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

POBAD ASSOCIATES,	:	June Term, 2001
Plaintiff	:	
	:	No. 2885
v.	:	
	:	Commerce Case Program
ALBERT EINSTEIN HEALTHCARE NETWORK,	:	
Defendant	:	Control No. 120373

OPINION

Defendant Albert Einstein Healthcare Network ("Einstein") has filed preliminary objections ("Objections") to the amended complaint ("Complaint") of Plaintiff Presidential TAC, L.P. ("Presidential"), who has been substituted for the original Plaintiff, POBAD Associates ("POBAD"). For the reasons set forth in this Opinion, the Objections are overruled.

BACKGROUND

On September 5, 2000, POBAD and Einstein entered into a lease agreement ("Lease") for property ("Premises") consisting of two stores at the Presidential Plaza Shopping Center ("Shopping Center") and a portion of land at the rear of the Shopping Center. The Lease limits Einstein's use of the Premises to "conducting the business of the operation of medical offices or healthcare related services or the retail sale of medical equipment . . . and related items and services and for no other purposes whatsoever without the consent of the Landlord," and prohibits Einstein from injuring the Premises or acting as a nuisance or menace. Lease at 2, art. 5. Under an accompanying Memorandum of Lease and Non-Exclusive Easement Agreement ("Easement Agreement"), POBAD

granted Einstein a non-exclusive right to use parking spaces in the Shopping Center's 150-space parking lot ("Lot") for its customers and employees subject to the terms of the Lease.

POBAD asserts that during the Lease negotiations, Einstein led POBAD to believe that it would use only a limited number of spaces in the Lot. Instead, the Complaint contends, Einstein has used the Lot in conjunction with its facilities on property next door to the Premises ("Medical Building Property"), has subleased the Premises and has allowed its subtenant to use the Lot. This allegedly has led to an overburdening of the Lot, congestion and a decrease in the value of the Shopping Center.

Relying on these allegations, the Plaintiff has brought suit against Einstein for breach of the Lease and Easement Agreement and fraud and seeks, among other things, punitive damages, attorneys' fees and termination of the Lease. In response, Einstein has filed the Objections, which challenge the legal sufficiency of both claims and certain of the Plaintiff's requests for relief.[1]

DISCUSSION

Each of the Objections is without merit and is overruled.

I. The Counts Set Forth in the Complaint Are Legally Sufficient

When a court is presented with preliminary objections asserting legal insufficiency,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by

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[1] The Objections also assert that Presidential, not POBAD, is the real party in interest because POBAD has transferred its interest in the Premises to Presidential. See Lore v. Sobolevitch, 675 A.2d 805, 808 (Pa. Commw. Ct. 1996) ("[C]ourts have defined the 'real party in interest' in any given contract or chose in action as a person who has the power to discharge the duties created and to control a cause of action and the proceedings brought to enforce it."). However, because POBAD has substituted Presidential as the Plaintiff in this matter, this Objection is moot and is overruled.

> demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999).

Einstein first argues that the parol evidence rule precludes the Plaintiff's reliance on any of Einstein's representations as to how many Lot spaces it would use, whether a subtenant would use the Lot and whether Einstein would use the Lot to service its facility next door to the Premises. Under Pennsylvania law, the Parol Evidence Rule limits the admission of evidence extrinsic to a contract.[2] Under this rule, "[i]f a written contract is unambiguous and held to express the embodiment of all negotiations and agreements prior to its execution, neither oral testimony nor prior written agreements or other writings are admissible to explain or vary the terms of that contract." Lenzi v. Hahnemann Univ., 445 Pa. Super. 187, 195, 664 A.2d 1375, 1379 (1995).[3] See also Zottlemeyer v. Transcontinental Gas Pipeline Corp., 540 Pa. 337, 345, 657 A.2d 920, 924 (1994) ("[W]hen the

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[2] The interpretation and construction of a contract is a matter of law to be decided by the court. Roman Mosaic & Tile Co. v. Thomas P. Carney, Inc., 729 A.2d 73, 77 (Pa. Super. Ct. 1999).

[3] The most recent Pennsylvania cases indicate that parol evidence will not be excluded unless a contract is both integrated and unambiguous. See Baker v. Cambridge Chase, Inc., 725 A.2d 757, 771 (Pa. Super. Ct. 1999) (excluding parol evidence "[w]here the alleged prior or contemporaneous oral representations or agreement concern a subject which is specifically dealt with within the written contract, and the written contract covers or purports to cover the entire agreement of the parties"); Roman Mosaic & Tile Co. v. Thomas P. Carney, Inc., 729 A.2d 73, 78 (Pa. Super. Ct. 1999) ("In cases where the terms are ambiguous or the complete agreement is not recorded, the court must examine the surrounding circumstances to determine the parties' intent."); West Conshohocken Restaurant Assocs., Inc. v. Flanigan, 737 A.2d 1245, 1248 (Pa. Super. Ct. 1999) ("[A]lthough a writing may appear to be complete on its face, parol evidence is admissible to vary the contents of the writing when there is proof that the writing does not reflect the true agreement of the parties."); Kehr Packages, Inc. v. Fidelity Bank, Nat'l Ass'n, 710 A.2d 1169, 1173 (Pa. Super. Ct. 1998) (determining issue of integration prior to use of Parol Evidence Rule); Lenzi, 445 Pa. Super. at 195, 664 A.2d at 1379 (A court must exclude parol evidence if the "written contract is unambiguous and held to express the embodiment of all negotiations and agreements prior to its execution.").

grant of an easement is ambiguous we must determine if the grantee's asserted use is a reasonable and necessary use in relation to the original purpose of the grant and within the intention of the original parties to the grant."); 1726 Cherry Street Partnerships v. Bell Atl. Props., Inc., 439 Pa. Super. 141, 146, 653 A.2d 663, 666 (1995) ("[I]n the absence of fraud, accident or mistake the alleged oral representations or agreements are merged in or superseded by the subsequent written contract, and parol evidence to vary, modify or supercede the written contract is inadmissible in evidence.").

Even if the parol evidence rule bars the admission of Einstein's alleged concessions, "[t]he owner of a dominant estate may not exercise the rights granted to him or her without regard to the rights of the servient owner." Purdy v. Zaver, 398 Pa. Super. 190, 197, 580 A.2d 1127, 1131 (1990). See also Mannherz v. Edgely Developers, Inc., 52 Pa. D. & C.2d 510, 527 (C.P. Bucks 1969) ("[T]he dominant tenement owner's use of the easement over the servient tenement must be a reasonable one."). Here, the Lease clearly indicates that the Lot is not for Einstein's exclusive use, and any attempt by Einstein to monopolize the Lot's spaces would qualify as a breach. Because the Plaintiff presents a legitimate breach of contract claim even if the parol evidence rule applies, the Court need not address the rule's application now, and the Objections to Count I's legal sufficiency are overruled.

Similar reasoning applies to the Plaintiff's fraud claim. Under Pennsylvania law, "if the promisor, at the time of making the promise, intended not to perform and made the promise only to secure the promisee's performance, the promisee may state a claim for promissory fraud." Textile Biocides v. Avecia, Inc., 52 Pa. D. & C.4th 244, 274 (C.P. Phila. 2001) (citing, inter alia, Brentwater Homes Inc. v. Weibley, 471 Pa. 17, 23, 369 A.2d 1172, 1175 (1977), and Tonkin v. Tonkin, 172 Pa. Super. 552, 560, 94 A.2d 192, 196 (1953)). In this instance, the Complaint alleges that Einstein

intended not to comply with certain of its representations, putting the focus on whether the parol evidence rule bars the Court from considering Einstein's representations because they vary or explain the terms of the Lease or Easement Agreement.

The alleged misrepresentations raised in the Complaint are that Einstein knew that it was going to overburden the Lot, that it was going to sublease the Premises and that it did not own the Medical Building Property. Any misrepresentation with regard to a sublease is not admissible, as the Lease and the Easement Agreement specifically contemplate assignment, and any representation to the contrary would vary or explain the written agreements.[4] However, the remaining two representations may be admissible. The Medical Building Property representation is echoed in the Easement Agreement, which states that Einstein is the "owner of certain real property located immediately adjacent to the Shopping Center. . . ." Easement Agreement ¶ A. Moreover, the fact that the Easement Agreement does not limit the number of Lot spaces available to Einstein is not important, as the requirement that it not burden the easement is implicit in the Easement Agreement for the reasons discussed supra. Thus, these two representations would not explain or vary the terms of the Lease or the Easement Agreement and therefore are not barred by the parol evidence rule. For these reasons, both of the Plaintiff's claims are legally sufficient.

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[4] Lease Section 13.01(a) allows assignment with the prior written consent of POBAD, which consent is not to be unreasonably withheld. Section 12(c) of the Easement Agreement allows assignment, but requires POBAD's prior written consent unless Einstein's interest is being assigned to a successor to its interests in the Medical Building Property or the Premises.

II. The Complaint Is Sufficiently Specific and Particular

To determine if a pleading meets Pennsylvania's specificity requirement set forth in Pennsylvania Rule of Civil Procedure 1019(a), a court must ascertain whether the allegations are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citation omitted). See also In re The Barnes Found., 443 Pa. Super. 369, 381, 661 A.2d 889, 895 (1995) ("[A] pleading should . . . fully summariz[e] the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [a] cause of action is based."). Allegations of fraud must be pled with particularity. Pa. R. Civ. P. 1019(b). See also Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992) (An allegation of fraud must "explain the nature of the claim to the opposing party so as to permit the preparation of a defense" and be "sufficient to convince the court that the averments are not merely subterfuge."); Maleski v. DP Realty Trust, 653 A.2d 54, 65 (Pa. Commw. Ct. 1995) (To determine whether fraud has been pled with particularity, a court must "look to the complaint as a whole."); McClellan v. Health Maint. Org. of Pa., 413 Pa. Super. 128, 143, 604 A.2d 1053, 1060 (1992) ("[P]laintiff must set forth the exact statements or actions plaintiff alleges constitute the fraudulent misrepresentations.").

The Court believes that the Plaintiff has set forth sufficient facts to meet the requirements set forth in the Pennsylvania Rules of Civil Procedure. The Complaint gives specific dates and times as to when certain material representations were made. In addition, the allegations, at the very least, allow an inference of Einstein's intent, which may be pled generally. Pa. R. Civ. P. 1019(b). This is sufficient to allow Einstein to prepare a defense and to convince the Court that the allegations are more than mere subterfuge. Thus, the Complaint meets the pleading requirements for specificity and particularity.

III. The Plaintiff's Requests for Relief Are Proper

Einstein attacks the Plaintiff's request for attorneys' fees, termination of the Lease and Easement Agreement and injunctive relief.[5] For the following reasons, these requests are proper.

When reviewing a pleading, "an allegation of damages or a prayer for damages which are not legally recoverable in the cause of action pleaded is impertinent matter in the sense that it is irrelevant to that cause of action." Huddock v. Donegal Mut. Ins. Co., 438 Pa. 272, 277 n.2, 264 A.2d 668, 671 n.2 (1970). Counsel fees cannot be recovered "unless there is express statutory authorization, a clear agreement of the parties, or some other established exception." Snyder v. Snyder, 533 Pa. 203, 212, 620 A.2d 1133, 1138 (1993) (citations omitted). Here, the Easement Agreement specifically provides for attorneys' fees. This does not necessarily conflict with the Plaintiff's request for termination of the Lease and Easement Agreement. See Baker v. Cambridge 725 A.2d 757, 766 (Pa. Super. Ct. 1999) ("[R]estitution often goes with rescission, and should not be characterized as damages. . . .").

The Plaintiff's request for injunctive relief is also proper. A plaintiff seeking a permanent injunction must establish that she has a clear right to relief, and that irreparable harm will occur if relief is not granted. Roman Cath. Congregation of St. Elizabeth Church v. Wuerl, 22 Pa. D. & C. 4th 391, 396 (C.P. Wash. 1994) (citing Carringer v. Taylor, 402 Pa. Super. 197, 586 A.2d 928 (1990), and State Ethics Comm'n v. Landauer, 91 Pa. Commw. 70, 496 A.2d 862 (1985)). See also Kimmel v. Lower Paxton Twp., 159 Pa. Commw. 475, 481, 633 A.2d 1271, 1274 (1993) (A trial court may

[5] Einstein also contends that the Plaintiff is not entitled to punitive damages because its fraud claim is legally insufficient. Because the Plaintiff's fraud claim is proper, the Court need not address this Objection.

grant a permanent injunction "only where the rights of the plaintiff were clear and free from doubt and the harm which the plaintiff sought to be remedied is great and irreparable."). Cf. Soja v. Factoryville Sportsmen's Club, 361 Pa. Super. 473, 478-79, 522 A.2d 1129, 1131-32 (1987) (comparing preliminary and permanent injunctions). Irreparable harm may include "the unbridled threat of the continuation of the violation, and incumbent disruption of the employer's customer relationships." West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295, 299 (Pa. Super. Ct. 1999) (quoting John G. Bryant Co. v. Sling Testing & Repair, 471 Pa. 1, 8, 369 A.2d 1164, 1167 (1977)) (quotation marks removed). The harm to the Plaintiff's business, as alleged in the Complaint, qualifies as irreparable harm, justifying a permanent injunction if the Plaintiff prevails on the merits of its claim. Thus, each of the challenged requests for relief is proper.

CONCLUSION

For the reasons set forth supra, the Objections are overruled.

BY THE COURT:

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JOHN W. HERRON, J.

Date: February 4, 2002

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Plaintiff	:	
	:	No. 2885
v.	:	
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ALBERT EINSTEIN HEALTHCARE NETWORK,	:	
Defendant	:	Control No. 120373

ORDER

AND NOW, this 4th day of February , 2002, upon consideration of the Preliminary Objections of Defendant Albert Einstein Healthcare Network to the Amended Complaint of Plaintiff Presidential TAC, L.P. and the response of the Defendant thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Preliminary Objections are OVERRULED. The Defendant is directed to file an answer to the Amended Complaint within 20 days of the date of entry of this Order.

BY THE COURT:

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JOHN W. HERRON, J.