sale differs as the number of sales made by Aquatic increases in each twelve month period commencing on September 22nd of a particular year and concluding September 21st of the following year. The consulting fee to be paid to Zuercher per sale is double the amount of the consulting fee to be paid to Garver per sale. A correct chart of these fees was introduced into evidence by the parties as Joint Exhibit 5.

14. The consulting agreements at issue in this case were executed on September 22, 1987.

15. The consulting agreements contained the complete agreement of the parties with regard to the subject matters contained in the agreements. Further, the consulting agreements were negotiated at arms-length and each side was represented by counsel.

16. Plaintiffs introduced no evidence of any sale by Aquatic of any item defined in Paragraph 3(c) of the consulting agreements upon which Plaintiffs are due a consulting fee other than the sale of pneumatic wave generation machines protected by Claim 5 of the 474 Patent.

17. Aquatic filed for protection from creditors pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of New York on September 19, 1995.

18. The Plan of Reorganization adopted by the United States Bankruptcy Court for the Northern District of New York in the Chapter 11 action filed by Aquatic did not reaffirm the consulting agreements in this case.

19. The guarantee provisions of the consulting agreements are Section 9 of Joint Exhibit 1 and Section 8 of Joint Exhibit 2, which are identical and provide: "As an additional incentive to Zuercher [or Garver] to enter into this agreement, Ellis hereby assumes personal responsibility for the undertakings of the corporation.

20. Section 9 of Joint Exhibit 1 and Section 8 of Joint Exhibit 2 also provide that "Ellis shall have no obligation, and his liability shall be extinguished with respect to amounts accruing hereunder subsequent to the transfer of the business or assets of the Corporation [Aquatic] to an independent third-party; providing that the obligations of the Corporation hereunder are assumed by such third-party."

21. Plaintiff Garver asserted at trial that he was entitled to the payment of consulting fees for all sales by Aquatic of pneumatic wave generating machines covered by Claim 5 of the 474 Patent after the date of Aquatic's bankruptcy.

22. Garver was paid in full all commissions due and owing to him for sales of pneumatic wave generation equipment by Aquatic from the date that his consulting agreement was executed in September, 1987, through the time that Aquatic filed for bankruptcy protection on September 19, 1995.

23. For the time period covering the filing of Aquatic's Chapter 11 bankruptcy through the present, Aquatic made 40 separate sales of pneumatic wave generating machines covered by Claim 5 of the 474 Patent.

24. Absent a consideration of the defenses raised by Ellis, Garver is entitled to consulting fees in the total amount of $45,000 for the contracts referred to in the immediately preceding paragraph. This calculation is based upon the number of contracts signed and the dates thereof and the consulting fee due per each contract in accordance with the chart admitted into evidence as Joint Exhibit 5.

25. Plaintiff Zuercher asserted at trial an entitlement to consulting fees for the sale of pneumatic wave generating machines covered by Claim 5 of the 474 Patent both prior to and after the bankruptcy filing of Aquatic.

26. As set forth in Section 1 of the Zuercher Consulting Agreement, the term of the consulting agreement with Zuercher was 5 years, beginning September 1987, renewable for additional one year extension periods unless Zuercher gave notice of his election to terminate at least 30 days prior to the end of the initial term or any renewal term.

27. As set forth in Section 10 of the Zuercher Consulting Agreement, all obligations of Aquatic and Ellis terminated upon Zuercher's refusal to render consulting services as provided for in the agreement:

> 10. Termination. **This Agreement shall be terminable by Zuercher in accordance with the provisions of paragraph 1 above. Further, all obligations of the Corporation and Ellis hereunder shall terminate** upon the death of Zuercher, **upon his refusal to render the**

> **consulting services provided for herein,** or upon his disability, rendering him unable to provide the services hereunder, which disability continues for a period of six (6) months. The obligation to pay amounts otherwise due hereunder for contracts executed prior to such terminating event shall survive the termination.

28. Section 1 of the agreement provided for termination after the initial term:

> 1. Term. The Corporation agrees to retain Zuercher and Zuercher agrees to be so retained for a term of five (5) years. Such consulting term shall commence upon the Closing of the acquisition of certain assets under a Settlement Agreement (hereinafter referred to as the "Settlement Agreement") of even date herewith among the parties hereto, WaveTek, Inc., WaveTek, Ltd., WaveTek Surf, Inc., The Coaster Slide Corporation, D-W Wave Co., Fostoria Corporation and Theodore Garver. Thereafter, **the Agreement shall automatically be renewed for one year periods unless Zuercher gives notice of his election to terminate at least thirty (30) days prior to the end of the initial term or any renewal term.**

29. On August 22, 1993, pursuant to Sections 1 and 10 of the Consulting Agreement, Zuercher informed Aquatic of his refusal to render further consulting services, effective September 22, 1993, and his letter was admitted into evidence as Joint Exhibit 3.

30. As set forth in Section 10 of the Zuercher Consulting Agreement, all obligations of the corporation and Ellis terminated on September 22, 1993, when Zuercher stopped rendering consulting services.

31. However, the consulting agreement between Aquatic and Zuercher also provided that upon the end of the term of the consulting agreement, Zuercher could not compete in this market for three years, and that if Zuercher had been paid $200,000 in consulting fees during the term of the contract, Aquatic would pay to Zuercher the additional sum of $1,000 per contract during the three year non-compete period as additional consideration to keep Zuercher from competing.

32. Because of Zuercher's recognized name in this market, Aquatic did not want Zuercher to compete with it after he terminated his consulting services. Therefore, despite the fact that all of Aquatic's obligations under the Consulting agreement were terminated by Zuercher's letter of August 23, 1993, Aquatic determined that it would pay $1,000 per contract to Zuercher in an effort to keep Zuercher from competing. In total, Aquatic paid to Zuercher the sum of $1,000 per contract for six contracts that it entered into between the time that it received Zuercher's letter giving notice of the termination of his consulting services and the date when it filed for bankruptcy protection.

33. Zuercher never accepted these payments as compensation in exchange for non-competition; instead, he asserted both at that time and at trial that Aquatic's obligation to pay him consulting fees in accordance with the contract was severable from his obligation to provide consulting services and, therefore, he was entitled to the full consulting fee even thought he was no longer consulting.

34. The parties never engaged in a course of conduct that evidenced an agreement to amend the contract so as to change the obligations owed to Zuercher, if any, once Zuercher gave notice that he would no longer provide consulting services.

35. To the contrary, although Aquatic made payments to Zuercher in the amount of $1,000 per contract after receiving notice of such termination, Zuercher testified that he placed a telephone call and wrote two letters to Aquatic and its counsel complaining that the amount of $1,000 per contract was inadequate and asserting his right to full consulting fees under the schedule of consulting fees under the contract.

36. Had Zuercher not voluntarily terminated his consulting services, and had Aquatic not filed for bankruptcy, Zuercher would have been entitled to fees in the amount of $90,000, based on the sales

described in the immediately preceding paragraph. This calculation is based upon the number of contracts signed and the dates thereof and the consulting fee due per each contract in accordance with the chart admitted into evidence as Joint Exhibit 5.

37. At trial, Plaintiffs sought payment of consulting fees not only upon sales made by Aquatic but also upon sales made by a third-party, namely Whitewater Wave Systems, Ltd. ("Whitewater") of British Columbia, Canada.

38. In 1988, Whitewater initiated a declaratory judgment action against Aquatic in the United States District Court for the Northern District of New York seeking a ruling that the 474 Patent was invalid and unenforceable. Aquatic filed a counterclaim in that action seeking a determination that the patent was valid and enforceable. That action was settled pursuant to an agreement executed on April 19, 1991. That settlement agreement, including all attachments (but with some information redacted) was jointly marked by the parties as Joint Exhibit 4 and admitted into evidence.

39. Pursuant to the consent judgment entry entered as a part of the settlement of that action, Whitewater admitted that the 474 Patent was valid and enforceable and that it had infringed same. Further, pursuant to that consent judgment entry, Aquatic waived any financial award with regard to prior sales by Whitewater that infringed the patent.

40. Further, pursuant to the settlement of that action, Aquatic granted to Whitewater a non-exclusive worldwide license (exclusive of Europe) to manufacture and sell wave generating equipment protected by Claims 5 through 19 of the 474 Patent. This allowed Whitewater to market equipment around the world that could be presented as being similar to the equipment manufactured and sold by Aquatic.

41. Pursuant to that license agreement, Whitewater was to pay a royalty to Aquatic for all such wave generating machines sold or installed by Whitewater in the United States, its territories, or possessions.

42. Plaintiffs produced no evidence that there was any agreement between Whitewater and Aquatic to "reserve" the entire U.S. market for this equipment for Aquatic and the entire Canadian market for this equipment to Whitewater. To the contrary, the representatives of Whitewater and Aquatic who testified at trial stated that no such agreement existed. Further, some of the sales made by Aquatic after the settlement of the Aquatic-Whitewater patent litigation and after Aquatic's bankruptcy, upon which Plaintiffs seek a consulting fee, were sales made by Aquatic in Canada. In addition, Aquatic never had any protection in Canada for the 474 Patent and therefore never had a basis to prevent Whitewater from making sales of multiple wave generating machines in Canada.

43. Since the date of the settlement agreement of the patent litigation between Whitewater and Aquatic, Whitewater sold no systems covered by the 474 Patent in the United States. It therefore paid no royalties to Aquatic.

44. Since the date of this settlement agreement between Whitewater and Aquatic, Whitewater has sold 14 systems that were capable of producing multiple wave patterns in Canada. It paid no royalties to Aquatic for such sales in Canada because it was not required to do so.

45. Plaintiffs failed to identify in which contract years (i.e. September 22 of one year through September 21 of the next year) the Whitewater sales in Canada took place and therefore failed to provide evidence to the Court upon which the Court could calculate the consulting fee per contract.

46. As set forth in Section 3(c) of the consulting agreements, payment is only due to Zuercher and Garver at such time as Aquatic has received payment from its customer: "For each contract covered, the corporation shall pay to Zuercher [or Garver] within thirty (30) days after the end of the calendar quarter, a percentage of the total fee due hereunder as is equal to the percentage of the total contract price received by the corporation that calendar quarter."

CONCLUSIONS OF LAW

1. Except for Aquatic, this Court has jurisdiction over the within action and over the parties to this action.

2. The contracts executed by the parties contain a valid choice of law clause and therefore the substantive law of the State of New York is applicable to the determination of this action. However, matters of procedure are governed by the law of the State of Ohio; specifically, matters that relate to admissibility, competence, quality, and degree of evidence, and questions relating to the burden of proof and the satisfaction of same, are to be interpreted in accordance with Ohio law. 16 Ohio Jur. 3d, Conflict of Laws, Sections 48, 49.

3. Pursuant to New York law, in interpreting and enforcing a contract, matters extrinsic to an agreement may not be considered when the intent of the parties can fairly be gleaned from the face of the instrument. A Court may neither rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous, nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case. Further, the entire contract must be considered, and all parts of it reconciled,

if possible, in order to avoid an inconsistency. Effect and meaning must be given to every term of the contract, and reasonable effort must be made to harmonize all of its terms. *Terwilliger v. Terwilliger*, 206 F.3d 240 (2nd Cir. 2000) and cases cited therein.

4. Because the consulting contracts at issue in this case were not reaffirmed in the Amended Plan of Reorganization that was approved by the United States Bankruptcy Court for the Northern District of New York in Aquatic's Chapter 11 filing, Aquatic's liability under both consulting agreements was discharged pursuant to 11 U.S.C. Section 1141(d)(1). Plaintiffs' claims against Aquatic are therefore dismissed with prejudice.

5. The Ellis guarantee in Sections 8 and 9 of the Zuercher/Garver agreements respectively, state: "Ellis hereby assumes personal responsibility for the undertakings of the corporation." Pursuant to this language in the consulting agreements, Ellis is a guarantor and not a primary obligor and/or maker.

6. Pursuant to 11 U.S.C. Section 524(e), "…Discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity, for such debt."

7. "Although confirmation of a reorganization plan in bankruptcy discharges the debtor from liability on the debt, it does not extinguish the debt, rather creditors can prosecute their claim against co-debtors or guarantors." *The Mercantile Club, Inc. v. Scherr*, 102 Md.App. 757, 768. See also *Terwilliger* (supra).

8. Since the bankruptcy discharge does not extinguish the debt, but merely discharges Aquatic Amusement from liability on the debt, the Plaintiffs may prosecute their claims against the guarantor, Herbert Ellis.

9. Ellis is liable to Plaintiff Garver for the payment of consulting fees on any sale by Aquatic of pneumatic wave generating equipment protected by Claim 5 of the 474 Patent after September 19, 1995. Specifically, Plaintiff Garver is entitled to consulting fees in the total amount of $45,000.

10. Moreover, pursuant to Section 10 of the Zuercher consulting agreement, Aquatic and Ellis's obligations under the contract were terminated when Zuercher terminated the agreement and expressed that he would no longer render consulting services as of September 22, 1993. Ellis therefore has no liability to Zuercher for the payment of consulting fees on any sale by Aquatic of pneumatic wave generating equipment protected by Claim 5 of the 474 Patent after September 22, 1993.

11. In the present case, the parties never reached a meeting of the minds as to the establishment of new obligations owed to Zuercher once he voluntarily terminated his consulting services, nor did the parties by their conduct evidence a clear and definite intention to substitute new obligations to Zuercher for the obligations in the consulting agreement. The Court therefore finds that neither the actions of Zuercher in claiming continued entitlement to consulting fees even after he had voluntarily terminated his consulting services, nor the action of Aquatic in paying a $1,000 fee per contract to Zuercher for his continued forbearance from competing, altered or amended the terms of the consulting agreements at issue in this case. Instead, the consulting agreement is to be enforced as it is written.

12. Ellis is not liable to Zuercher for the payment of consulting fees on any claim that the conduct of the parties after the date of Zuercher's letter of September 22, 1993, modified or amended the contract such that new obligations were undertaken.

13. The contracts at issue in this case call for a commission to be paid to the Plaintiffs based upon equipment protected by Claim 5 of Patent 474 "…contracted for and sold in the United States of

America and Canada *by the corporation* after the commencement of the consulting period…" This Court may not add words to the contract so as to include sales not only by the corporation (i.e. Aquatic) but also sales made by licensees of Aquatic. Therefore, Ellis is not liable for the sales made by Whitewater from the date of the settlement agreement of the Whitewater patent infringement litigation on April 19, 1991.

14. Further, this Court may not add words to the contract so as to include sales made by competitors that infringed the 474 Patent, even if Aquatic failed to obtain a financial recovery for patent infringement. Therefore, Ellis is not liable for the sales made by Whitewater from the date of the first infringing sale by Whitewater.

15. The consulting contracts provide that Aquatic is only obligated to pay consulting fees to the Plaintiffs when it has been paid by its customer. Aquatic has not been paid any commission by Whitewater for any sale that it made upon which Plaintiffs seek a consulting fee. Therefore, for this additional reason, Ellis is not liable to Plaintiffs for any consulting fees for the time period covering the first infringing sale by Whitewater.

16. Upon the Findings of Fact and Conclusions of Law above, this Court enters judgment in favor of Plaintiff Garver and against Defendant Herbert Ellis in the amount of $45,000 plus interest at 9% per annum from the date of the breach. On the other hand, this Court enters judgment in favor of Defendant Ellis and against Plaintiff Gary Zuercher, which results in no monetary award for this Plaintiff. Paragraph 4 of each consulting agreement provides that in any dispute under the agreements that if **any party** is determined to be totally correct in such proceeding, the other party shall bear all costs and expenses, including reasonable attorney fees for the successful party. This Court finds that no party has been the

"totally correct" party within the meaning of Paragraph 4, and therefore each party shall bear their own costs.

IT IS SO ORDERED.

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MICHAEL J. RUSSO, JUDGE

Date: September ____, 2004

CERTIFICATE OF SERVICE

A copy of the foregoing **Finds of Fact and Conclusions of Law** was sent by ordinary U.S. Mail this _____ day of September, 2004 to:

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MICHAEL J. RUSSO, JUDGE