IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

MERCY HEALTH SYSTEM OF SOUTHEASTERN PENNSYLVANIA,	:	November Term 2001
Plaintiff,	:	No. 3046
v.	:	
METROPOLITAN PARTNERS REALTY LLC, PHILADELPHIA WELLNESS PARTNERS, ANCHOR HEALTH PROPERTIES and METROPOLITAN PARTNERS, LTD.,	:	COMMERCE PROGRAM
	:	Control Number 060165

ORDER

AND NOW, this 6TH day of March 2005, upon consideration of the Motion for Summary Judgment of the Defendants Metropolitan Partners Realty LLC, Philadelphia Wellness Partners and Anchor Health Properties, all responses in opposition thereto, Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion in support of this Order, it hereby is **ORDERED** and **DECREED** that

1. Defendants' Motion is Granted as to Count I (rescission) and Granted in part as to Count III (breach of contract).
2. Defendants' Motion is Denied as to the remaining counts.

It is further Ordered that the parties appear for a scheduling conference/settlement conference on At in courtroom 676 City Hall.

BY THE COURT,

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C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, II, J.

This matter arises from a relationship between Mercy Health System of Southeastern Pennsylvania (hereinafter "Mercy") and Metropolitan Partners Realty LLC, Philadelphia Wellness Partners, Anchor Health Properties and Metropolitan Partners, Ltd (hereafter "Defendants")[1] created by two lease agreements for properties located in Upper Darby and Eastwick.[2] Presently before the court is the Motion for Summary Judgment of Defendants Metropolitan Partners Realty LLC, Philadelphia Wellness Partners and Anchor Health Properties (collectively referred to as the "Defendants"). For the reasons more fully set forth below, the defendants' motion is granted as to Count I (rescission) and granted in part to Count III (breach of contract) and denied as to the remaining counts.

[1] Metropolitan Partners Realty, LLC originally executed the leases in question. Metropolitan allegedly changed its name to Anchor Health Properties LLC, which in turn was succeeded by Anchor Health Properties Delaware LLC. Metropolitan was dismissed as a defendant in this court's order dated July 10, 2003.

[2] The leases at issue are almost identical and any reference made within this opinion is made with reference to same.

Background

Mercy is a non profit catholic health care ministry that operates and maintains ambulatory care facilities. In the early 1990's, Mercy began considering the expansion of its ambulatory care services in the communities it served. Sometime in 1994, Paula Crowley and Lou Sachs, real estate developers, approached Mercy with a new concept for ambulatory care. The new concept was known as "the Wellness Place ®". The Wellness Place ® was developed by Crowley and Sachs and marketed through Metropolitan Partners Realty, LLC, a company owned by Crowley and Sachs.

The Wellness Place concept was created to enable hospitals, through their sponsorship of ambulatory care anchors, to recapture and increase market share in the delivery of healthcare services. By combining healthcare, retail shops and interactive wellness education under one roof, in an inviting and safe setting, the idea was that the hospital could achieve real market differentiation in the field of outpatient care. (Plaintiff's Exhibit "1"). The Wellness Place service mark is registered with the United States Patent and Trademark Office. (Plaintiff's Exhibit 1 and 2).

After reviewing the concept for two years, obtaining the approval of the Board of Trustees of Mercy, assembling a team of three attorneys, a real estate consultant, market research analyst and various upper level management personnel to study and oversee the development of the projects and conduct lease negotiations, in November and December 1996, Mercy entered into two fifteen year agreements with the defendants for two properties where the concept was to be implemented. The leases were for properties in the Eastwick section of Philadelphia, 2821 Island Avenue and Upper Darby, 6800 Market Street.

Mercy alleges (1) that the relationship created by the lease agreements is not one of landlord/tenant but one of franchisee/franchisor and the agreements should be rescinded since Metropolitan failed to follow the rules prescribed by the Federal Franchise Regulations and (2) that defendants failed to perform its duties in accordance with the agreement's express and implied terms. As a result, Mercy asserts that it is no longer receiving the benefits it bargained for when it originally executed the agreements. Moreover, Mercy believes its current payments are far in excess of the value it is receiving. Mercy attributes this reduction in value to the defendants' breaches.

Mercy alleges that it attempted to address the perceived inequities with the defendants by requesting that the defendants renegotiate the Agreements. Ultimately, Mercy's efforts did not resolve the matter and Mercy commenced this action by filing a civil action complaint alleging causes of action for rescission of the lease agreements (count I), declaratory judgment (count II), breach of contract (count III), breach of implied contract (count IV), breach of the implied covenant of good faith and fair dealing (count V), breach of fiduciary duty (count VI) and unjust enrichment (count VII). Thereafter the case was removed to federal court and then remanded for lack of jurisdiction. Defendants filed a motion for judgment on the pleadings which was granted in part and sustained in part; counts V, VI and VII were dismissed. Defendants have now filed this motion for summary judgment.

DISCUSSION

I. Standard for Summary Judgment

Summary judgment may be granted only in those cases where the record clearly demonstrates that there are no genuine issues of material fact and that the moving party is

entitled to judgment as a matter of law. Cresswell v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 820 A.2d 172, 177 (Pa. Super. 2003). In determining whether summary judgment is appropriate, the record must be viewed in the light most favorable to the non-moving party and all doubts regarding the existence of an issue of material fact must be resolved against the movant who bears the burden of proving the absence of a factual dispute. Al's Cafe v. Sanders Ins. Agency, 820 A.2d 745, 748 (Pa. Super. 2003); Downey v. Crozer-Chester Med. Ctr., 817 A.2d 517, 524 (Pa. Super. 2003). "Only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment." Cresswell, supra. Thus, "summary judgment may only be granted in cases where it is clear and free from doubt the moving party is entitled to judgment as a matter of law." David Pflumm Paving & Excavating Inc. v. Found. Serv. Co., 816 A.2d 1164, 1167 (Pa. Super. 2003).

II. A franchise relationship does not exist between the parties and Count I should be dismissed.

In Count I of the complaint, Mercy seeks rescission of both leases on the grounds that they are illegal contracts that cannot be enforced. Mercy alleges that the leases create accidental franchise arrangements and therefore defendants owe Mercy various advance disclosures under the Franchise Rules of the Federal Trade Commission (hereafter "FTC"). Defendants have now moved for summary judgment on Count I arguing that as a matter of law Mercy cannot claim that Defendants are a franchisor as defined under the franchise rules for the FTC. For the reasons discussed below, the court finds that summary judgment is appropriate in favor of defendants on Count I.

The Franchise Rule requires a franchisor to provide prospective franchisees with various disclosures including but not limited to the history of the franchisor and the terms

and conditions under which the franchise operates. See 16 C.F.R. § 436.19 (a)(1), (a)(20), 436.1 (b)(2), (3), (c) (2) and (e) (1) (4). The franchise rule is applicable to business ventures which (1) are either a product franchise or package franchise, as defined in 16 CFR § 436.2 (a)(1)(I), or a business opportunity, as defined in 16 C.F.R. 436.2 (a) (1)(ii); (2) require a payment of at least $500, 16 C.F.R. 436.2 (a)(2); and (3) do not fall within any of the exemptions or exclusions set out in 16 C.F.R. §§ 436.2 (a)(3) or 436.2 (a)(4). FTC v. Wolf, 1996 U.S. Dist. Lexis 1760, *18 (S.D. Fla. 1996).

A product franchise under 16 C.F.R. § 436.2 (a)(1)(I) is a commercial relationship created by an arrangement in which (1) the alleged franchisee sells goods, commodities, or services; (2) to any person other than the alleged franchisor; (3) where the goods, commodities or services are identified by the service mark, trademark or advertising or other commercial symbol of the alleged franchisor; and (4) where the alleged franchisor offers to provide significant assistance to the alleged franchisee in the latter's method of operation, including but not limited to, the alleged franchisee's business organization, management, marketing plan, promotional activities or business affairs. Id. (citing FTC v. Jordan Ashley, Inc., 1994 U.S. Dist. Lexis 7494 (S.D. Fla. 1994).

Similar to a product franchise, a package franchise adopts the business format established by the franchisor and identified by the franchisor's trademark. The franchisee's method of operation in producing the goods or services sold by him are subject to significant controls instituted by the franchisor or alternatively the franchisor promises to render significant assistance to the franchisee in the operation of the business.

A business opportunity under 16 C.F.R. § 436.2 (a)(1)(ii) is a continuing commercial relationship in which: (1) the alleged franchisee sells goods, commodities, or services; (2)

to any person other than the alleged franchisor; (3) where the goods, commodities or services are supplied by the alleged franchisor; and (4) where the alleged franchisor supplies to the alleged franchisee the services of a person able to provide locations for the vending machines or display racks. Id.

Here, Mercy argues that the parties' relationship qualifies as a package franchise. The court does not agree. As set forth above, one of the three elements necessary to establish a franchise relationship is a trademark. Under the federal guides this element is satisfied only when the franchisee is given the right to distribute goods and services which bear the franchisor's trademark, service mark, trade name, advertising or other commercial symbol. Although, the agreements entered into between the parties grants Mercy permission to use the service mark, "The Wellness Place ®", the record fails to evidence any standard services established by defendants to be offered by Mercy. Mercy's services are not identified to the public under the service mark, "the Wellness Place ®". The services rendered by Mercy are not associated with nor do they conform to quality standards established by defendants. Defendants do not provide medical services nor do they control or direct the selection or quality of the services that Mercy provides.

Paragraph 19.3 of the respective lease agreements simply grants Mercy the right to use the Wellness service mark; it does not require Mercy to use the service mark. The provision grants Mercy a limited license to use the service mark "at the building" or "in conjunction with its own name in brochures, publicity, stationary and other materials specifically related to its activities at the building." The agreements contain no requirement that Mercy sell any good or service as directed by or provided by

Defendants. The record evidence supports same since Mercy promotes the Eastwick and Upper Darby facilities under its very own trade name, Mercy Wellness Centers, (Mac Bribe tr. 105-106; Fylnn tr. 61-62; Bradley tr. 102-03; McGinley tr. 63; Exhibit "G").[3]

The second element of the FTC's definition of a package franchise, substantial control over the franchisees method of operation or substantial assistance to the franchisee in the operation of the business, is also not satisfied. According to the FTC guide, the term "significant" relates to the degree to which the franchisee is dependent upon the franchisor's superior business expertise –an expertise made available to the franchisee by virtue of its association with the franchisor. Id. The franchisee, in order to reduce its business risks or enhance its chances for business success, relies upon the availability of such expertise to avoid business mistakes that it otherwise might make. The franchisor exercises its control over the franchisees method of operation of the business or by furnishing assistance to the franchisee in areas relating to the franchisee's method of operation. If the control over or the method of operation of the business is significant then the second element of the rule is satisfied. Id.

Examples of significant types of control are identified by the FTC guide as (1) site approval for the unestablished business, (2) site design or appearance requirements, (3) hours of operation, (4) production techniques, (5) accounting practices, (6) personnel policies and practices, (7) promotional campaigns requiring franchisee participation or financial contribution, (8) restrictions on customers and (9) location or sales area restrictions.

[3] In support of its argument that the first requirement under the FTC is satisfied Mercy relies upon an FTC advisory opinion Sinclair Marketing, Inc., Bus. Franchise Guide (CCH) ¶ 6392 (Oct. 1, 1979). Sinclair is distinguishable from the case at bar since the manufacturer in Sinclair provided its service station with a license to use its trademark to sell the manufacturer's branded products. Mercy does not sell services with "The Wellness Place ®" service mark. Mercy uses its own mark.

After applying the foregoing principles to the facts of record only one conclusion could be reached; defendants did not exercise the requisite significant control over Mercy's method of operation or provide substantial assistance in the operation of Mercy's business required to classify the relationship between Mercy and defendants as franchisee/franchisor. Defendants do not advise Mercy on which physicians to recruit at the facilities. Defendants do not advise Mercy on which health plans to accept. Defendants do not instruct Mercy on how to advertise the facilities. Defendants do not dictate how Mercy presents itself to the community. Defendants do not instruct or advise defendants on which medical equipment to buy and use at the projects. As for site location, the record is clear that Mercy chose the neighborhoods where the projects were eventually located and in fact selected the very building which it occupies in Eastwick.

Mercy relies upon certain lease restrictions such as signage, hours of operation, food service and subtenant restrictions as establishing the requisite substantial control and assistance required by the FTC. The court finds said restrictions to be those customarily found in lease agreements where the landlord retains some level of management responsibilities under the lease.

Based on the foregoing, this court concludes that the relationship between Mercy and defendants is not one of franchisor/franchisee subject to the FTC rules. Accordingly, Count I is dismissed.

III. Plaintiff's Claims for Breach of Contract, Express and Implied.

A. Count III Breach of Express Contract.

In Count III of the complaint, Mercy alleges that defendants breached the express provisions of the Agreements by failing to develop and promote the Projects as

"Wellness Place ®" integrated facilities, by failing to provide complimentary retail, food, educational and service operations at each of the project locations and by failing to maintain and utilize the promotion fund to promote the Projects. (Complaint ¶¶ 33-35). Later, in response to interrogatories propounded by defendants, plaintiff specifically identified provisions which defendants allegedly failed to perform as follows: The Background section, Paragraph 1.4 "Schematic Plan", Paragraph 3.6 "Concerning Other Tenants in the Building", Paragraph 5.3 "Promotion Fund", Paragraph 6.4 "Security", Paragraph 6.5 "Repairs", Paragraph 19.3 "Service Mark The Wellness Place ®", Paragraph 19.3 "Tenant's Primary Market", Paragraph 7.5 Sign & Signage and Appendix II Schedule B.

A cause of action for breach of contract requires 1) the existence of a contract, 2) a breach of the duty imposed by the contract; and 3) resultant damages." Corestates Bank N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). Defendants argue that the background section of the lease does not create additional obligations for defendants to fulfill and therefore are not the basis of a breach of contract action. Defendants also argue that plaintiff has failed to produce sufficient evidence to state a claim for breach of contract with respect to the provisions identified above or in the alternative has failed to produce sufficient evidence of resultant damages due to the breach.

With respect to Mercy's claim that defendants breached the background section of the agreements, the court is not persuaded that the background section alone constitutes an enforceable obligation. The subject leases respectively contain a background section which provides as follows:

> Landlord and Tenant have agreed that the Building (defined in Paragraph 1.1 below) will be developed by Landlord and occupied by Tenant and

> others as a "Wellness Place ®". Anchored by an off-campus, hospital-sponsored ambulatory care facility, a "Wellness Place ®" includes complementary retail, food, educational and service operations, integrated through public spaces which serve all the uses.

Mercy maintains that the above provision is an actual agreement between the parties reflecting a commitment by the defendants to develop a particular type of facility which the court should enforce. This clause, contrary to Mercy's assertion, does not impose any contractual obligations on defendants but rather is an indication of the parties' intent to create a Wellness Place ® at the demised premises. See Pritchard v. Wick, 406 Pa. 598, 178 A.2d 725 (1962)(finding recitation in "whereas" clause a reliable indicator of intentions of the parties). The court recognizes the well settled principal of contract interpretation that each and every part of a contract must be taken into consideration and given effect if possible and that the intention of the parties must be ascertained from the entire instrument. An interpretation will not be given to one part of a contract which will annul another part of it. Neal D. Ivey Co. v. Franklin Associates, Inc., 370 Pa. 225, 87 A.2d 236 (1952).

With this principle in mind, the reasonable inference drawn from the background section is that defendants would develop the demised premises and Mercy would occupy the demised premises as a Wellness Place ® with a hospital sponsored ambulatory care facility as the anchor with complimentary retail food, educational and service operations, integrated through public spaces which serve all of the uses. In this instance, the background section provides a general overview of the purpose of the leases and by itself does not establish any obligations on the part of the parties. The essential terms of the leases necessary to create the Wellness Place ® are contained within the Agreement

section of the leases. Since the background section of the leases set forth the intention of the parties to create a Wellness Place® generally, the court must look to the specific provisions of the lease to determine whether the obligations stated therein were breached.

In this regard, Mercy alleges that sections 1.4 Schematic Plan, 3.6 concerning other tenants, Schematic Plan, 5.3 Promotion Fund, 6.4 security, 6.5 repairs, 7.5 signs and signage, 19.3 service mark and 19.4 tenant's primary market and Appendix II of Schedule B have been breached. Taking into consideration the respective briefs submitted by the parties as well as the record evidence, the court finds that genuine issues of material fact exist as to whether defendants breached paragraphs 1.4 Schematic Plan, 3.6 concerning other tenants, 5.3 Promotion Fund, 6.4 security, 7.5 signs and signage, and Appendix II of Schedule B

On the other hand, this court finds plaintiff has failed to produce sufficient evidence to state a claim for breach of contract based on sections 6.5 repairs, 19.3 service mark and 19.4 tenant's primary market contained within the lease agreements. Based on the foregoing, defendants' motion for summary judgment is granted in part and denied in part.

B. Count IV Breach of Implied Contract

In Count IV of the complaint, plaintiff alleges that defendants owed plaintiff a duty to promote, market and make reasonable efforts to develop the Projects into integrated health care and retail properties, as well as to provide all services necessary for the planning and development of the projects and owed plaintiff a duty to use their best efforts to develop, market and promote the Projects. (Complaint ¶¶ 37-38). Plaintiff further alleges that defendants breached these obligations by failing to make reasonable

efforts to plan, develop, promote and market the Projects as a "Wellness Place ®" integrated health care and retail properties. (Id. ¶ 39). Defendants argue that Mercy's claim for breach of implied contract is foreclosed because the relationship is governed by the written lease agreements and the implied duties are vague and unenforceable.

The law is clear that in absence of an express provision the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract. Slater v. Pearle Vision Center, Inc., 376 Pa. Super. 580, 546 A.2d 676 (1988). This is known as the doctrine of necessary implication. Where it is clear that an obligation is within the contemplation of the parties at the time of contracting or is necessary to carry out their intentions, the court will imply it. Id. This is true even where the contract itself is not ambiguous since the doctrine allows the court to enforce the clear intention of the parties and avoid injustice. The existence of an express agreement does not foreclose the existence of an implied contract.

After considering the record evidence, the court reaches no conclusion as to whether an implied contract exists under the circumstances and whether a breach of said contract occurred. Although, evidence exists in the lease that the landlord intended to develop the demised property as a "Wellness Place ®" and tenant intended to occupy the building as a "Wellness Place ®" (See Background section of the Lease Agreements; ¶¶ 1.1, 1.2, 1.3, 1.4, and 5.3), genuine issues of fact exist as to whether an implied contract was intended by the parties or if the alleged implied contract is encompassed within the

express terms of the leases as discussed in the previous section in this Opinion. Based on the foregoing defendants motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted as to Count I (rescission), granted in part and denied as to Count III and denied as to the remaining counts. An order contemporaneous with this Opinion will follow.[4]

BY THE COURT,

_____

C. DARNELL JONES, II, J.

[4] In count III of the complaint, Mercy alleges it is entitled to declaratory relief because of the various alleged breaches. Since defendants' motion for summary judgment is denied in part as to Count III and denied as to Count IV, defendants' motion regarding Count II is also denied.