

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CASE NO. 1:05-CV-00436-CCB

DREAMS, INC.,

Appellant,

v.

UNITAS MANAGEMENT CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND, BALTIMORE DIVISION
CHAPTER 11, CASE NO. 03-60005-SD, AND ADVERSARY NO. 03-05810

REPLY BRIEF OF APPELLANT

Bryan D. Bolton
Michael P. Cunningham
Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, Maryland 21201-3111
(410) 659-7700 (telephone)
(410) 659-7773 (facsimile)

Attorneys for Appellant, Dreams, Inc.

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I. PRELIMINARY STATEMENT

In a vain attempt to create contractual life after death, Appellee, Unitas Management Corporation (“UMC”), misstates the facts, misstates the bankruptcy court’s findings of fact, and misstates the law. UMC’s legal alchemy must fail because the death of Johnny Unitas, Sr. (“Mr. Unitas”) terminated the personal services agreement between UMC and Appellant, Dreams, Inc. (“Dreams”), and no authority exists to support the proposition that the word “guarantee” revives such a contract. Indeed, the word “advance,” which UMC relies upon, proves the money to be paid by Dreams was an “advance” against future services Mr. Unitas was to render. Once Mr. Unitas became unable to perform due to death, the contract terminated and further “advances” were not due. For this reason, and the reasons more fully explained below, the judgment of the bankruptcy court should be reversed.

II. ARGUMENT

A. UMC Seeks To Extend The Life Of The Personal Services Agreement By Misleading The Court And By Misrepresenting The Bankruptcy Court’s Findings Of Fact

UMC falsely states that “Dreams had the exclusive right to ‘the name, likeness and persona of [Mr.] Unitas’ during the term of the contract, through December 31, 2004.” (Appellee’s Br. at 4, 12.) UMC made the same argument before the bankruptcy court (*see* Pl.’s Mem. Supp. Mot. Summ. J. at 1), and lost this point when the bankruptcy court declined to make this finding of fact. (*See* Mem. Op.) Having failed to file a cross-appeal, UMC cannot now argue the bankruptcy court’s finding of fact was in error. *See Smith v. Dairymen, Inc.*, 790 F.2d 1107, 1110-11 (4th Cir. 1986) (“[O]nly a party who files a notice of appeal [pursuant to the Bankruptcy Rules] properly invokes the appellate jurisdiction of the district court[.]”); *United*

States Dep't of Educ. v. Blair (In re Blair), 301 B.R. 181, 183-84 (D. Md. 2003); *see also* Fed. R. Bankr. P. 8002(a) (providing 10 days from date of entry of judgment to file a notice of appeal).

Indeed, the bankruptcy court found the personal services agreement required Mr. Unitas to (i) personally autograph items; and (ii) make personal appearances. (Mem. Op. at 2.) Thus, UMC errs when it contends, at page 12 of its brief, that “prospective performance of *some obligations* undertaken by the parties may have been excused *per force* by the death of [Mr. Unitas]....” (Appellee’s Br. at 12) (emphasis added). The death of Mr. Unitas, per the bankruptcy court’s findings of fact, *per force* relieved UMC of *all obligations* to perform under the personal services agreement. Indeed, even UMC acknowledged that Mr. Unitas did not perform any services under the agreement with Dreams after his death. (See Deposition of Howard H. Moffet (UMC’s corporate designee) (“Moffet Dep.”) (Ex. 7 to Mem. Supp. Def.’s Mot. Summ. J. (Paper No. 28 in Adversary No. 03-05810)), at 33.) Thus, the sundry arguments by UMC concerning obligations continuing beyond death and continuing through the end of 2004 are erroneous, both as a matter of law and as a matter of fact, based on the bankruptcy court’s finding of fact.

UMC also argues the contract between Dreams and UMC “may be generally characterized as a hybrid personal services contract.” (Appellee’s Br. at 11.) Once again, however, the bankruptcy court’s findings of fact are at odds with UMC’s assertion. According to the bankruptcy court, the agreement between UMC and Dreams “is a personal services agreement.” (Mem. Op. at 4.) UMC, having failed to file a cross-appeal, cannot now argue that the contract is a “hybrid personal services contract.” *See, e.g., In re Blair*, 301 B.R. at 183-84.

Moreover, contrary to UMC’s repeated assertion in its brief, the license to use the name and likeness of Mr. Unitas *in advertising* “Unitas Articles” was not an exclusive right of

publicity for the name, likeness and persona of Mr. Unitas. (See Personal Services Agreement (“PSA”), ¶ 1.c.) Indeed, deals to use Mr. Unitas’ name and likeness in other contexts or for other purposes were negotiated separately and subject to separate agreement. (See, e.g., Deposition of John Unitas, Jr. (“Unitas Dep.”) (Ex. 2 to Mem. Supp. Def.’s Mot. Summ. J.), at 63-67.) Dreams never had an outright assignment of the publicity rights of Mr. Unitas. Dreams had no right to use the limited license granted in Paragraph 1.c. for anything other than advertising the sale of Unitas Articles. See, e.g., *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730-31 (8th Cir. 1995) (holding defendant’s use of celebrity’s right of publicity exceeded scope of license when publicity right was used in a manner not contemplated by license); *Dzurenko v. Jordache, Inc.*, 451 N.E.2d 477, 478 (N.Y. 1983) (holding use of professional model’s photograph for large poster advertisement was outside scope of license permitting “magazine ad use only”); 2 J. Thomas McCarthy, *The Rights of Publicity and Privacy* §§ 10:27, 10:35 (2d ed. 2000) (noting consent for a particular use cannot be stretched to include consent for different uses, and use by a licensee outside the scope of a license or consent can constitute invasion of privacy or breach of the license contract).

B. The California Authority Relied Upon By UMC Does Not Support
The Bankruptcy Court’s Decision Or UMC’s Position

UMC relies on essentially one case to support its strained interpretation of the personal services agreement. This intermediate appellate court decision has absolutely no application to the facts or issues in this case. The fact that neither the bankruptcy court nor UMC can find any relevant legal authority to support the decision below speaks volumes about the validity of that decision.

In *National Football League Players Association v. National Football League Management Council*, 233 Cal. Rptr. 147 (Cal. Ct. App. 1986), the court considered whether the

doctrines of mitigation and offset were applicable in a case where an NFL player was “waived” and subsequently earned more money playing for two other NFL teams.

In 1980, the Oakland Raiders assumed four one-year contracts for quarterback Dan Pastorini. *See id.* at 149. Each of Pastorini’s contracts contained the following provision:

Club shall pay Player the salary specified ... even if at any subsequent time Player’s skill or performance is judged by Club to be unsatisfactory as compared with that of other players competing for positions on Club’s roster The guarantee provided ... above shall in no way affect the operation of the League’s waiver system.

Id. This provision, sometimes found in NFL player contracts, is known as a “skills guarantee.”¹

A “skills guarantee” prevents a team from terminating a player’s contract for unsatisfactory performance and guarantees the player’s salary even if he does not play. *See id.* at 152.²

After one season, the Raiders determined Pastorini’s “skill and performance were unsatisfactory.” *Id.* at 149. Although unable to terminate his contract because of the “skills guarantee,” the Raiders placed Pastorini “on waivers” and released him in accordance with his contract. *See id.* After being waived, Pastorini secured other work with the Los Angeles Rams and later the Philadelphia Eagles. *See id.* During the three years he played for the Rams and the Eagles, Pastorini earned a higher cumulative salary than he would have received from the Raiders. *See id.* Nevertheless, Pastorini demanded the Raiders pay him the full amount of his salary pursuant to the “skills guarantee” provision in his contracts. *See id.* When the Raiders refused, Pastorini instituted an arbitration proceeding against his former team. *See id.*

¹ *See* Daniel M. Faber, *The Evolution of Techniques for Negotiation of Sports Employment Contracts in the Era of the Agent*, 10 U. Miami Ent. & Sports L. Rev. 165, 182 (1993).

² Under a standard NFL player contract, a team can “cut” a player for unsatisfactory performance, thereby terminating the player’s contract with no further financial obligations to the player. *See Clark v. First City Bank*, 891 F.2d 111, 113 (5th Cir. 1989) (discussing “skills guarantee” provision in an NFL player’s contract).

The Raiders defended against Pastorini’s claim based on the doctrines of mitigation of damages and offset. *See id.* at 150. The Raiders did not contend Pastorini’s contract terminated or that Pastorini breached his contract. *See id.* The arbitrator found the doctrines of mitigation and offset did not apply because the case did not involve a wrongful discharge and then awarded Pastorini his full salary. *See id.* at 149. In confirming the arbitrator’s decision, the court found Pastorini “fully performed under the contracts with [the Raiders].” *See id.* at 153. Indeed, Pastorini was ready, willing, and able to perform in accordance with his contracts. It was the Raiders who decided they would no longer need Pastorini’s services.

Unlike Pastorini, UMC’s performance was rendered *impossible* by the death of Mr. Unitas. Pastorini’s case has no application here because UMC did not, and cannot, fulfill its obligations under the PSA. Furthermore, unlike the Raiders, Dreams did not voluntarily “release” UMC from its obligations under the PSA. Dreams understood and accepted that the PSA terminated, as a matter of law, upon the death of Mr. Unitas.

C. UMC Ignores The Constructive Condition That The Personal Services Agreement Would Terminate Upon The Death Of Johnny Unitas And Ignores The Key Word “Advance” In The Personal Services Agreement

UMC contends the phrase “guaranteed nonrefundable advance” obligated Dreams to continue performing under the personal services agreement, notwithstanding the death of Mr. Unitas. UMC’s discussion of this issue, however, ignores the constructive contract term that Mr. Unitas would remain alive. *See Nutt v. Members Mut. Ins. Co.*, 474 S.W.2d 575 (Tex. Civ. App. 1971). Once Mr. Unitas died, the constructive contract term caused the personal services agreement to terminate.

Although the parties by express agreement may override this constructive condition, the personal services agreement clearly does not do so. Indeed, the operative words “guaranteed

nonrefundable advance” are inconsistent with UMC’s legal position. If the payments by Dreams were a “guaranteed nonrefundable advance,” then the word “advance” clearly connects the payments by Dreams with the continued performance by Mr. Unitas. Once Mr. Unitas became unable to perform his duties, as a result of his death, the personal services agreement terminated, and the right to receive further “advances” ended. Thus, the pertinent language in the personal services agreement does not support the legal position espoused by UMC.

III. CONCLUSION

For all the reasons stated, the Court should reverse the bankruptcy court’s decision and direct the entry of judgment in favor of Dreams, Inc.

Respectfully submitted,

/s/ Michael P. Cunningham
Bryan D. Bolton
Federal Bar No. 02112
Michael P. Cunningham
Federal Bar No. 26010

Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, Maryland 21201-3111
(410) 659-7700 (telephone)
(410) 659-7773 (facsimile)

Attorneys for Dreams, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 24th day of March, 2005, copies of the foregoing Reply Brief of Appellant were mailed, first class, postage prepaid, to:

Glenn E. Bushel, Esquire
Tydings & Rosenberg, LLP
100 East Pratt Street, 26th Floor
Baltimore, Maryland 21202

Attorneys for Unitas Management Corporation

and

U. S. Trustee
300 W. Pratt Street, Suite 350
Baltimore, Maryland 21201

/s/ Michael P. Cunningham
Michael P. Cunningham