IN THE SUPREME COURT OF GUAM

MOBIL OIL GUAM, INC.
Plaintiff-Appellee,

v.

YOUNG HA LEE
Defendant-Appellant.

Supreme Court Case No.: CVA02-007
Superior Court Case No.: CV0460-00

Petition for Rehearing Granted,
Opinion vacated June 10, 2004

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 4, 2003
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] This case arises out of the alleged breach and improper termination of a Petroleum Marketing Practices Act Motor Fuels Franchise Agreement (hereinafter "Franchise Agreement") executed between Plaintiff-Appellee Mobil Oil Guam, Inc. (hereinafter "Mobil") and Defendant-Appellant Young Ha Lee (hereinafter "Lee"). The trial court held that Lee breached the Franchise Agreement and that Mobil's termination of the Franchise Agreement did not violate the provisions of the Petroleum Marketing Practices Act. We affirm the trial court in part and reverse in part.

I.

[2] On September 1, 1998, Mobil and Lee executed a Franchise Agreement governed under the Petroleum Marketing Practices Act (hereinafter "PMPA"), wherein Mobil, as Franchisor, granted Franchisee and Dealer, Lee, the right to use and occupy the Mangilao Service Station in the connection with the sale and distribution of Mobil brand fuels for a period of eight years. In return for the franchise rights, Lee provided Mobil with a $260,000 non-refundable conversion fee, a $30,000 security deposit, and, an authorization to make direct debit draws on Lee's First Hawaiian Bank (hereinafter "FHB") business banking account.[1]

[3] For twelve months, Lee operated his service station and received monthly Statements of Account from Mobil, which indicated that Mobil was being paid timely for its fuel sales. However, Lee's credit posture changed after Lee's wife triggered an investigation into their account when she inquired about the possibility that Mobil was double charging on some invoices. The investigation

[1] By partaking in the direct debit program, Lee received a one percent discount on the purchase of fuels and lubricants.

led to the discovery that some of Mobil's direct debit draws from Lee's FHB account were returned for non-sufficient funds, which meant that Mobil's monthly Statements of Account did not reconcile with the parties' respective monthly bank statements.

[4] In a letter dated September 16, 1999, Serge Alves, a Mobil employee, informed Lee's wife of the problem. On October 4, 1999, Leo A. Manlapaz (hereinafter "Manlapaz"), Mobil Fuels Manager, contacted Lee for a meeting, in which Lee was provided a listing of all the returned direct debits amounting to $270,198.60 and was informed that his account would be switched to cash on delivery basis. When Lee was asked to review and verify each item on the Non-Sufficient Funds (hereinafter "NSF") list, Lee could not readily do so and "claimed that he had no prior knowledge of the returned direct debits and it was his wife who was handling all bank deposits." Appellant's Excerpts of Record, vol. II, p. 239 (Manlapaz Decl.). On October 20, 1999, after several failed attempts to follow-up on the status of Lee's review of the listing, Manlapaz called Lee, wherein "[Lee] confirmed the accuracy of the NSF listing that was provided to him" and "promised to submit a written payment plan by October 21, 1999." Appellant's Excerpts of Record, vol. II, p. 240 (Manlapaz Decl.).

[5] Lee did not meet his self-imposed deadline of October 21, 1999 to submit a payment plan. Instead, on November 1, 1999, Lee met with and delivered to Manlapaz a letter, which apologized for the overdue payments. The letter also contained a proposed payment plan, wherein he would "pay at least $50,000 within the next 2 weeks." Appellant's Excerpts of Record, vol. II, p. 354 (Lee's Ltr.). On November 8, 1999, Mobil informed Lee that his proposed payment plan outlined on November 1, 1999 was "unacceptable as it [did] not meet Mobil's requirements on the timeliness of the full payment of [Lee's] delinquent account," which currently stood at $287,543.53. Appellant's Excerpts of Record, vol. II, p. 355 (Manlapaz Ltr.). Mobil also warned Lee that the

overdue payments "constitute[d] a serious violation of Article II(C) of [the] Franchise Agreement." Excerpts of Record, vol. II, p. 355 (Manlapaz Ltr.).

[6] On November 26, 1999, Mobil again reminded Lee of his continued violation of Article II(C) of the Franchise Agreement. At this point, Lee's balance stood at $255,050.28. Mobil further notified Lee that in order to cure his default, he would have to make a $155,000.00 payment by the end of November 1999 and the remaining balance by December 31, 1999. In response to Mobil's demand, on November 29, 1999, Lee's attorney informed Mobil of the difficulty in making the $155,000 payment within four days. The attorney further expressed that, "Mr. Lee, of course, will make the payments, and he does not dispute the debt at this time, but he does need some additional time in which to make this overdue payment." Appellant's Excerpts of Record, vol. II, p. 358 (Teker's Ltr.).

[7] In light of Lee's request for additional time to make the payments, on December 1, 1999, Mobil informed Lee that the $155,000.00 payment deadline would be extended to December 9, 1999. Lee did not meet the December 9 deadline, and on December 15, 1999, Mobil sent Lee a "Final Warning" letter that again reminded Lee of his continued default. Three days later, on December 18, 1999, Lee outlined another proposed payment plan.

[8] On December 22, 1999, Mobil formally declined Lee's latest proposed payment plan and counter-offered with another plan. Under the plan, Lee was to sign a promissory note and to agree to pay $50,000 per month with interest at 15% per annum. The promissory note was to be secured by a mortgage on some of Lee's property. Mobil noted that Lee's acceptance of the plan would be evidenced by either first payment of the $50,000 by December 28, 1999 or the finalization of certain documents (such as appraisal papers) in preparation for the execution of the promissory note. Lee failed to accept Mobil's payment plan, and on December 29, 1999, Mobil sent Lee a "Notice of

Termination: Failure to Pay" letter, which notified Lee that the Franchise Agreement would be terminated on January 16, 2000.

[9] On January 13, 2000, Lee's attorney informed Mobil that his client was able to sell one of his properties and therefore, "[would] be able to deliver a check in the amount of Eighty Thousand Dollars" to Mobil, which is to be applied on the outstanding account. Appellant's Excerpts of Record, vol. I, p. 162 (Teker's Ltr.). The letter also noted other properties that Lee was trying to sell and a request "that Mobil continue its practice of withholding" $9,000.00 to $10,000.00 monthly from his "customers' credit card charges to apply on the outstanding indebtedness." Appellant's Excerpts of Record, vol. I, p. 162 (Teker's Ltr.).

[10] Despite Lee's latest offer, on January 16, 2000, Mobil effectively terminated the Franchise Agreement and took control over the Mangilao fuel station. On January 26, 2000, Mobil informed Lee's attorney that Lee's offer (expressed during counsels' telephone conversation on January 24, 2000) of a $100,000.00 check payment and an execution of a promissory note "for the balance due providing for $10,000.00 monthly payments until this account is paid in full" was rejected. Appellant's Excerpts of Record, vol. I, p. 167 (Johnson's Ltr.). The letter also outlined Lee's balance of $199,463.22 after Mobil subtracted the value of the station's inventory.

[11] On March 20, 2000, Mobil filed a Complaint in the Superior Court of Guam, alleging breach of contract and praying for Lee's payment of $192,465.72. On April 24, 2000, Lee filed an Answer and a Counterclaim to Mobil's Complaint. Lee's Answer asserted five defenses, including estoppel[2]

[2] Lee's fourth defense stated that, "Plaintiff failed to timely notify Defendant that Defendant was in arrears in his payments for gasoline deliveries and, therefore, is estopped from terminating Defendant's Franchise Agreement as a result thereof." Appellant's Excerpts of Record, vol. I, p. 37 (First Amended Answer and Counterclaim of Young Lee).

and waiver.[3] Lee also filed a counterclaim alleging that Mobil's termination and termination notice violated the provisions of the PMPA. On May 4, 2000, Mobil filed a Reply to Lee's First Amended Counterclaim.

[12] On July 20, 2000, Mobil sent Lee a "Supplemental Notice of Termination." Appellant's Excerpts of Record, vol. II, p. 380 (Glath Ltr.). Although "Mobil maintain[ed] that that notice of termination was sufficient as a matter of law and that termination of your franchise, Franchise Agreement and franchise relationship was legal and proper as January 16, 2000," the supplemental notice provided that if "the Superior Court of Guam . . . determines that you were entitled to a longer notice period than was provided by Mobil's December 29, 1999 notice of termination, this letter shall serve as a supplemental notice of termination." Appellant's Excerpts of Record, vol. II, p. 380 (Glath Ltr.).

[13] On November 16, 2000, Mobil filed a motion for partial summary judgment arguing that Lee breached the contract, and, that Mobil's termination of the Franchise Agreement and notice of termination did not violate the provisions of the PMPA.

[14] On December 4, 2001, the trial court issued a decision and order. First, the trial court granted Mobil's summary judgment motion on the issue that Lee breached the contract. However, the trial court found that there was a factual question regarding "the amount due in excess of $164,922.51," which took into consideration the three invoices that Lee challenged. Appellant's Excerpts of Record, vol. I, p. 47 (Decision and Order, Dec. 4, 2001). Second, the trial court granted Mobil's summary judgment motion and found that Mobil did not violate the PMPA provisions. Last, the trial court dismissed Lee's counter-claim "for attorney fees and exemplary damages."

[3] Lee's fifth defense stated that, "Plaintiff waived the right to require timely payment of gasoline purchases and, therefore, waived the right to demand immediate payment therefor." Appellant's Excerpts of Record, vol. I, p. 37 (First Amended Answer and Counterclaim of Young Lee).

Appellant's Excerpts of Record, vol. I, p. 51 (Decision and Order, Dec. 4, 2001). Lee filed a timely appeal challenging the trial court's decision.

II.

[15] This court has jurisdiction over this appeal from a final judgment pursuant to Title 7 GCA §§3107, 3108(a) (1994).

[16] We review the trial court's grant of a summary judgment *de novo*. *See Amsden v. Yamon*, 1999 Guam 14, ¶ 7 (citations omitted). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c); *Amsden*, 1999 Guam 14 at ¶ 7. We similarly review contract construction *de novo*. *See Apana v. Rosario*, 2000 Guam 7, ¶ 9; *State Farm Mut. Auto. Ins. Co. v. George Hyman Constr. Co.*, 715 N.E.2d 749, 754-55 (Ill. App. Ct. 1999). "In interpreting a contract, the language governs if clear and explicit and not involving absurdity." *Ronquillo v. Korea Auto., Fire, & Marine Ins. Co.*, 2001 Guam 25, ¶ 10 (citing Title 18 GCA §87104 (1992)). "Issues of statutory construction and jurisdiction are [also] reviewed *de novo*." *Taijeron v. Kim*, 1999 Guam 16, ¶ 9 (citing *People v. Quichocho*, 1997 Guam 13, ¶ 3).

III.

[17] On appeal, Lee asserts that the trial court erred in granting Mobil's summary judgment motion on the issues of whether he breached the Franchise Agreement, and whether Mobil's termination of the Franchise Agreement and notice of the termination complied with the provisions of the PMPA.

A. Breach of Contract

[18] We begin our analysis by addressing the following three factual disputes that Lee avers to support his contention that the trial court erred in granting Mobil's summary judgment on the breach of contract issue: (1) non-delivery of fuel, (2) amount of damages, and, (3) equitable estoppel.

1. Delivery

[19] Lee first argues that "there are issues of material fact in dispute of whether good[s] for which Mobil is seeking payment were actually delivered." Appellant's Opening Brief, p. 11. Although Lee correctly maintains that "evidence rais[ing] a disputed issue of material fact as to whether the goods . . . were actually delivered" forecloses summary judgment, *Mountain Bound, Inc. v. Alliant FoodService, Inc.*, 530 S.E. 2d 272, 274 (Ga. Ct. App. 2000) (citations omitted), Lee has not proffered any material evidence that disputes Mobil's actual delivery of the fuels.

[20] The gravamen of Lee's allegation with respect to non-delivery is that the documents accompanying Mobil's "NSF listing" are computer-generated and contain no signatures to prove receipt of the delivery. We find Lee's allegation unpersuasive. The NSF listing contains twelve entries, denoting the date and the amount of the returned direct debits from Lee's account. Accompanying the NSF listing were sets of the following documents: (1) Summary Statements, which contain various invoice numbers to account for the direct debit entries that were allegedly returned for non-sufficient funds (Appellant's Excerpts of Record, vol. II, pp. 317, 323-324, 333, 336, 338, 340, 341, 344, 346, 348, 350, 352), and, (2) the duplicate Sales Invoices, which match the invoice numbers noted on the Summary Statement (Appellant's Excerpts of Record, vol. II, pp. 318-322, 325-332, 334, 337-339, 342-343, 345, 347, 349, 351, 353). While we agree with Lee's observation that the Summary Statements were most likely computer-generated and printed around November as noted on the bottom of each Summary Statement, we disagree with Lee's contention that the Sales Invoices are not valid duplicates of the original invoices. Each of the Sales Invoices

contains various order numbers and is dated from September 29, 1998 through June 3, 1999. Unless Lee "submit[s] evidentiary facts or materials, by affidavit or otherwise" to challenge the validity of the duplicate Sales Invoices, Lee is unable to support his assertion that Mobil did not make actual delivery of the items it claims it did. *See Tobron Office Furniture Corp. v. King World Prods., Inc.*, 555 N.Y.S.2d 315, 316 (App. Div. 1990) (citations omitted).

[21] Moreover, we find especially significant the fact that Lee's own "review[] [of] the documentation relative to the deliveries of fuel Mobil claims it delivered to the Mangilao Mobil gas station during the time at issue" (in preparation for trial) resulted in the discovery of only three challenged invoices that are not dispositive in this appeal. Appellant's Excerpts of Record, vol. I, pp. 62-64 (Lee's Decl.). Consequently, because Lee has not produced evidence challenging the invoices that are part of the appeal, Lee's assertions that Mobil did not make the actual delivery of fuels is insufficient to defeat summary judgment. *See Hartz Mountain Corp. v. Allou Distribs., Inc.*, 570 N.Y.S.2d 66, 67 (App. Div. 1991); *Tobron Office Furniture Corp.*, 555 N.Y.S.2d at 316 (noting that "[t]he failure to sufficiently demonstrate a material issue of fact requiring trial entitles plaintiff to an expedited determination of its claim for payment as to that merchandise actually delivered . . . .").

2. Total Damage Amount

[22] Lee next challenges the trial court's granting of summary judgment in light of his own expert's inability to determine the exact amount of damages. The crux of Lee's challenge is grounded upon the declaration of Roger Slater (hereinafter "Slater"), a C.P.A., who was hired by Lee "to review documents and financial records pertaining to this case." Appellant's Excerpts of Record, vol. II, p. 169 (Slater's Decl.). With regard to the determination of the total outstanding amount owed, Slater made the following conclusion:

> In reviewing the monthly Statements of Account, and the invoices and other paperwork supplied by Mobil I am unable to determine for the proper balance of Mr. Lee's account, because various documentation supporting numerous charges and credits to Mr. Lee's account was not supplied.

Appellant's Excerpts of Record, vol. II, p. 174 (Slater's Decl.). We find Lee's solicitation of an expert, whose only real conclusion is that he was unable to determine the amount that Lee owes because of missing documents, unpersuasive especially since Lee was responsible for maintaining current, complete and accurate business records under the Franchise Agreement.[4] As we discussed above, notwithstanding Lee's challenge to the three invoices, Lee has not averred material evidence disputing the rest of the invoices, and therefore, the total damages that Mobil claims that Lee owes. *See Tobron Office Furniture Corp.*, 555 N.Y.S.2d at 316.

3. Equitable Estoppel and Waiver

[23] The last challenge that Lee proffers with respect to the breach of contract issue is whether equitable estoppel is applicable in this case.[5] Equitable estoppel is defined as "[t]he doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he would otherwise have had." *Heskett v. Paulig*, 722 N.E.2d 142, 145-146

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[4] Pursuant to Article IV, paragraph C, section 10 of the Franchise Agreement, the Dealer is obligated to

> maintain current, complete and accurate business records, including all records referred to in Article VII, Paragraph A, and make such records available to Mobil for inspection during normal business hours at Mobil's request. Mobil shall not disclose any such records or the contents thereof to any other party unless required by law to do so.

Appellant's Excerpts of Record, vol. I, p. 14 (Franchise Agreement).

[5] We note a discrepancy between Lee's First Amended Answer and Counterclaim and the issues Lee presents on appeal. Under the First Amended Answer and Counterclaim, Lee couches the estoppel issue as the following: "Plaintiff failed to timely notify Defendant that Defendant was in arrears in his payments for gasoline deliveries and, therefore, *is estopped from terminating Defendant's Franchise Agreement as a result thereof.*" Appellant's Excerpts of Record, vol. I, p. 37 (First Amended Answer and Counterclaim of Young Lee) (emphasis added); Appellant's Opening Brief, p. 14. However, on appeal, Lee is no longer employing the estoppel doctrine to challenge Mobil's termination of the Franchise Agreement, but, rather on Mobil's right to demand payment of the outstanding balance. *See* Appellant's Opening Brief, pp. 12-13.

(Ohio Ct. App. 1999) (citations and quotations omitted); *see Hodgkins v. New England Tel. Co.*, 82 F.3d 1226, 1232 (1st Cir. 1996). "The doctrine . . . is designed to prevent a miscarriage of justice" and "is to be *used cautiously* because it bars the normal assertion of rights otherwise present." *Prof'l Credit Servs. of New Orleans, Inc. v. Skipper*, 543 So.2d 498, 499-500 (La. Ct. App. 1989) (emphasis added). "Unlike promissory estoppel, equitable estoppel is available only as a 'shield' or defense." *Estate of Hall v. HAPO Fed. Credit Union*, 869 P.2d 116, 118 (Wash. Ct. App. 1994) (citations omitted). Guam has codified the doctrine of equitable estoppel in Title 6 GCA §5106(3), which provides:

> Specification of Conclusive Presumptions. The following presumptions, and no others, are deemed conclusive:
>
> > Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission be permitted to falsify it;

Title 6 GCA §5106(3) (1994). Lee correctly notes that Guam's equitable estoppel doctrine was adopted from the California Civil Procedure (CCP § 1962). Case law applying the doctrine has set forth the following four elements that must be proven in an equitable estoppel analysis:

> (1) that the party to be estopped must be apprised of the facts;
> (2) he must intend that his conduct will be acted upon, or act in such a manner that the party asserting the estoppel could reasonably believe that he intended his conduct to be acted upon;
> (3) the party asserting the estoppel must be ignorant of the true state of the facts; and
> (4) he must rely upon the conduct to his injury.

Crestline Mobile Homes Mfg. Co., Inc. v. Pac. Fin. Corp., 356 P.2d 192, 195-196 (Cal. 1960); *Mariano v. Guam Civil Service Commission Bd.*, 1983 WL 30227 * 1 (D.Guam App. Div. 1983); *Safway Steel Prods., Inc. v. Lefever*, 256 P.2d 32, 33 (Cal. Ct. App. 1953). Moreover, because the doctrine is an affirmative defense, "the party relying upon the doctrine of equitable estoppel," which in this case is Lee, has the burden to "prove the existence of the four required elements essential to

its application." *Crestline Mobile Homes*, 356 P.2d at 195-196.

[24] In the case at bar, Lee argues that Mobil is equitably estopped from demanding payment on Lee's outstanding balance because Mobil sent him monthly Statements of Account, which provided that he was making timely statements, notwithstanding his receipt of FHB's monthly statements that apprised him that his direct debits were being returned.[6] We find that Lee's equitable estoppel argument fails for two reasons. First, with regards to the first and second elements in an equitable estoppel analysis, the record does not establish that Mobil, an international conglomerate, was intentionally misleading one of its franchisees by sending him Statements of Account that did not include information on the returned direct debits. Mobil explained that the error was caused by Mobil's internal accounting system, which "was not 'directly linked' with information generated by its 'direct debit system' and information provided by the statements furnished Mobil by the [BOG] relating to Mobil's account with the [BOG]." Appellant's Excerpts of Record, vol. II, p. 170 (Slater Decl.); *see* Appellant's Excerpts of Record, vol. II, p. 239 (Manlapaz Decl.) (expressing "Mobil acknowledges that it did not catch numerous returned items until the fall of 1999.").

[6] Although the parties refer to the defense of "waiver" in the topic sentence of their briefs, both parties do not separately address the elements of waiver and merely lump it with the equitable estoppel discussion. *See* Appellee's Brief, p. 13; Appellant's Reply Brief, p. 5. The separate defense of waiver stems from Lee's fifth defense contained in his First Amended Answer and Counterclaim, which states "Plaintiff waived the right to require timely payment of gasoline purchases and, therefore, waived the right to demand immediate payment therefore." Appellant's Excerpts of Record, vol. I, p. 37 (First Amended Answer and Counterclaim of Young Lee). Moreover, both parties fail to cite Article XVI(G) of the Franchise Agreement. The provision, entitled "Waiver," provides the following:

> Unless a specific time requirement is set forth in this Agreement, *no failure or delay* on the part of Mobil or Dealer in exercising any of their respective rights under this Agreement shall operate as a waiver of such rights. No single or partial exercise of any rights under this Agreement shall preclude any other or further exercise of such rights or the exercise of any other right under this Agreement.

Appellant's Excerpts of Record, vol. I, p. 32 (Franchise Agreement) (emphasis added). Consequently because the substance of the parties' brief do not treat waiver as a separate issue, we will not address waiver as a separate matter. *See Cent. Indiana Carpenters Welfare Fund v. Ellis*, 412 N.E.2d 865, 869 (Ind. Ct. App. 1980) ("Technically, there is a distinction between 'waiver' and 'estoppel.' A waiver is an intentional relinquishment of a known right and is a voluntary act, while the elements of estoppel are the misleading of a party entitled to rely on the acts or statements in question and a consequent change of position to his detriment.") (citation omitted).

However, once Mobil was made aware of the problem, it immediately notified Lee.

[25] Second, assuming *arguendo* that Lee successfully demonstrates that Mobil was aware of the returned direct debits and nonetheless sent Lee the inaccurate monthly Statements of Account, Lee remains unable to prove all of the requisite elements in an equitable estoppel defense. Lee must still establish that he was "ignorant of the true state of the facts" and was therefore, an innocent party. *See Scottsbluff Nat. Bank v. Blue J Feeds, Inc.*, 54 N.W.2d 392, 401 (Neb. 1952) (quotations and citations omitted) ("An essential element [of equitable estoppel] is the entire good faith and innocence of the party imposed on."); *W.E. Richmond & Co. v. Sec. Nat. Bank*, 64 S.W.2d 863, 872 (Tenn. Ct. App. 1933). Here, Lee does not deny receiving FHB monthly statements, which afforded him knowledge of the true facts. *See Scottsbluff Nat. Bank*, 54 N.W.2d at 401 (noting "no estoppel can arise where all the parties interested have equal knowledge of the facts, or where the party setting up the estoppel is chargeable with notice of the facts, or is equally negligent or at fault.") (citation omitted); *Yancey Bros. Co. v. Dehco, Inc.*, 134 S.E.2d 828, 830 (Ga. Ct. App. 1964) ("[A]n estoppel of this nature cannot arise where both parties have equal knowledge or means of obtaining knowledge of the facts alleged to constitute an estoppel."). More importantly, Lee is also not arguing that proper examination of the monthly statements, conducted by a prudent businessman such as himself, was insufficient to provide him notice of the returned direct debits. Lee's monthly bank statements from FHB informed him that certain direct debits were being returned as marked by "Return Item Non-Encl." At the bare minimum, Lee's disregard of the FHB statements illustrates that he did not "exercise . . . reasonable diligence to learn the truth." *See Scottsbluff Nat. Bank*, 54 N.W.2d at 401-02 (citation omitted).

[26] Accordingly, we hold that the trial court did not err with respect to the equitable estoppel defense issue.

B. PMPA

[27] The next issue that Lee presents is that the trial court erred in holding that Mobil's termination of the Franchise Agreement and the notice of termination complied with the provisions of the PMPA. The PMPA Act, 15 U.S.C. §§ 2801 *et seq*., "was enacted by Congress in 1978 to establish 'minimum Federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchiser or supplier of such fuel.'" *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1566 (11th Cir. 1987) (quoting to S. Rep. No. 95-731, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 873). The Act reflects Congress' concern with "protecting franchisees, who generally have inferior bargaining power when dealing with franchisors, from unfair termination or nonrenewal of their franchises." *Carter v. Exxon Co., U.S.A.*, 177 F.3d 197, 201 (3rd Cir. 1999) (citing S.Rep. No. 95-731, at 17-19, (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 875-77); *see Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986) (citing to S.Rep. No. 95-731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Admin.News 873, 874). In order to prevent unlawful terminations or non-renewal of franchise agreements, the PMPA "impos[es] two requirements on franchisors. First, the franchisor may terminate a franchise only for certain statutorily prescribed grounds. Second, the franchisee must be given adequate notice of the franchisor's intent to terminate the franchise." *Sun Refining & Mktg. Co. v. Rago*, 741 F.2d 670, 672 (3rd Cir. 1984) (citations omitted); *see Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 376 (4th Cir. 1992) (citations omitted). In the present appeal, Lee argues both that Mobil's termination of the Franchise Agreement was not properly grounded under the PMPA and that Mobil's first notice of termination did not comply with the PMPA.

1. Grounds for Termination

[28] The grounds for termination and non-renewal under the PMPA are specifically delineated and described in Title 15 U.S.C. § 2802(b)(2), which provides:

> For purposes of this subsection, the following are grounds for termination or nonrenewal of a franchise relationship:
>
> (A) *A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship*, if the franchisor *first acquired actual or constructive knowledge of such failure*—
>
> (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or
>
> (ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.
>
> (B) *A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise*, if—
>
> (i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and
>
> (ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.
>
> (C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period of the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—[7]
>
> (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or
>
> (ii) not more than 60 days prior to the date on which notification is given pursuant to section 2804(b)(1) of this title.

Title 15 U.S.C. § 2802(b)(2)(A)-(C) (2002) (emphasis and footnote added).[8] Moreover, even though

[7] "The PMPA provides a non-exhaustive list of examples of such occurrences under sub-section (C) including fraud or criminal conduct by the franchisee, and *failure by the franchisee to make timely payments of sums owing to the franchisor*." *Reyes v. Atlantic Richfield Co*., 12 F.3d 1464, 1468 (9th Cir. 1993) (citations omitted) (emphasis added).

[8] Although the trial court in its Decision and Order relied on section 2802(c)(8) as the ground for Mobil's proper termination of the Franchise Agreement, we are precluded from applying section 2802(c)(8) because Mobil's first notice

Title 15 U.S.C. § 2804, entitled "Notification of termination or nonrenewal of franchise relationship," is the principal provision, which governs the timing of when a notification for termination or non-renewal should be provided to the franchisee, the ground that a franchisor relies upon to justify the termination under section 2802(b) also triggers certain notice timing requirements.

[29] In the instant matter, Mobil's first notice of termination dated December 29, 1999 (hereinafter "first notice") provided as follows:

> Your failure to comply with the above-mentioned provisions provides grounds for termination of our Franchise Agreement, franchise and franchise relationship under the Petroleum Marketing Practices Act (PMPA). Pursuant to 15 U.S.C. 2802(b)(2)(A) and 2802(b)(2)(B), Mobil hereby terminates its Franchise Agreement, franchise and franchise relationship with you along with all related supplemental agreements, effective January 16, 2000.

Appellant's Excerpts of Record, vol. I, pp. 41-42 (Manlapaz's Ltr.). According to the first notice, Mobil's termination of the Franchise Agreement was grounded on sections 2802(b)(2)(A) and 2802(b)(2)(B). At the outset, we readily dispose of the issue of whether section 2802(b)(2)(A) was a proper ground for termination in light of Mobil's failure to comply with the notification timing requirements as set forth in section 2802(b)(2)(A).[9] However, even though Mobil's first notice was

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of termination did not specifically cite the section as a ground for termination. *See* Appellant's Excerpts of Record, vol. I, pp. 49-50 (Decision and Order, Dec. 4, 2001); *See O'Shea v. Amoco Oil Co*., 886 F.2d 584, 597-598 (3rd Cir. 1989) ("[I]n order for a termination to be proper under any of the subsections of section 2802(b)(2), the franchisor must comply with the notice requirement. *In order for the notice requirement to be meaningful, it must be the case that the franchisor, defending a PMPA action, not assert new reasons for the termination in court; the defendant must establish that the termination was proper under the PMPA based on the reasons that it gave to the franchisee in the notice of termination*.") (emphasis added).

[9] Mobil's reliance on 15 U.S.C. § 2802(b)(2)(A) fails. According to the record, Mobil "first acquired actual or constructive knowledge," 15 U.S.C. § 2802(b)(2)(A), of Lee's failure to comply with the provisions of the Franchise Agreement around September or October 1998 as evidenced by the parties' bank records. *See* Appellant's Excerpts of Record, vol. II, p. 176 (Mobil's Bank of Guam Statement of account 10-31-98, providing that "$46,890.36, ACH RT FOR YOUNG HA LEE—NSF"). Section 2802(b)(2)(A) requires that the "franchisor first acquired actual or constructive knowledge of [franchisee's] . . . failure . . . not more than 120 days prior to the date on which notification of termination . . . is given" pursuant to section 2802(b)(2)(A)(i) or "not more than 60 days prior to the date on which notification of termination or non renewal is given" pursuant to section 2802(b)(2)(A)(ii). 15 U.S.C. § 2802(b)(2)(A)(i), (ii).

improperly grounded on section 2802(b)(2)(A), the first notice was not rendered automatically ineffective and in contravention to the PMPA in light of Mobil's reliance on section 2802(b)(2)(B) as an alternative ground for termination. To be entitled to summary judgment, Mobil "needed to prove the occurrence of *only one* of the grounds for termination under the PMPA." *Clinkscales*, 831 F.2d at 1571 (emphasis added). Our review of the trial court's decision and order reveals that the trial court failed to consider whether Mobil properly relied on section 2802(b)(2)(B) as a ground for termination. In view of such failing, we remand this case for the trial court to determine whether section 2802(b)(2)(B) justified Mobil's termination of the Franchise Agreement.

2. Execution of Notice

[30] In addition to challenging whether Mobil's termination was properly grounded on the PMPA, Lee further contends that Mobil violated the timing and content requirements of the PMPA. Title 15 U.S.C. § 2804 sets forth the procedural and technical requirements of when a notice of termination must be sent and what that notice must contain. Section 2804 provides in relevant part:

> (a) General requirements applicable to franchisor
> Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship–
> **(1)** in the manner described in subsection (c) of this section; and
> **(2)** except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.
> (b) Additional requirements applicable to franchisor

Consequently, Mobil's December 29, 1999 notice surpassed both the one hundred twenty days and the sixty days requirement.

Furthermore, we are cognizant of the cases, which have held that each breach of the Franchise Agreement constitutes a separate and new running of the one hundred twenty days or sixty days period. *Geib v. Amoco Co.*, 29 F.3d 1050, 1056 (6th Cir. 1994) (citation omitted) (holding when "[franchisee] repeatedly breached the [Agreement], . . . each new breach provided [franchisor] with 120 days to terminate the franchise"); *Chevron U.S.A., Inc. v Finn*, 851 F.2d 1227, 1230 (9th Cir. 1988) (citation omitted) (finding that "each . . . separate violation of the lease agreement . . . constituted separate grounds for terminating the lease."). However, even if this court applies the analysis of those cases, Mobil still did not meet the one hundred twenty days or sixty days requirement. According to the NSF listing, the last entry/violation occurred on June 22, 1999. Mobil's December 29, 1999 notice surpassed both the one hundred twenty days and sixty days deadline.

> **(1)** In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section–
>
> **(A)** such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and
>
> . . . .
>
> (c) Manner and form of notification
>
> Notification under this section--
>
> **(1)** shall be in writing;
>
> **(2)** shall be posted by certified mail or personally delivered to the franchisee; and
>
> **(3)** shall contain–
>
> **(A)** a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;
>
> **(B)** the date on which such termination or nonrenewal takes effect; and
>
> **(C)** the summary statement prepared under subsection (d) of this section.

Title 15 U.S.C. § 2804 (2002). Lee argues that Mobil violated the PMPA because Mobil's first notice did not properly comply with the timing and content requirements set forth by the PMPA. Because we do not opine and remand the issue of whether Mobil's termination of the Franchise Agreement was properly grounded on the PMPA, we similarly remand the issue of whether Mobil violated the timing and content requirements of the PMPA. Our rationale for reserving opinion on this matter stems from the fact that the issue of whether Mobil's first notice of termination comported with the provisions of the PMPA is inextricably related to and contingent on whether Mobil's termination was properly grounded on the PMPA. If the trial court should find, however, that Mobil's termination was properly grounded on the PMPA, it should then make a determination of whether Mobil's first notice complied with the procedural and technical requirements as outlined in section 2804.

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IV.

[31] We hold that the trial court did not err in granting Mobil partial summary judgment on the breach of contract issue. With respect to the trial court's granting of Mobil's partial summary judgment on the PMPA issue, we **REMAND** this case for the trial court to determine whether Mobil's termination of the Franchise Agreement was proper under the PMPA, and if so, whether Mobil's notice of termination complied with the provisions of the PMPA. Accordingly, the trial court is **AFFIRMED** in **PART** and **REVERSED** in **PART**.

RICHARD H. BENSON
Justice *Pro Tempore*

FRANCES M. TYDINGCO-GATEWOOD
Associate Justice

F. PHILIP CARBULLIDO
Chief Justice