SC 87816

IN THE MISSOURI SUPREME COURT

RICHARD D. WEINSTEIN,

Plaintiff-Appellant,

v.

KLT TELECOM, INC.,

Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri

21st Judicial Circuit

The Honorable Carolyn Whittington, Judge

APPELLANT RICHARD D. WEINSTEIN'S SUBSTITUTE REPLY BRIEF

Kenneth J. Mallin #33307
Kimberly A. Mohr #54067
BRYAN CAVE LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020
kjmallin@bryancave.com
kimberly.mohr@bryancave.com

Edward L. Dowd, Jr. #28785
DOWD & BENNETT LLP
7733 Forsyth Blvd.
Suite 1410
Clayton, MO 63105
(314) 889-7300
(314) 863-2111
edowd@dowdbennett.com

Attorneys for Plaintiff-Appellant, Richard D. Weinstein

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER

INTRODUCTION

KLTT has boiled this appeal down to a single, conveniently tailored issue: KLTT argues that "[s]imply put, Weinstein wants KLTT to pay him $15 million for nothing." This is not what Weinstein is seeking in this appeal. Weinstein simply wants KLTT to hold up its end of the parties' agreement. In this agreement, KLTT granted Weinstein a put option and promised to pay Weinstein $15 million dollars if Weinstein: (a) transferred a stock certificate evidencing his remaining shares in DTI to the agreed upon escrow agent at the close of the transaction contemplated by the Second Amended and Restated Agreement; and (b) exercised his option in the time and manner prescribed by the parties' agreement. Weinstein has done both. The trial court erred in granting summary judgment in favor of KLTT, and denying Weinstein's motion for summary judgment, and the Court of Appeals erred when it affirmed that judgment.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE THERE HAS BEEN NO FAILURE OF CONSIDERATION FOR KLTT'S CONTRACTUAL OBLIGATIONS, IN THAT CONSIDERATION MUST BE ASSESSED AT THE TIME THE PUT OPTION AGREEMENT WAS ENTERED INTO, AND AT THAT TIME, WEINSTEIN'S SHARES IN DTI EXISTED AND HAD VALUE.

KLTT's "failure of consideration" argument rests on the proposition that "consideration for [an] option is a thing apart from consideration for the sale of the [subject of the option].” Citing only cases involving options to purchase, rather than options to sell, KLTT argues that there was no consideration for its obligation to pay the agreed upon floor value because, by the time Weinstein was allowed to exercise his option, the shares in DTI had been extinguished by the bankruptcy court.

The cases cited by KLTT are easily distinguishable and merely recognize that the holder of an option to purchase cannot force the optionor to sell without tendering consideration for the sale, i.e., the purchase price.[1] KLTT’s cases involve option agreements, but this is where the similarities end. None of these cases involved a put

---

[1] Suhre v. Busch, 120 S.W.2d 47 (Mo. 1938), the main case upon which KLTT relies, is distinguishable for yet another reason. In Suhre, the court held that the plaintiff had not effectively exercised her option to purchase stock because she did not tender the purchase price within the time allotted by the contract.

KLTT attempts to downplay this distinction by arguing that “[i]t makes no difference whether Weinstein’s conveyance of stock to KLTT is viewed as the obligation supporting the bilateral contract formed upon exercise of his option, or the means of accepting KLTT’s offer to purchase. . . . If the latter, then no contract exists because there has been no acceptance.” Here, unlike the plaintiff in Suhre, there is no dispute that Weinstein exercised his option in the manner required by the terms of the parties’ agreement. (L.F. 502).

option, and this is a distinction with a significant difference.[2] Unlike a put option, an option to purchase (otherwise known as a "call option") becomes valuable when the subject of the option increases in value. See, e.g., C.F.T.C. v. Risk Capital Trading Group, Inc., 2006 WL 2468277, *25 (N.D. Ga. 2006) ("A call option is in-the-money if the option exercise price is below the underlying futures price.). For this reason, the holder of a call option would never exercise the option if – as in this case – the subject of the option has ceased to exist or no longer has value. Therefore, the rule suggested in the cases cited by KLTT would never come into play. On the other hand, a put option becomes valuable when the subject of the option decreases in value. See id. at *35 ("A put option is in-the-money if the option exercise price is above the underlying futures price."). This is when the risk pays off.

The trial court's judgment and the Court of Appeals' decision deprived Weinstein of this pay-off. KLTT agreed to pay Weinstein the floor value of the option if he exercised his option in the time and manner described in the Put Option Agreement, and required only that he hold "good, valid and marketable title" to the remaining shares in DTI for one year. (L.F. 310; 317). Under these facts, KLTT – not Weinstein – took the

---

[2] Ragan v. Schreffler, 306 S.W.2d 494 (Mo. 1957), and Hott v. Pearcy/Christon, Inc., 663 S.W.2d 851 (Tx. Ct. App. 1983), involved options to purchase real estate, and Fru-Con Construction Corp. v. KFX, Inc., 153 F.3d 1150 (10th Cir. 1998), and Suhre involved options to purchase – not sell – shares.

gamble that the stock certificate would not represent anything when Weinstein exercised his option – two years after it was granted. Consideration for KLTT's obligations under the Put Option Agreement has not failed because that gamble did not pan out. See, e.g., WILLISTON ON CONTRACTS § 7:21 ("[T]ransferring worthless corporate stock will serve as consideration so long as it is clear that there is no fraud or other impropriety involved in the transaction and so long as it can be said that the promisor was in fact bargaining for what he received."); Malloy v. Short, 1991 WL 86205 (Conn. Super. May 9, 1991) (though stock may have been worthless when stock purchase agreement was entered into and note supporting the sale of the stock came due, there was sufficient consideration for the note where maker was aware of the corporation's financial condition when he entered into the agreement); Napoli v. Cavalier, 163 A.2d 824, 825 (D.C. App. 1960) (where buyer of 51% of stock in corporation also owned remaining 49% and was active in the corporate business, buyer would not be heard to complain that alleged insolvency of corporation and worthlessness of stock caused a lack of consideration for the note which the buyer gave in consideration for the stock transfer).

KLTT may receive little more than a piece of paper in exchange for the floor value of the option, but that is the risk that KLTT took. The fact that DTI entered bankruptcy does not obviate the parties' agreements. Under Missouri law, the fact that the party receiving the consideration ultimately realized little or no economic benefit is immaterial. Diminished value – and even a complete of lack of value – does not result in a failure of consideration. See, e.g., Union Pac. R. Co. v. KC Transit Co., 401 S.W.2d 528, 536 (Mo. App.1966) ("If promisor gets what he bargained for, there is no failure of consideration although what he receives become less valuable or of no value at all.") (emphasis added); Vorchetto v. Sappenfield, 14 S.W.2d 685, 686 (Mo. App. 1929) ("[I]t is well settled that because one suffers a disappointment in his bargain a failure of consideration does not arise. . . .").

This rule applies with equal force to the Put Option Agreement at issue in this case. See 12A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5575 ("The adequacy of consideration is to be determined with reference to the date of the option rather than the date of its exercise.") (emphasis added); In re Air Vermont, Inc., 44 B.R. 440, 443 (Bankr. D.Vt. 1984) ("[T]o determine whether an option to purchase is for nominal consideration, the option price should be compared with the fair market value of the subject matter, not as of the time the option is to be exercised, but as of the formation of the agreement."); Polinsky v. Vaughan, 268 Cal.App.2d 183, 194 (Cal. App. 1968) ("In case of the exercise of an option, the value at the time the option was given is considered the measure of the adequacy of the consideration.").

KLTT underplays the significance of these cases, by drawing a specious distinction between stock that is "valueless" and stock that has been "extinguished." Under KLTT's arguments, KLTT would be relieved of its obligation to pay the floor value agreed to by the parties simply because the stock has been extinguished – but it would be obligated to pay if the stock had not been extinguished but completely worthless. According to KLTT, the Put Option Agreement, which not only set a floor value for the Weinstein option without specifically addressing the known possibility of a DTI bankruptcy, but also required only that Weinstein hold "good, valid and marketable title" to the remaining shares for only one year, relieves KLTT of its promise to pay because the KLTT-controlled DTI Board of Directors voted to seek the protection of the bankruptcy court after this one year period expired. Nothing in the Put Option Agreement, or Missouri law, allows or requires such an illogical and unreasonable interpretation.

At the time the parties entered into the Put Option Agreement, and at the time Weinstein transferred his stock certificate to the escrow agent, his remaining shares in DTI existed and had value. There has been no failure of consideration because the stock certificate is now valueless. See, e.g., Union Pac., 401 S.W.2d at 536; Air Vermont, 44 B.R. at 443; Polinsky, 268 Cal.App.2d at 194. The trial court and the Court of Appeals erred.

II. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN PERFORMED AND SATISFIED ALL CONDITIONS PRECEDENT UNDER THE TERMS OF THE PARTIES' AGREEMENT, IN THAT WEINSTEIN DELIVERED TO THE ESCROW AGENT A STOCK CERTIFICATE REPRESENTING HIS REMAINING SHARES IN DTI IN ACCORDANCE WITH THE PUT OPTION AGREEMENT, AND EXERCISED HIS PUT OPTION RIGHTS IN THE TIME AND MANNER REQUIRED UNDER THE PUT OPTION AGREEMENT.

While professing adherence to general rules of contract construction, KLTT relies on an interpretation of the Put Option Agreement that disregards not only the contract's nature and purpose, but also the clear intent of the parties. KLTT argues that the DTI bankruptcy negated its obligations under the Put Option Agreement because “[t]he Put Option is a contract that clearly gives Weinstein the right to sell and, upon exercise, requires KLTT to purchase, shares of common stock in DTI.” (Respondent’s Brief, p. 27). To support its argument, KLTT highlights every provision in the parties agreements that refers to “shares of common stock of DTI Holdings, Inc.” (Respondent’s Brief, pp. 27, 30-32).

True, the agreements refer to shares of DTI. Weinstein was to transfer a stock certificate evidencing those shares to the escrow agent under the parties’ agreements. But KLTT’s assertion that Weinstein is not entitled to payment of the floor value because the DTI stock was extinguished in bankruptcy ignores the irrefutable and material fact that KLTT was aware, at the time the parties entered into the Put Option Agreement, that a DTI bankruptcy was possible.[3] KLTT also ignores the irrefutable and material facts that KLTT failed to address the possibility of a DTI bankruptcy in the parties’ agreement, that KLTT agreed to a floor value for the option, that Weinstein followed the agreement’s requirements to trigger KLTT’s obligations under the Put Option Agreement, and that,

[3] As discussed in Point VI of Weinstein’s opening brief and Point VI of this reply brief, there can be no serious dispute that KLTT was fully aware that the financial future of DTI was in jeopardy before it executed the Put Option Agreement. In fact, KLTT produced numerous internal documents that specifically address the possibility of a DTI bankruptcy. (L.F. 432-52).

pursuant to section 3.6 of the Second Amended Agreement, KLTT required only that Weinstein hold "good, valid and marketable title" in the remaining shares in DTI for one year.[4]

Under the terms of the parties' agreements, KLTT agreed to pay Weinstein $15 million – regardless of what happened to the DTI stock. In doing so, KLTT assumed the risk that it would receive little more than a piece of paper when Weinstein exercised his option. A put option is, by its very nature, a risk-shifting device. See, e.g., Market Street Ltd. Partners v. Englander Capital Corp.,1993 WL 212817, *1 (S.D.N.Y. 1993) ("the option writer takes on the downside risk in exchange for the price of the option"). Under the terms of the parties' agreement, the risk that DTI might fail fell on KLTT's shoulders.

"The policy of the law is to let parties weigh the benefits pro and con and leave them free to make whatever contract between themselves that they please." Bydalek v.

---

4 KLTT argues that Weinstein's reference to Section 3.6 should be stricken because Rule 83.08 provides that "the substitute brief . . . shall not alter the basis of any claim that was raised in the court of appeals brief." Weinstein's reliance on Section 3.6 does not, however, "alter the basis" of his claim that the Put Option Agreement does not require that Weinstein own shares in DTI at the time the option is exercised. This argument has been consistently advanced at both the trial and appellate levels. See Ogg v. Mediacom, L.L.C., 142 S.W.3d 801, 809 (Mo. App. 2004) ("At worst, the Oggs have simply focused on language in Eureka that they did not focus on before. This is not the type of 'new argument' that is prohibited on appeal.").

Brines, 947 S.W.2d 135, 143 (Mo. App. 1997). KLTT could have negotiated an agreement that specifically addressed the very real possibility of a DTI bankruptcy. It did not – even though KLTT was aware of the possibility of a DTI bankruptcy at the time it entered into the Put Option Agreement. Under the terms of the parties' agreement, Weinstein was to transfer a stock certificate evidencing his remaining shares to an agreed upon escrow agent at the close of the transaction. He was also required to exercise his option in the time and manner prescribed under the parties' agreements. That is all the Put Option required.

As KLTT points out, the cardinal rule in contract interpretation is to ascertain the intent of the parties. See, e.g., Brock v. Blackwood, 143 S.W.3d 47, 60 (Mo. App. 2004). That intent is not reflected in random references in the agreement to "common stock" taken from other contexts. See State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co., 594 S.W.2d 950, 954 (Mo. App. 1980). It is reflected in the object, nature and purpose of the Put Option Agreement, as well as the facts and circumstances surrounding the execution of the agreement. See Wilshire Constr. Co. v. Union Elec. Co., 463 S.W.2d 903, 906 (Mo. banc 1971); Black & White Cabs of St. Louis, Inc. v. Smith, 370 S.W.2d 669, 675 (Mo. App. 1963); Cornblath v. Fireman's Fund Ins. Co., 392 S.W.2d 648, 650-51 (Mo. App. 1965). KLTT granted Weinstein a put option. This is a distinct type of contract, the purpose of which is to allocate risk. See, e.g., Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 491 (7th Cir. 2001). Under the terms of the Put Option Agreement, Weinstein was required only to transfer a stock certificate evidencing his remaining shares to the escrow agent at the time of the close of the transaction, and to exercise his option in the time and manner set forth in the agreement. In light of these provisions, and given the complete absence of any provision addressing the known possibility of a DTI bankruptcy, the clear purpose of the Put Option Agreement was to place the risk of a DTI failure on KLTT and allow Weinstein to recover the floor value of the option regardless of what happened to the DTI stock.

The answer to the question presented in this appeal will not be found in convoluted interpretations of the agreement, which rely on provisions containing references to "common stock." It will found in what the agreement does not provide. There is no provision requiring that Weinstein's remaining shares in DTI exist and have value at the time Weinstein exercised his option. The trial court erred in denying Weinstein's motion for summary judgment and entering judgment in favor of KLTT, and the Court of Appeals erred when it affirmed that judgment.

III. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN'S CLAIM IS NOT BARRED BY THE TERMS OF THE BANKRUPTCY PLAN, IN THAT THE BANKRUPTCY COURT DID NOT DISCHARGE KLTT'S CONTRACTUAL OBLIGATIONS TO WEINSTEIN UNDER THE PUT OPTION AGREEMENT.

In its brief, KLTT acknowledges that the Bankruptcy Court did not discharge KLTT's obligations to Weinstein under the Put Option Agreement. Nonetheless, KLTT argues that Weinstein's claim for breach of the Put Option Agreement against KLTT is barred by the Bankruptcy Court's confirmation of the DTI bankruptcy plan.

KLTT's argument misconstrues the nature of the dispute before this Court. The bankruptcy court may have extinguished all equity interests in DTI, but Weinstein is not asking to restore his equity interests in DTI. He is seeking to enforce the terms of an option granted by KLTT, under which KLTT promised to pay a minimum of $15 million if he: (a) transferred a stock certificate evidencing his remaining shares in DTI to the agreed upon escrow agent at the close of the transaction contemplated by the Second Amended and Restated Agreement; and (b) exercised his option in the time and manner prescribed by the parties' agreements. Weinstein is not collaterally attacking the bankruptcy court's order or asserting a right in this action that is inconsistent with the bankruptcy court's order. The bankruptcy court did not (and could not) extinguish KLTT's obligation to abide by its contractual obligations. See, e.g., Johnson v. Home State Bank, 501 U.S. 78, 82 (1991) ("[A] discharge extinguishes only 'the personal liability of the debtor.'"); In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir.1995), cert. denied, 517 U.S. 1243 (1996) ("This court has repeatedly held without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of nondebtors."); Matter of Zale Corp., 62 F.3d 746, 760 (5th Cir.1995) (stating that section 524 prohibits the discharge of debts of nondebtors).

Weinstein is not seeking to have equity interests in DTI restored. He is seeking to enforce the terms of his Put Option Agreement with KLTT.

IV. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN'S CLAIM IS NOT BARRED BY SECTION 1.3(C) OF THE SECOND AMENDED AGREEMENT, IN THAT WEINSTEIN DID NOT SELL OR DISPOSE OF HIS REMAINING SHARES IN DTI BY VOTING TO PLACE DTI IN BANKRUPTCY.

Without citation to any authority, KLTT argues that it is relieved of its contractual obligations under the Put Option Agreement because, by participating in the decision to place DTI in bankruptcy as a member of the DTI Board of Directors, Weinstein "sold or disposed" of his remaining shares in DTI within the meaning of section 1.3(c) of the Second Amended Agreement.

There is no reason to construe section 1.3(c) in the manner urged by KLTT. Under Missouri law, contract terms must be construed in accordance with their plain and ordinary meaning. See, e.g., Ferguson v. Gateway Ins. Co., 151 S.W.3d 911, 913 (Mo. App. 2004). KLTT cites no authority to support the argument that section 1.3(c), which, by its express terms, applies only if Weinstein "sold or disposed" of his remaining shares in DTI, applies if a bankruptcy court extinguished the equity interests in DTI.

Even more telling is the fact that, while arguing that Weinstein "sold or disposed" of his remaining shares in DTI by voting to place DTI in bankruptcy, KLTT conveniently overlooks the fact that it has repeatedly eschewed any responsibility for the extinguishment of the equity interests in DTI – despite the fact that KLTT held majority control of the DTI Board of Directors when it voted to seek bankruptcy protection. If

KLTT, which held majority control of the DTI Board, did not cause "Weinstein's failure or inability to deliver actual shares of common stock," Weinstein surely did not.

By participating in the decision to place DTI in bankruptcy, Weinstein neither "sold" nor "disposed" of his remaining shares in DTI within the meaning of section 1.3(c) of the Second Amended and Restated Agreement. The trial court erred in denying Weinstein's motion for summary judgment, and entering summary judgment in favor of KLTT.

V. THE TRIAL COURT ERRED IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN IS ENTITLED TO PAYMENT OF THE $15 MILLION FLOOR VALUE UNDER THE TERMS OF THE PUT OPTION AGREEMENT, IN THAT THE PUT OPTION AGREEMENT WAS A VALID AND ENFORCEABLE CONTRACT SUPPORTED BY CONSIDERATION, WEINSTEIN FULFILLED ALL CONDITIONS PRECEDENT TO KLTT'S PERFORMANCE, AND KLTT'S AFFIRMATIVE DEFENSES FAIL AS A MATTER OF LAW.

KLTT argues that the trial court's denial of Weinstein's motion for summary judgment is not an appealable order. Though this is the general rule, there are exceptions. When the denial of a motion for summary judgment is "intertwined with the propriety of an appealable order granting summary judgment to another party," the denial is appealable. Fischer v. City of Washington, 55 S.W.3d 372, 381 (Mo. App. 2001). Furthermore, as a matter of "judicial efficiency and economy" an appellate court may consider the denial of a motion for summary judgment if "a question of law is almost certain to arise on retrial and has been fully briefed by the parties." SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP, 128 S.W.3d 534, 537 (Mo. App. 2003).

Here, the validity of KLTT's commercial frustration and equity defenses may arise if this case is remanded and the issues have been fully briefed by the parties. In addition, the issues raised in KLTT's motion for summary judgment are the same issues Weinstein addressed in his motion for summary judgment. Accordingly, Weinstein respectfully requests that this Court consider not only the propriety of the trial court's entry of summary judgment in favor of KLTT, but also the propriety of the trial court's denial of Weinstein's motion for summary judgment.

For the reasons stated in points I through IV of Weinstein's opening brief, and points I through IV of this Reply Brief, the following KLTT's arguments fail as a matter of law: (1) Weinstein failed to satisfy a condition precedent to KLTT's performance, (2) there was a failure of consideration for KLTT's future performance obligations under the Put Option Agreement; (3) Weinstein's claim is barred by the terms of the bankruptcy court's order, and (4) Weinstein's claim is barred by section 1.3(c) of the Second Amended Agreement. Furthermore, for the reasons stated below and in Points VI and VII of Weinstein's opening brief, KLTT's defense of commercial frustration and its reliance on general principles of equity cannot negate KLTT's contractual obligations.

VI. THE TRIAL COURT ERRED IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT BECAUSE KLTT'S CONTRACTUAL OBLIGATIONS UNDER THE PUT OPTION AGREEMENT ARE NOT EXCUSED BY THE DOCTRINE OF COMMERCIAL FRUSTRATION, IN THAT THE BANKRUPTCY OF DTI WAS FORESEEABLE AT THE TIME THE PUT OPTION AGREEMENT WAS ENTERED INTO AND THERE IS NO GENUINE ISSUE OF MATERIAL FACT REGARDING THE FORESEEABILITY OF THE DTI BANKRUPTCY.

Invoking the doctrine of commercial frustration, KLTT alleges that there is a genuine issue of material fact as to the foreseeability of the DTI bankruptcy which precludes summary judgment in Weinstein's favor. "The foreseeability of the frustrating circumstance and the ability of defendant to overcome it are questions of law to be resolved by the court." See Northern Illinois Gas Co. v. Energy Cooperative, Inc., 461 N.E.2d 1049, 1059 (Ill.1984).

There is no genuine issue of material fact as to the foreseeability of the DTI bankruptcy. KLTT produced numerous internal documents which discuss DTI's financial instability and specifically address the possibility of a DTI bankruptcy. (L.F. 290; L.F. 432-52). KLTT argues that these documents are not relevant because they do not take into account the steps KLTT took to prevent a DTI bankruptcy after the Put Option Agreement was executed. This argument is absurd. Foreseeability must be measured at the time the agreement is entered into. See, e.g., Adbar, L.C. v. New Beginnings C-Star, 103 S.W.3d 799, 801 (Mo. App. 2003). Any actions KLTT took after it entered into the Put Option Agreement (especially in light of the fact that these actions were intended to avoid a DTI bankruptcy and restore its financial stability) cannot be evidence that the bankruptcy was not foreseeable at the time the parties entered into the Put Option Agreement.

Furthermore, as explained fully in Weinstein's opening brief, Howard v. Nicholson, 556 S.W.2d 477 (Mo. App. 1977), does not render the DTI bankruptcy unforeseeable. The fact that the parties in Howard did not foresee the bankruptcy of a prospective tenant certainly does not mean that the bankruptcy of DTI – a company experiencing known financial difficulties – was not "reasonably foreseeable." To determine whether a supervening event was "reasonably foreseeable," the court must consider "the relation of the parties, the terms of the contract, and the circumstances surrounding the formation of the contract." Werner v. Ascraft Bloomquist, Inc., 10 S.W.3d 575, 577-78 (Mo. App. 2000). In this case, the relation of the parties and the circumstances surrounding the formation of the Put Option Agreement leave no doubt that a DTI bankruptcy was within the contemplation of KLTT when it entered into the Put Option Agreement.

Missouri courts have repeatedly recognized that the doctrine of commercial frustration should be "limited in application so as to preserve the certainty of contracts." See, e.g, Adbar, 103 S.W.3d at 801; Werner, 10 S.W.3d at 578. This case does not present the type of extraordinary circumstances that warrant application of the doctrine. KLTT is a sophisticated business entity. It was unquestionably aware of the risk that DTI would go bankrupt and its stock would be rendered worthless. Having failed to address this recognized risk in the parties' contract, KLTT cannot rely on the doctrine of commercial frustration to escape its contractual obligations. See, e.g., Adbar, 103 S.W.3d at 801; see also Stein v. Bruce, 366 S.W.2d 732 (Mo. App. 1963) ("In case a party desires to be excused from performance in the event of contingencies arising, it is his duty to provide for the contingency in his contract."). The trial court erred in allowing KLTT to avoid its obligations to Weinstein, and denying Weinstein's motion for summary judgment.

VII. THE TRIAL COURT ERRED IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN'S CLAIM IS NOT BARRED BY PRINCIPLES OF EQUITY, IN THAT EQUITY WILL NOT RELIEVE A PARTY OF CONTRACTUAL OBLIGATIONS SIMPLY BECAUSE THE CONTRACT PROVED NOT TO BE FINANCIALLY BENEFICIAL.

As its final defense, KLTT invokes "general principles of equity" and argues that because "KLTT has lost over $158 million that it invested and loaned to DTI Holdings, Inc. and Digital Teleport, Inc. since December of 2000, whereas Weinstein has received $32 million for his initial shares in DTI Holdings, Inc.," Weinstein's claim should be barred. (Respondent's Brief, p. 50).

The fact that KLTT ultimately lost money in its investment in DTI cannot excuse its contractual obligations. See, e.g., Vondera v. Chapman, 180 S.W.2d 703, 705 (Mo. 1944); Williams v. Walls, 964 S.W.2d 839, 850 (Mo. App. 1998). "The policy of the law is to let parties weigh the benefits pro and con and leave them free to make whatever contract between themselves that they please." Bydalek, 947 S.W.2d at 143. "Sophisticated parties have freedom of contract – even to make a bad bargain." Purcell Tire & Rubber Co., Inc. v. Executive Beechcraft, Inc., 59 S.W.3d 505, 508 (Mo. banc 2001). Under Missouri law, equity cannot excuse KLTT's contractual obligations.

CONCLUSION

For the foregoing reasons, Weinstein respectfully requests that the trial court's entry of summary judgment in favor of KLTT and the Court of Appeals decision affirming that judgment be reversed, and summary judgment be entered in Weinstein's favor.

Respectfully submitted,

BRYAN CAVE LLP

____

Kenneth J. Mallin #33307
Kimberly A. Mohr #54067
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020
kjmallin@byrancave.com
kimberly.mohr@bryancave.com

DOWD & BENNETT LLP
Edward L. Dowd, Jr. #28785
7733 Forsyth Blvd.
Suite 1410
Clayton, MO 63105
(314) 889-7300
(314) 863-2111
edowd@dowdbennett.com

Attorneys for Plaintiff-Appellant
Richard D. Weinstein

<u>CERTIFICATION</u>

I certify that this brief complies with the limitations contained in Rule 84.06 (b) and Rule 55.03. This brief contains 5,504 words. I further certify that the floppy disk provided to the Court has been scanned for viruses and is virus-free pursuant to Rule 84.06 (g).

Dated: October 11, 2006

Respectfully submitted,

BRYAN CAVE LLP

____

Kenneth J. Mallin #33307
Kimberly A. Mohr #54067
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020

DOWD & BENNETT LLP
Edward L. Dowd, Jr. #28785
7733 Forsyth Blvd.
Suite 1410
Clayton, MO 63105
(314) 889-7300
(314) 863-2111

Attorneys for Plaintiff-Appellant
Richard D. Weinstein

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief, along with a floppy disk (scanned for viruses pursuant to Rule 84.06 (g)) was sent by First Class U.S. Mail, postage pre-paid on this 11th day of October, 2006 to the individuals named below:

Kent Sullivan
Erin N. Schmidt
STINSON MORRISON HECKER LLP
1201 Walnut, Suite 2800
Kansas City, MO 64106

Gretchen Garrison
STINSON MORRISON HECKER LLP
100 S. 4th Street, Suite 200
St. Louis, MO 63102

Attorneys for Defendant-Respondent KLTT Telecom, Inc.