IN THE SUPREME COURT OF GUAM

MOBIL OIL GUAM, INC.,
Plaintiff-Appellee,

v.

YOUNG HA LEE,
Defendant-Appellant.

OPINION

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

Cite as: 2004 Guam 9
Vacating 2003 Guam 15

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Petition for Rehearing
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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] The court's Opinion in this matter, 2003 Guam 15, was filed on July 9, 2003. Defendant-Appellant Young Ha Lee ("Lee") filed a Petition for Rehearing on July 23, 2003. Plaintiff-Appellee Mobil Oil Guam, Inc. ("Mobil") filed a Petition for Rehearing on July 23, 2003. Lee's Petition for Rehearing was denied by this court on November 19, 2003. After considering Lee's Answer to Mobil's Petition for Rehearing, we hereby grant Mobil's Petition, vacate our Opinion, 2003 Guam 15, and issue this Opinion.

[2] This case arises out of Lee's alleged breach of a Petroleum Marketing Practices Act ("PMPA") Motor Fuels Franchise Agreement ("Franchise Agreement"). On Mobil's Motion for Summary Judgment, 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 PMPA. We affirm the decision of the trial court.

I.

[3] On September 1, 1998, Mobil and Lee executed a PMPA Franchise Agreement, wherein Lee was granted the right to use and occupy the Mangilao Mobil Station in 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 ("FHB") business banking account.

[4] For twelve months, Lee operated his service station and received monthly account statements 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 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 account statements did not reconcile with the parties' respective monthly bank statements.

[5] 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 ("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" ("NSF List") 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 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.).

[6] Lee did not submit a payment plan by his self-imposed deadline of October 21, 1999. Instead, on November 1, 1999, Lee personally delivered a letter to Manlapaz, which apologized for the overdue payments. The letter also contained a proposed payment plan, wherein Lee 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 in his November 1, 1999 letter was "unacceptable as it [did] not meet Mobil's requirements on the timeliness of the full payment of [Lee's] delinquent account." 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.).

[7] On November 26, 1999, Mobil again reminded Lee of his continued violation of Article II(C) of the Franchise Agreement. 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 pay 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.).

[8] 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. 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.

[9] 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 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" letter ("December 29th Notice of Termination"), which notified Lee that the Franchise Agreement would be terminated on January 16, 2000.

[10] On January 13, 2000, Lee's attorney informed Mobil that Lee 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 was 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 requested "that Mobil continue its practice of withholding" $9,000.00 to $10,000.00 monthly from Lee's "customers' credit card charges to apply on the outstanding indebtedness." Appellant's Excerpts of Record, vol. I, p. 162 (Teker's Ltr.).

[11] Despite Lee's offer, on January 16, 2000, Mobil effectively terminated the Franchise Agreement and took control of the Mangilao Mobil 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.

[12] On March 20, 2000, Mobil filed a Complaint in the Superior Court, 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 alleging that Mobil's termination and termination notice violated the provisions of the PMPA.

[13] On July 20, 2000, Mobil sent Lee a "Supplemental Notice of Termination." Appellant's Excerpts of Record, vol. II, p. 380 (Glath's Ltr.). Although "Mobil maintain[ed] that the 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's Ltr.).

[14] 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.

[15] On December 4, 2001, the trial court issued a decision and order granting partial summary judgment and holding that Lee breached the Franchise Agreement and that Mobil complied with the PMPA. Appellant's Excerpts of Record, vol. I, p. 51 (Decision and Order). However, the trial court found that there was a factual question regarding "the amount due in excess of $164,922.51." Appellant's Excerpts of Record, vol. I, p. 47 (Decision and Order). The trial court also dismissed Lee's counter-claim "for attorney fees and exemplary damages." Appellant's Excerpts of Record, vol. I, p. 51 (Decision and Order). Lee appealed.

II.

[16] This court has jurisdiction over this appeal from a final judgment pursuant to Title 7 GCA §§3107 (as amended by P.L. No. 27-31, Oct. 31, 2003) , 3108(a) (1994).

[17] 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*. *Brown v. Dillingham Const. Pacific Basin Ltd.*, 2003 Guam 2 ,¶ 6. "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.

[18] 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 the Franchise Agreement

[19] Lee avers three factual issues to support his contention that the trial court erred in granting summary judgment on the breach of contract issue: (1) non-delivery of fuel, (2) amount of damages, and, (3) equitable estoppel.

1. Non-Delivery of Fuel

[20] 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) (citation omitted), Lee has not proffered any material evidence that disputes Mobil's actual delivery of the fuels.

[21] The gravamen of Lee's allegation of non-delivery of fuel is that the documents accompanying Mobil's NSF List are computer-generated and contain no signatures to prove receipt of the deliveries. We find Lee's allegation unpersuasive. The NSF List contains twelve entries, denoting the dates and the amounts of the returned direct debits from Lee's account. Accompanying the NSF List 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 (N.Y. App. Div. 1990) (citations omitted).

[22] 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 conclusory assertions that Mobil did not make the actual deliveries of fuel are insufficient to defeat summary judgment. *See Hartz Mountain Corp. v. Allou Distribs., Inc.*, 570 N.Y.S.2d 66, 67 (N.Y. 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 Amount of Damages

[23] 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. Lee's challenge is grounded upon the declaration of Roger Slater ("Slater"), a Certified Public Accountant, 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, especially unpersuasive since Lee was responsible for maintaining current, complete and accurate business records under the Franchise Agreement.[1] 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.

a. Equitable Estoppel

[24] Lee's last challenge with respect to the breach of contract issue is whether equitable estoppel is applicable in this case. "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 (Ohio Ct. App. 1999) (citation and internal quotation marks 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 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

[1] 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).

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:
> . . . .
> (3) 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 law (CCP § 1962). Case law applying the doctrine has set forth four elements that must be proven in an equitable estoppel analysis:

> (1) 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. v. Pac. Fin. Corp., 356 P.2d 192, 195-196 (Cal. 1960); *Mariano v. Guam Civil Service Comm'n Bd.*, D.C. Civ. App. No. 810052A, 1983 WL 30227 * 1 (D. Guam App. Div. June 20, 1983); *Safway Steel Prods. v. Lefever*, 256 P.2d 32, 33 (Cal. Ct. App. 1953).[2] 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." *See Crestline Mobile Homes*, 356 P.2d at 195-96.

[25] 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 account statements, 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. 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

[2] Because Guam's equitable estoppel statute was derived from California law, case law from that state is persuasive. *See O'Mara v. Hechanova*, 2001 Guam 13, ¶ 8 n.1. District Court of Guam Appellate Division opinions are also persuasive. *People v. Quenga*, 1997 Guam 6 , ¶ 13 n.4.

establish that Mobil, an international conglomerate, was intentionally misleading one of its franchisees by sending him account statements 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 Bank of Guam relating to Mobil's account with the Bank of Guam." Appellant's Excerpts of Record, vol. II, p. 170 (Slater's 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."). However, once Mobil was made aware of the problem, it immediately notified Lee.

[26] Second, assuming *arguendo* that Lee successfully demonstrates that Mobil was aware of the returned direct debits and nonetheless sent Lee the inaccurate monthly account statements, 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'l. 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'l. Bank*, 64 S.W.2d 863, 872 (Tenn. Ct. App. 1933). Here, Lee does not deny receiving FHB's monthly statements, which afforded him knowledge of the true facts. *See Scottsbluff Nat'l. Bank*, 54 N.W.2d at 402 (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.") (citations omitted and quotation marks 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.") (citations omitted). 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'l. Bank*, 54 N.W.2d at 402 (citations omitted).

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

B. Compliance with the PMPA

[28] Lee argues 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, 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 S. REP. NO. 95-731, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S.C. C.A.N. 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 S.REP. NO. 95-731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S.C.C.A.N. 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).

[29] Lee argues that summary judgment was inappropriate because material facts are in dispute on the issue of whether Mobil complied with the PMPA's provisions. We disagree. The PMPA delineates specific grounds for termination and non-renewal of a franchise agreement. In particular, Title 15 U.S.C. § 2802(b)(2) 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—
>
> (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.

15 U.S.C. § 2802(b)(2)(A)-(C) (2002)(emphasis added).

(30) Mobil's December 29th Notice of Termination 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' Ltr.). The termination of the franchise agreement was expressly based on subsections (A) and (B) of section 2802(b)(2). We turn to whether Mobil complied with each of these provisions.

1. Section 2802(b)(2)(A)

[31] To justify termination of a franchise agreement, section 2802(b)(2)(A) requires that the franchisee's breach must be a failure to comply with a provision of the franchise that is reasonable and materially significant to the franchise relationship. 15 U.S.C. § 2802(b)(2)(A) (2002). This section then gives two different timing requirements for a notice of termination: (1) a notice of termination must be furnished within 120 days of the franchisor acquiring actual or constructive notice of the franchisee's failure, if the notice is given not less than ninety days prior to the termination date (pursuant to Title 15 U.S.C. § 2804(a)); or (2) a notice of termination must be furnished within sixty days of the franchisor acquiring actual or constructive notice of the franchisee's failure, under circumstances in which it would unreasonable for the franchisor to provide notice not less than 90 days prior to the termination date (pursuant to Title 15 U.S.C. § 2804(b)(1)). 15 U.S.C. § 2802(b)(2)(A) (2002).

[32] In this case, Mobil furnished the December 29th Notice of Termination, which stated that the franchise would be terminated on January 16, 2000. Lee argues that the effective date of termination was not properly indicated because the December 29th Notice of Termination and the Supplemental Notice of Termination provided four dates.

[33] A notice terminating a franchise agreement must contain "the date on which such termination or nonrenewal takes effect." 15 U.S.C. § 2804(c)(3)(B) (2002). The Supplemental Notice of Termination sent by Mobil to Lee on July 20, 2000 was apparently aimed at correcting any potential deficiencies in complying with the timing requirements for providing notice under the PMPA. However, the supplemental notice offers Mobil no support. The December 29, 1999 notice of termination expressly specified a termination date: "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, p. 42 (Notice of Termination). On January 16th, Lee met Manlapaz at the service station and "voluntarily turned over the site to Mobil." Appellant's Excerpts of Record, vol. II, p. 245 (Manlapaz' Decl.). Thus, there is no genuine issue of material fact that the December 29th Notice of Termination provided the January 16, 2000 date of termination, and on that date Mobil took possession of the service station and terminated the Franchise Agreement.

[34] Without dispute, the December 29th Notice of Termination gave less than ninety days notice before the termination date. Thus, our inquiry is narrowed to whether there is a genuine issue of material fact that: (1) the breach was reasonable and of material significance to the franchise relationship, and (2) Mobil complied with section 2804(b)(1).

a. Lee's Breach of the Franchise Agreement

[35] The December 29th Notice of Termination was based on Lee's violation of Articles I(C), II(C), and IV(A) of the franchise agreement. Appellant's Excerpts of Record, vol. I, p. 41 (Notice of Termination). Article I(C) required Lee to comply with personal performance obligations and commitments. Appellant's Excerpts of Record, vol. I, p. 4 (Franchise Agreement). Article II(C) required Lee to make payment by direct debit or other payment method specified by Mobil. Appellant's Excerpts of Record, vol. I, p. 6 (Franchise Agreement). Article IV(A) governed Lee's use of the marketing premises. Appellant's Excerpts of Record, vol. I, p. 9 (Franchise Agreement).

[36] Lee argues that the notice of termination did not mention Lee's failure to make payments for the fuel delivered to him, thus he did not have information to determine whether the termination complied with the PMPA. Appellant's Opening Brief p. 31. His argument is unconvincing. In addition to stating that Lee violated Article II(C), requiring payment of amounts due as specified by Mobil, the December 29th Notice of Termination stated:

> In previous warning notices, we outlined your violations and requested that you carry out the above-mentioned provisions of your franchise. Despite those opportunities to cure, however, you have continued to violate those provisions. Your account remains past due in the sum of $226,101.68.

Appellant's Excerpts of Record, vol. I, p. 41 (Notice of Termination). This notice clearly referred to Lee's failure to pay amounts past due. Lee admitted that he learned of the unpaid debits on October 4, 1999, made payments toward his debt, and engaged in negotiations over payment proposals with Mobil throughout the months of October, November and December of 1999 and up to January 13, 2000. Appellant's Excerpts of Record, vol. I, pp. 56-62 (Lee's Decl.). Lee does not dispute that Mobil made repeated demands for payment in his meetings with Mobil officials on October 4, November 4, and November 8, 1999. Appellant's Excerpt of Record, pp. 58-60 (Lee Decl. ¶¶ 9-11, 13). Additionally, Lee does not dispute that Mobil demanded payment by letters of November 8, November 26, December

1, December 15, and December 22, 1999. Appellant's Excerpts of Record, vol. II, pp. 355, 356, 360, 363, 368 (Manlapaz Decl.).

[37] The December 29th Notice of Termination and the undisputed record show that Lee had ample knowledge of his failure to pay Mobil and his violation of Article II(C) of the Franchise Agreement. The analysis turns to whether the breach was reasonable and of material significance to the franchise relationship.

[38] Under the PMPA:

> 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 includes events such as [the] *failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled.*

15 U.S.C. § 2802(c)(8) (emphasis added internal, quotation marks omitted). Thus, Lee's undisputed failure to pay all sums to which Mobil was entitled was a material breach of the Franchise Agreement and Mobil's termination of the Franchise Agreement was justified under the PMPA. The next question is whether Mobil complied with the timing requirements of the PMPA.

b. Compliance with sections 2802(b)(2)(A)(ii) and 2804(b)(1)

[39] As noted above, because Mobil's December 29th Notice of Termination gave less than ninety days notice prior to the date of termination, section 2802(b)(2)(A)(ii) applies. This section provides that the franchisor must have

> first acquired actual or constructive knowledge of [the franchisee's] . . . failure . . . 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,

15 U.S.C. § 2802(b)(2)(A)(ii) (2002). Section 2804(b)(1) is also applicable under the present circumstances and it provides:

> 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 . . . such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable[.]

15 U.S.C. § 2804(b)(1) (2002). The analysis requires a determination of whether: (1) Mobil acquired actual or constructive notice of Lee's failure to pay within sixty days prior to the December 29th Notice of Termination, and (2) it would have been unreasonable for Mobil to provide ninety days notice.

[40] Lee states that Mobil acquired actual or constructive notice of the first unpaid debit as early as October of 1998 as indicated in Mobil's Final Warning letter of December 15, 1999. Appellant's Opening Brief p. 40. Thus, Lee argues that more than a year lapsed from the date Mobil's debits were first returned to the date of the December 29th Notice of Termination, in violation of the sixty day actual or constructive knowledge requirement of section 2802(b)(2)(A)(ii). We disagree. The same Mobil letter that Lee uses to support this argument also shows a series of returned debits extending to June 22, 1999. *See* Appellant's Excerpts of Record, vol. II, pp. 364, 316 (Manlapaz Decl). Each of these returned debits constituted a new breach. *See Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1056 (6th Cir. 1994). Moreover, it is undisputed that Mobil began demanding payment and commenced negotiations for payment plans in October of 1999.

[41] The case of *California Petroleum Distrib. v. Chevron U.S.A., Inc.*, 589 F.Supp. 282 (E.D. N.Y. 1984), provides a situation very similar to the one at bar. In that case, California Petroleum became indebted to Chevron for failing to pay for fuel products and Chevron spent four months attempting to negotiate payment to preserve the franchise agreement. *Id.* at 284-85. Chevron terminated the franchise agreement and gave sixteen days notice. *Id.* at 285. Because Chevron's notice of termination provided less than ninety days notice, the issue was whether Chevron had actual or constructive knowledge of California Petroleum's breach within sixty days prior to the issuance of the notice of termination. *Id.* at 287. The court held that California Petroleum's failure to pay amounts past due was an ongoing default and that each of Chevron's unsuccessful attempts to negotiate payment gave rise to a new event of noncompliance. *Id.* at 288. The court found that the last meeting between Chevron and California Petroleum, wherein the franchisee could neither give nor guarantee payment, was a new default and Chevron's notice of termination, issued within three weeks of that meeting, was within the sixty day actual or constructive knowledge requirement. *Id.*

[42] We agree in principle with *California Petroleum*[3] and find that Lee's failure to commence payments on December 28, 1999, pursuant to Mobil's last demand letter of December 22, 1999,

[3] Although *California Petroleum* is a decision of a federal district court, both Lee and Mobil argued the applicability of *California Petroleum* in their briefs. Moreover, the parties did not offer, and this court could not find, appellate case law involving the issues and factual circumstances presented in the instant case.

constituted a new breach of the franchise agreement. Therefore, we hold that Mobil's December 29th Notice of Termination was in compliance with the sixty day actual or constructive knowledge requirement of Title 15 U.S.C. § 2802(b)(2)(A)(ii).

[43] Lee next argues that the eighteen days notice given by Mobil was not reasonable under section 2804(b)(1). We disagree. Mobil began negotiations with Lee in October of 1999. A series of proposals, counter-proposals and demands for payment were made through December of 1999. Thus, from October of 1999 through January 16, 2000, Lee had more than three months to attempt to make payments or arrive at a payment plan to Mobil's satisfaction. Moreover, although the last demand letter gave Lee until December 28, 1999 to begin payments, the December 29th Notice of Termination effectively gave Lee eighteen additional days to attempt to cure his deficiencies. Indeed, the record shows that Lee attempted to save the franchise on January 13 and 14, 2000. Appellant's Excerpts of Record, vol. I, pp. 67-68 (Lee Decl.). Under these circumstances, we find that Mobil's eighteen-day notice of termination was reasonable. *See California Petroleum*, 589 F.Supp at 289 (finding that a sixteen-day notice of termination was reasonable after the franchisor spent four months attempting to negotiate payment); *cf*. *Zipper v*. *Sun Co.*, 947 F.Supp. 62, 69 (E.D. N.Y. 1996) (finding that it would have been reasonable for the franchisor to give ninety days notice, "*or at least some notice which was not effective immediately*"(emphasis added, internal quotation marks omitted).

[44] We hold that Mobil's December 29th Notice of Termination was proper under 15 U.S.C. § 2802(b)(2)(A) and the timing requirements of sections 2802(b)(2)(A)(ii) and 2804(b)(1).

2. Section 2802(b)(2)(B)

[45] Because we hold that termination of the Franchise Agreement was proper under section 2802(b)(2)(A), we need not reach the issue of whether it was also proper under section 2802(b)(2)(B). *See Clinkscales*, 831 F.2d at 1571 (stating that a franchisor need prove "only one of the grounds for termination under the PMPA.").

3. Section 2801(13)(B)

[46] Lee's final argument is that his failure to pay Mobil resulted from acts which were beyond his control. Specifically, Lee cites to the PMPA definition of "failure" which provides: "The term failure does

not include . . . any failure for a cause beyond the reasonable control of the franchisee." 15 U.S.C. § 2801(13)(B) (2002). Lee argues that Mobil's negligence in furnishing incorrect information on his monthly account statements was beyond his control and caused his nonpayment. We disagree.

[47] While better accounting practices might have enabled Mobil to discover Lee's unpaid debts sooner, Lee also had an affirmative duty to pay any amounts owed to Mobil under Article II(C) of the Franchise Agreement or risk termination under Title 15 U.S.C. §§ 2802(b)(2) and 2802(c)(8). As we noted above, Lee does not dispute receiving the FHB monthly statements of his account which afforded him knowledge of the facts. Moreover, and as also found above, Lee's disregard of the FHB statements amounted to a failure to exercise reasonable diligence. Thus, Lee's failure to make payments was not beyond his reasonable control and section 2801(13)(B) is not available to Lee as a defense.

IV.

[48] We find that there are no genuine issues of material fact that Lee breached the Franchise Agreement, that his breach was reasonable and of material significance to the franchise relationship, and that Mobil's December 29th Notice of Termination complied with the provisions of the PMPA. We hold that Mobil is entitled to summary judgment as a matter of law on these issues. The summary judgment of the trial court is hereby **AFFIRMED**.