

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

ERIE PLAZA PARTNERS, L.P.,	:	December Term 2003
Plaintiff,	:	
v.	:	No. 1376
SAVE-A-LOT FOOD STORES,	:	
Defendant.	:	Commerce Program
	:	
	:	Control Number 081723

ORDER

AND NOW, this 4th day of November, 2004, upon consideration of Defendant Save-A-Lot Food Stores' Motion for Summary Judgment, Plaintiff Erie Plaza Partners, L.P.'s response in opposition, memorandum, all matters of record and in accord with the contemporaneous Memorandum Opinion being filed of record, it hereby is **ORDERED** and **DECREED** that said Motion is **Granted**.

It is further **ORDERED** that Plaintiff's complaint is dismissed against the defendant in its entirety.

BY THE COURT,

C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, II, J.

Presently before the court for its consideration is the motion for summary judgment filed by defendant Save-A-Lot Food Stores. For the reasons discussed, defendant's motion is denied and plaintiff's complaint is dismissed in its entirety.

BACKGROUND

This action arises out of an alleged breach of a commercial lease entered into by the parties on September 27, 1989 for premises located at "L" and Erie Avenue in Philadelphia, Pa. known as the Erie Shopping Center.¹ The lease provided that Moran would rent the aforementioned premises for an initial term of five years, commencing December 1, 1989 and ending November 30, 1994. The lease provided for the payment of a base rent as well as percentage rent based on any sales over a break even point.

In or about January 27, 1994, an agreement to Amend and Extend the existing lease entitled First Amendment ("Amendment") was executed. The First Amendment extended the primary term of the lease to November 30, 2004, expanded the physical

¹ The lease agreement was entered into between S.I.R. Associates ("SIR"), plaintiff Erie Plaza & Associates' successor in interest, and Moran Foods Co. Inc. d/b/a Save -A- Lot Food Stores ("Defendant" or "Moran").

premises to be leased to Moran and raised the financial “break point” above which Moran was obligated to pay percentage rent to the landlord.

In November 1998, plaintiff purchased the shopping center from the existing landlord. Pursuant to the purchase, plaintiff alleges it obtained an assignment of the lease and the amendment.

In November 2002, Moran ceased operations at the leased premises and opened a new store approximately two (2) blocks from Erie Shopping Center. Moran has continued to pay the amounts due and owing pursuant to the lease and first amendment.

On December 8, 2003, plaintiff instituted suit against Moran alleging breach of contract (Count I) and breach of the covenant of good faith and fair dealing (“Count II”).² Erie Plaza Partners alleges that Moran breached its obligations under the lease and the amendment to the lease when it abandoned the leased premises, failed to account for percentage rent on sales at the reopened Save-A-Lot store and failed to maintain the leased premises.³ Plaintiff further alleges that defendant breached its duty of good faith and fair dealing when it failed to keep the Save-A-Lot store opened. Moran has now filed a motion for summary judgment seeking dismissal of plaintiff’s complaint.

DISCUSSION

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Destefano & Associates, Inc.

² The implied covenant of good faith and fair dealing does not allow a claim separate and distinct from a breach of contract claim. JHE Inc. v. Southeastern Pennsylvania Transportation Authority, November Term 2001, No. 1790 (May 17, 2002)(Sheppard, J.).

³ With respect to plaintiff’s claim for failure to maintain the premises, plaintiff has failed to come forward with any evidence of how defendant failed to maintain the premises. Since the discovery period expired and since plaintiff has failed to produce evidence to demonstrate that defendant failed to maintain the premises, the court will dismiss this claim without prejudice.

v. Cohen, 2002 WL 1472340,* 2 (Pa. Com. Pl. 2002) (Herron, J.). Under Pa. R.C. P. 1035.2(2), a defendant may make the showing necessary to support the entry of summary judgment by pointing to evidence which indicates that the plaintiff is unable to satisfy an element of his cause of action. Id. In response, the nonmoving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

“Leases between landlords and tenants are governed by contract law.” Cambria-Stoltz Enterprises v. TNT Investments, 747 A.2d 947, 950 (Pa. Super. 2000)(quoting Stonehedge Square Ltd. v. Movie Merchants, Inc., 454 Pa. Super. 468, 685 A.2d 1019, 1025 (Pa. Super. 1996)). Interpretation of a contract, poses a question of law for the court to decide. Charles D. Stein Revocable Trust v. General Felt Industries Inc., 749 A.2d 978, 980 (Pa. Super. 2000). “In construing a contract, the intention of the parties is paramount and the court will adopt an interpretation which under all circumstances ascribes the most reasonable, probable and natural conducts of the parties, bearing in mind the objects to be accomplished.” Id. (quoting Village Beer & Beverage Inc. v. Vernon D. Cox & Co. Inc., 327 Pa. Super. 99, 107, 475 A.2d 117, 121 (1984)). “If the language appearing in the agreement is clear and unambiguous, the parties’ intent must be discerned solely from the plain meaning of the words used.” Id. A court will not imply a contract different than that which the parties have expressly adopted. Id. This rule is particularly apt when reviewing a contract involving two parties of relatively equal bargaining power as is generally the case in a commercial lease setting. Id.

Moran argues that it is entitled to summary judgment since plaintiff has failed to adduce sufficient evidence to prove that it was obligated under the terms of the lease and amendment to continuously operate at the premises. In response, plaintiff argues that it is not the closure that violates the lease but the reason for the closure and the circumstances that give rise to the closure. After reviewing the terms of the lease and amendment and after considering the parties respective positions, defendant's motion for summary judgment is granted.

Every contract in Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and its enforcement. Donahue v. Federal Express Corp., 753 A.2d 238, 242 (Pa. Super. 2000). Good faith has been defined as "honesty in fact in the conduct or transaction concerned." Id (quoting Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 671 A.2d 716, 722 (Pa. Super. 1996)). The duty of good faith however has been recognized in only limited situations. Creeger Brick and Bldg. Supply, Inc. v. Mid-State Bank and Trust Co., 385 Pa. Super. 30, 36-37, 560 A.2d 151, 154 (1989). Specifically, the duty of good faith may not be implied where (1) a plaintiff has an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith; (2) such implied duty would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid; or (3) there is no confidential or fiduciary relationship between the parties. Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863, 867 (Pa. Commw. 2000). Types of contractual good faith include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the

other party's performance." Baron v. Pritzker, 52 Pa. D.& C. 4th 14, 29 (Pa. com. Pl. 2001)(Sheppard, J.)(quoting Somers v. Somers, 418 Pa. Super. 131, 613 AA.2d 1211, 1213 (Pa. Super. 1992)). A party cannot be liable for a breach of the contractual duty of good faith, however, for doing something that the contract expressly permits. Id (quoting Creeger Brick and Bldg. Supply, Inc. v. Mid-State Bank and Trust Co., 385 Pa. Super. 30, 36-37, 560 A.2d 151, 154 (1989)).

In asserting that Moran breached its duty of good faith and fair dealing under the lease agreement, plaintiff maintains that "defendant has not only failed to apply its best efforts to drive sales over the base rent, but are, in fact competing with that obligation and attempting to restrain trade at the shopping center by refusing to terminate the lease unless plaintiff agreed not to lease to a grocery store." (Plaintiff's memo of law in opposition to defendant's motion for summary judgment p. 4). Plaintiff's attempts however to impose a mandatory obligation upon Moran to pay percentage rent is not in accordance with the terms of the lease and amendment.

The pertinent and unambiguous language within the lease and amendment clearly state that payment of percentage rent is contingent upon Moran's gross receipts reaching a specific dollar value for the applicable lease year. Specifically, Section 3.3 provides in part as follows:

Section 3.3 Percentage Rental

For each lease year during the term hereof, lessee shall pay, in addition to minimum rent, (1%) of the amount by which lessee's gross receipts in the demised premises for such lease year exceeds the sum of SIX MILLION DOLLARS (\$6,000,000.00), hereafter called the "volume allowance";...

Likewise, the amendment does not guarantee the payment of percentage rent but makes payment contingent upon reaching a certain dollar value in gross receipts. Specifically, the amendment requires the payment of percentage rent for lease years one through five of the initial ten year extension term of one percent of the gross receipts from the leased premises that exceed \$6,262,666.00. This amount increases with each term extension. Based on the clear language of these provisions, the payment of percentage rent is not mandatory as is the payment of annual base rent.

Plaintiff further maintains that defendant has failed to apply its best efforts to drive sales over the “break point”. Reviewing the lease and the amendment to determine the parties’ obligations demonstrates an absence of any language requiring Moran to use its best efforts to drive its gross receipts above the break even point denoted therein. The obligation to pay a substantial minimum annual base rent supports this courts interpretation that payment of percentage rent is not obligatory but conditional. (See Lease section 3.2 Minimum Rental).

Moreover, in addition to the lease and the amendment making the payment of percentage rent contingent upon a dollar value, the lease and amendment specifically provide that the percentage rent arises from the gross receipt from the leased premises. (See Exhibit A p. 3.4 (b) and Amendment p. 3). Leased premises are specifically defined as “L” and Erie Avenue and Colonial Village Meat Market. The percentage rent due plaintiff under the terms of the lease are confined to the leased premises as defined therein. No evidence exists that the drafters of the lease and amendment intended to collect percentage rent from locations other than the leased premises.

The court finds that imposing upon defendant the duty to pay percentage rent based on the gross receipt's of another location without any specification to do so within the lease and amendment would be in total disregard of the unambiguous language contained therein and would defeat the intentions of the parties.⁴

The same reasoning is equally applicable when applying the doctrine of necessary implication. "In the 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 of the contract and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract." Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863, 868 (Pa. Commw. 2001)(quoting Daniel B. Van Campen Corp. v. Building & Construction Trades Council of Philadelphia & Vicinity, 202 Pa. Super. 118, 195 A.2d 134, 136-37 (Pa. Super. 1963)). This doctrine may only be applied in limited circumstances to prevent injustice where it is abundantly clear that the parties intended to be bound by the terms sought to be implied. Id (Kaplan v. Cablevision of Pa, Inc., 448 Pa. Super. 306, 671 A.2d 716 (1996)).

The application of this doctrine to the case at hand would defeat the express, bargained for terms of the lease and amendment in which the defendant did not guarantee the payment of percentage rent and did not agree to pay percentage rent from gross

⁴ Additionally, plaintiff claims that defendant breached its duty of good faith and fair dealing when it refused to terminate the lease unless plaintiff agreed not to lease the premises to a grocery store. Once again Plaintiff fails to produce any evidence such as affidavit, deposition or documents, to support such a claim. In order to oppose a motion for summary judgment, the adverse party may not rest upon mere allegations or denials of the pleadings but must identify one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or identify evidence in the record establishing the facts essential to the cause of action. Pa. R. Civ. P. 1035.3 (a) (1)(2).

receipts at a different store location. Accordingly, defendant's motion for summary judgment is Granted.

CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment is Granted. Plaintiff's complaint is dismissed in its entirety. An Order contemporaneous with this Opinion will follow.

BY THE COURT,

C. DARNELL JONES, II, J.