UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Sandowitz Motors, LLC,

Plaintiff,

v. Case No. 16-x-1234

Norman's Custom Catering, Inc.,

Defendant.

OPINION AND ORDER

DIEDRICH, District Judge (sitting by fiction).

During a high-stakes card game 1762, the Earl of Sandwich ordered his servant to fetch him some meat wedged between two slices of bread. Half a century later and nearly a continent away, Neapolitan commoners began topping flatbread with tomatoes, thus creating the world's first pizzas. Or so the popular legends go. Regardless of the tales' veracity, however, one thing is certain: those 18th century figures never dreamed that their respective inventions would lead to the dispute before this Court today.

BACKGROUND

The plaintiff here is Sandowitz Motors, LLC ("Sandowitz"), a car dealership with several locations across Wisconsin. Continuing its territorial expansion, Sandowitz—led by its larger-than-life CEO Harold "Ham" Sandowitz—recently opened a new Honda dealership in Kenosha. The dealership hosted an extravagant grand-opening event to spread the Sandowitz name and to showcase new and used Honda automobiles. The event lasted an entire weekend, Thursday evening through Sunday.

For obvious reasons, Sandowitz wanted to serve *sandwiches* at the grand opening.[1] To that end, it contacted the defendant in this case, Norman's Custom Catering, Inc. ("Norman's"), a Waukegan, Illinois-based catering company with extensive experience serving large events. After some discussion and dickering, the parties consummated their relationship by signing a contract (the "Catering Agreement"), which, among other things, obligated Norman's to "prepare and serve 1000 sandwiches" at the grand opening. Under the Catering Agreement, Norman's also promised to prepare and serve a variety of other foods and drinks, to set up and take down food stations at the dealership, and to provide waitstaff for the event, all in exchange for $25,000.

It is undisputed that Norman's showed up at the grand opening replete with a legion of professional waitstaff who set up and took down food stations and served a variety of foods and drinks as required under the Catering Agreement. It is also undisputed that Norman's prepared and served 1000 scrumptious-looking ~~sandwiches~~ pizzas. This last fact forms the meat of the case.

While Norman's chalked up the sandwich-pizza switcharoo to "cr*eat*ive differences," Def.'s Br. 11 (emphasis in original),[2] Sandowitz considered it a bit more serious and, hence, sued Norman's for breach of contract. Beyond claiming the contract price, Sandowitz further alleges that the pizzas "filled the air with a stale and unpleasant odor," Compl. ¶ 30, which caused customers to leave the event more quickly, harmed Sandowitz's reputation, impaired the "fun and memorable connection between

[1] In case it's not obvious, the name "Sandowitz" calls to mind the word "sandwich."

[2] The Court wishes to reiterate that the emphasis was, indeed, in the original.

Sandowitz and sandwiches," *id.* ¶ 33, prevented Ham Sandowitz from securing an endorsement deal he otherwise would have, and consequently led to fewer sales during and after the event. Remarkably, all of these allegations find support in the record. All in all, Sandowitz claims that it suffered $103,950 in damages, an amount sufficient for this Court to exercise jurisdiction under 28 U.S.C. § 1332.

Both parties have moved for summary judgment. Perhaps bizarre at first blush, the thrust of Norman's motion argues that Norman's did not breach the Catering Agreement when it prepared and served pizzas instead of sandwiches. Sandowitz, of course, argues the opposite. At the parties' urging, this Court now wrestles with the all-important question: *Is a pizza a sandwich?*

DISCUSSION

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial responsibility of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once a properly supported motion for summary judgment is made, the nonmoving party then bears the burden to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A party asserting that a fact is genuinely disputed must cite to particular parts of materials in the record and may not rest upon mere allegations or denials. Fed. R. Civ. P. 56(c)(1); *Anderson*, 477 U.S. at 256.

The Catering Agreement calls for the application of Wisconsin substantive law, under which "the cornerstone of contract construction is to ascertain the true intentions

of the parties." *State ex rel. Journal/Sentinel, Inc. v. Pleva*, 155 Wis. 2d 704, 711, 456 N.W.2d 359 (1990). To that end, courts construe a contract as a whole according to its plain and ordinary meaning. *MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust*, 2015 WI 49, ¶¶ 38, 43, 362 Wis. 2d 258, 864 N.W.2d 83. If the face of the contract itself reveals the parties' intent, the interpretation ends. *Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶ 33, 330 Wis. 2d 340, 793 N.W.2d 476. But if language in the contract is ambiguous, courts may then "look beyond the face of the contract and consider extrinsic evidence to resolve the parties' intent." *Id.*

"[C]ontract language is ambiguous only if it is reasonably susceptible to more than one meaning." *Columbia Propane, L.P. v. Wis. Gas Co.*, 2003 WI 38, ¶ 25, 261 Wis. 2d 70, 92, 661 N.W.2d 776. Although "[a] phrase need not have a single dictionary definition to avoid ambiguity," it must have "a workable meaning and no other reasonable meaning." *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶ 16, 266 Wis. 2d 124, 667 N.W.2d 751.

The Catering Agreement does not define "sandwich." Sandowitz argues that the term "sandwich" is unambiguous, that pizzas are not sandwiches, and therefore, that it is entitled to summary judgment on liability. Pointing to common usage and dictionary definitions, Sandowitz suggests that no reasonable person could interpret "sandwich" to include pizza.

To bolster its position, Sandowitz cites *White City Shopping Ctr., LP v. PR Restaurants, LLC*, No. 2006196313, 2006 WL 3292641, at *1 (Mass. Super. Oct. 31, 2006). In that case, PR Restaurants leased space in a shopping center, where it operated a Panera Bread restaurant. Its lease agreement included an exclusivity clause precluding the

landlord, White City, from leasing other space in the shopping center to "a bakery or restaurant reasonably expected to have annual sales of *sandwiches* greater than ten percent (10%) of its total sales . . . ." *Id.* At some point, White City leased space to another party that planned to open a Qdoba restaurant. *Id.* at *2. PR Restaurants asserted that tacos, burritos, and quesadillas—all of which would be served at the Qdoba—fell within meaning of "sandwiches," and hence, permitting a Qdoba to operate would violate the exclusivity clause. *Id.* White City sought a declaratory judgment that it did not breach the lease agreement, and PR Restaurants moved in the opposite direction for an injunction. *Id.*

Interpreting the lease, the *White City* court determined that the word "sandwiches" was not ambiguous and then applied a dictionary definition defining "sandwich" to mean "two thin pieces of bread, usually buttered, with a thin layer (as of meat, cheese, or savory mixture) spread between them." *Id.* at *3. "Under this definition and as dictated by common sense," said the court, "the term 'sandwich' is not commonly understood to include burritos, tacos, and quesadillas . . . ." Ultimately, the court found "no viable legal basis" for enjoining the lease or the operation of the Qdoba. *Id.*

Sandowitz also argues that the language surrounding "sandwich" in the Catering Agreement supports its position. The Catering Agreement lists several other foods and drinks that Norman's was obligated to provide at the grand opening. Among other things, the Catering Agreement listed potato salad, assorted chips and similar snacks, sliced raw vegetables with dip, fresh fruit, fruit salad, and three sheet cakes. Sandowitz argues that, when read as a whole, the Catering Agreement requires two conclusions: (1)

the other menu items were enumerated with a certain level of specificity, and interpreting "sandwich" so broadly as to include pizza would be inconsistent with that surrounding level of specificity; and (2) the other menu items consisted of "typical American picnic fare," with which pizza would be "woefully incompatible." Pl.'s Br. 12.

Norman's, for its part, argues that the term "sandwich" is unambiguous and that pizzas are sandwiches. Like Sandowitz, Norman's begins with dictionary definitions. Of the three offered by Webster, Norman's focuses on the second: "[o]ne slice of bread covered with food." Norman's points out that the term "open-faced sandwich" is in the popular lexicon and that it is commonly understood that "open-faced sandwiches" are, in fact, sandwiches. Norman's goes on: "'Open-faced' merely modifies 'sandwich,' just like 'club,' 'PB&J,' or 'big' modify 'sandwich.' A fish sandwich doesn't stop being a sandwich just because it includes fish. Conversely, a fish fry doesn't become a sandwich simply because it contains fish." Def.'s Br. 15. In the end, so the argument goes, "sandwich" includes "open-faced sandwich," and pizza easily qualifies as an open-faced sandwich because it is "[o]ne slice of bread covered with food."

To this Sandowitz replies: "Attempting to shoehorn pizza under the umbrella of open-faced sandwich is meaningless without first defining 'sandwich'; any other approach is circular." Pl.'s Br. 20. It also more generally proposes that interpreting "sandwich" to include pizzas would start down a slippery slope: Are hot dogs sandwiches? What about bruschetta? Oreos?

In light of the foregoing arguments, this Court finds that the term "sandwich," at least as it used in the Catering Agreement, is ambiguous. That term is reasonably

susceptible to multiple meanings—one narrower that does not include pizza, and one broader that does. The fact that both parties persuasively argue that "sandwich" is unambiguous, *but in opposite directions*, is evidence of ambiguity. And *White City*, despite its similarities, is an unpublished opinion from an out-of-jurisdiction court and thus carries little persuasive weight in this Court—it's a thin crust, if you will.

So the Court now consults extrinsic evidence. Among other things, courts may infer intent "from the circumstances in which the parties agreed to enter the contract." *Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91, ¶ 10, 245 Wis. 2d 186, 629 N.W.2d 150. Courts also may consider custom and usage, both in general and with reference to industry knowledge. *See Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶ 37, 363 Wis. 2d 699, 866 N.W.2d 679; *Columbia Propane, L.P. v. Wis. Gas Co.*, 2003 WI 38, ¶¶ 12, 25–26, 261 Wis. 2d 70, 661 N.W.2d 776. Anticipating that the analysis may reach this stage, the parties have submitted relevant extrinsic evidence.

Deposition testimony demonstrates that the parties were not on the same page. At his deposition, Ham Sandowitz testified that "Norman's knew how important it was that we have sandwiches. It's all about the name—Sandowitz, sandwich, Sandowitz, sandwich. I mean, isn't it obvious?" Sandowitz Dep. 94:12–15. He further testified that he believed Norman's was going to serve "a variety of classic deli sandwiches. . . . I thought that meant ham, turkey, chicken salad—stuff like that." *Id.* at 100:10–101:12.

On the other hand, Jim Norman, who signed the Catering Agreement on behalf of Norman's, testified that he was unaware of the Sandowitz/sandwich homophonic(ish) relationship. He also testified that the parties intended for Norman's to have wide

latitude in determining what types of sandwiches to serve. Tammy Hero, another of Sandowitz's main contacts at Norman's, provided some salty testimony:

> Q: When did you first realize that Sandowitz sounds like sandwich?
> A: Probably when I found out we were being sued. I read the complaint.
> Q: You didn't realize it when you first heard the name Sandowitz?
> A: No. Not that I recall—I mean, I certainly didn't think it was a big deal.
> Q: You didn't realize it when Mr. Sandowitz ordered 1000 sandwiches?
> A: Lots of people order sandwiches.
> . . . .
> Q: You know your last name means sandwich, too, right?
> A: I'm aware.
> Q: And yet you still didn't make any connection between Sandowitz and sandwich?
> . . . .
> A: I guess not.
> Q: Has Norman's ever—scratch that. Lots of people order sandwiches, you said?
> A: Yep.
> Q: Has Norman's ever served pizza when someone ordered sandwiches?
> A: Oh sure, all the time.
> Q: How many times?
> A: I really have no idea. It happens a lot. People like our food very much.
> Q: And none of these people ever objected to you serving pizza when they ordered sandwiches?
> A: Not that I know.

Hero Dep. 34:15–20, 36:1–4, 36:6–17.

Sandowitz has enlisted the help of two expert witnesses. First is Janice Snyder, a research associate with the Gastronometrics Corporation. She reviewed 657 menus from restaurants around the country, selecting from a cross-section of price ranges, Yelp review scores, longevity, clientele, and other factors. Her research revealed that 97.4% of restaurants that serve both sandwiches and pizza display those offerings in discrete sections of their menus. Second is Dr. Malcolm Finch, a food science professor at the

University of Southern Wisconsin. Finch, whose research focuses on the catering and private-chef industries, opined that a caterer operating in the in "competitive space" in which "Norman's purported to be operating" would "not interpret a request for 'sandwiches' to include pizza." Finch Dep. 45:25–47:16. He also admitted, however, that "caterers and their clients often agree to things outside the terms of a written contract. It's informal, the relationship. Often we see last-minute changes to the menu contents, as well as modifying the meaning of the items on the written menu." *Id.* at 99:10–23.

Norman's submitted an affidavit of Sara Baker, executive director of the American Society of Caterers and Private Chefs. Baker averred that it is a "reasonable" and "accepted" practice in the catering industry to substitute pizza for sandwiches, especially where the ordering party provides minimal guidance on the particulars of the menu. *See* Baker Aff. ¶¶ 9–15.

In the end, the Court concludes that factual disputes exist regarding the parties' intent, the general practices of the catering industry, and ultimately the meaning of the Catering Agreement. This conclusion is mandated by the evidence catalogued above, which is a microcosm of a much larger body presented by the parties. This case will benefit from further development of the record and resolution of the factual disputes by a jury. Granting summary judgment would be inappropriate at this stage of the case; accordingly, both parties' motions are denied.

ORDER

IT IS ORDERED that Plaintiff's motion for partial summary judgment is DENIED;

IT IS FURTHER ORDERED that Defendant's motion for summary judgment is DENIED.

SO ORDERED.

Dated at Milwaukee, Wisconsin, this 14th day of March, 2017.

BY THE COURT:

/s/

JOSEPH S. DIEDRICH
U.S. District Judge