

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

KANE'S OFFICE FURNITURE, INC.	:	MARCH TERM, 2001
	:	
	:	
Plaintiff	:	No. 1671
	:	
v.	:	COMMERCE CASE MANAGEMENT
	:	PROGRAM
PREFERRED REAL ESTATE	:	
INVESTMENTS, INC. et al.	:	
Defendants	:	Control Nos. 060058
	:	060173

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**ORDER and MEMORANDUM**

AND NOW, this 21st Day of November, 2002, upon consideration of the cross Motions for Summary Judgment of Plaintiff, Kane's Office Furniture, Inc. ("Kane's"), and Defendants Preferred Real Estate Investments, Inc., et al., the pertinent responses thereto, oral argument from the parties, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that:

- 1) Plaintiff's Motion for Summary Judgment is DENIED; and
- 2) Defendants' Motion for Summary Judgment is GRANTED and the Plaintiff's case is dismissed.

BY THE COURT:

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*COHEN, GENE D., J.*



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**OPINION**

Plaintiff, Kane’s Office Furniture, Inc. (“Kane’s”), and Defendants, 211 Gulroad Associates, L.P. (the “Landlord”), 211 Gulroad, Inc., Preferred Real Estate Investments, Inc. (“Preferred”), and Preferred Real Estate Advisors, Inc. have filed these cross Motions for Summary Judgment. For the reasons discussed below, the Plaintiff’s motion is **denied**, the Defendants’ motion is **granted** and the Plaintiff’s case is **dismissed** accordingly.

**BACKGROUND**

Kane’s is a Pennsylvania Corporation which sells used office furniture. On September 25, 1998, Kane’s entered into a lease agreement with 211 Gulroad Associates, L.P. (“Gulroad Associates”) to lease 8000 square feet of warehouse and showroom space<sup>1</sup> at 211 South Gulph

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<sup>1</sup> Paragraph 1 of the Lease states that the premises shall be “used by the Tenant for the purpose of Retail Furniture Warehouse Showroom and Outlet (In accordance with the Upper Merion Township Municipal Zoning Ordinance) and for no other purpose.” Defendants’ note that Kane’s proposed sublease was for “office use” in violation of both the terms of the Lease and

Road, King of Prussia, PA (“211 S. Gulph Road”). Pl.’s Mot. Sum. Judg. Ex. C. Preferred is the asset manager and broker for Gulroad Associates.

Kane’s commenced this action against Defendants for breach of contract, tortious interference, and under the theory of promissory estoppel, for claims arising from the Landlord’s refusal to approve a proposed sublease between Kane’s and PFPC, a subsidiary of PNC Bank and the largest tenant of 211 S. Gulph Road. Kane’s contends that Preferred, acting on behalf of the Landlord, orally consented to Kane’s sublease to PFPC, and that Preferred later refused to approve the sublease to PFPC. Preferred replies that they never consented, either orally or in writing, to Kane’s sublease with PFPC.<sup>2</sup> Kane’s also alleges that Preferred interfered with Kane’s prospective sublease agreement with PFPC by brokering an alternative sublease deal between Comcast and PFPC. During the relevant time period, Comcast, PFPC and Kane’s were tenants at 211 S. Gulph Road.

As early as the winter of 2000, PFPC indicated to Preferred that it needed more space at 211 S. Gulph Road. Pl. Mot. Sum. Judg. ¶¶13-14. In response, Joseph Muldoon (“Muldoon”) an employee of Preferred, informed Kane’s that PFPC’s needed more space. *Id.* at ¶15. Kane’s argues that Muldoon approached Kane’s to sublease its space or relocate and that Mike O’Neill, Chairman of Preferred’s Board, stated that Kane’s could sublease if they wanted to terminate the lease. *Id.* at ¶¶15-18. Preferred alleges that Kane’s offered to vacate the premises if Gulroad Associates exercised its option to terminate the lease and buy out Kane’s. Def.’s Mot. Sum. Judg.

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the Upper Merion Township Municipal Zoning Ordinance.

<sup>2</sup> It is undisputed that the terms of lease agreement provide that Kane’s must obtain the Landlord’s written approval before subletting the property.

at 7. Gulroad Associates declined to terminate the lease.

On May 15, 2000 Kane's confirmed, in writing, that it was entering into negotiations to sublease its space to either PFPC or Comcast. Pl.'s Mot. Sum. Judg. Ex. L. On May 31, 2000, Preferred acknowledged Kane's letter and stated that Gulroad Associates, as Landlord, reserved the right to approve any sublease between Kane's and a prospective sublessee. Id. at Ex. M. After receiving the Muldoon letter, Kane's retained Patrick Shea ("Shea") to assist Kane's negotiate a sublease with PFPC. Id. at ¶23. In a letter dated June 30, 2000, Shea informed Preferred that he was working on behalf of Kane's to obtain a sublease between Kane's and PFPC. Id. at ¶24.

During the summer of 2000, Kane's advised Preferred that it was negotiating a proposed sublease with PFPC. Pl.'s Mot. Sum. Judg. ¶¶24-30. In September, 2000, PNC Bank signed a Letter of Intent which set forth terms of proposed sublease between PFPC and Kane's. Id. at ¶30. On October 12, 2000, Kane's sent Preferred a draft of Kane's proposed sublease with PFPC; it is undisputed that this proposal was never approved by Preferred or accepted by PFPC. Id. at ¶34. In a facsimile dated, October 12, 2000, Preferred informed PNC that Kane's space was not approved for office use and proposed an alternative sublease arrangement between Comcast and PFPC. Id. at Ex. W. In December, 2000 negotiations culminated with PFPC entering into a lease agreement for office space vacated by Comcast. Id. at Ex. Z.

Now before this Court are the parties cross Motions for Summary Judgment, their responses, as well as the respective memoranda. In its Motion, Kane's moves for summary judgment on its breach of contract claim on the grounds that Preferred breached an oral contract with Kane's by allegedly renegeing on its consent to the sublease between Kane's and PFPC.

Preferred's Motion asserts that on all counts, Kane's complaint should be dismissed because, as a matter of law, the statute of frauds bars any oral modification of the parties lease agreement, there was no oral modification and there was no evidence of tortious interference with Kane's prospective agreement with PFPC.

### **DISCUSSION**

In accordance with Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, this Court may grant Summary Judgment where the evidentiary record shows either that the material facts are undisputed, or the facts are insufficient to make out a prima facie cause of action or defense. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998). To succeed, a Defendant moving for summary judgment must make a showing that the Plaintiff is unable to satisfy an element in his cause of action. Basile v. H&R Block, 777 A.2d 95, 100 (Pa. Super. Ct. 2001). To avoid summary judgment, the Plaintiff, as the non-moving party, must adduce sufficient evidence on the issues essential to its case and on which it bears the burden of proof such that a reasonable jury could find in favor of the Plaintiff. McCarthy, 724 A.2d at 940.

In addressing the issue, this Court is bound to review the facts in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Manzetti v. Mercy Hospital of Pittsburgh, 565 Pa. 471, 776 A.2d 938, 945 (2001). The Plaintiff, must be given the benefit of all reasonable inferences. Samarin v. GAF Corp., 391 Pa. Super. 340, 350, 571 A.2d 398, 403 (1989).

#### **1. Defendants' Motion for Summary Judgment on Plaintiff's Breach of Contract Claim is Granted Because There Was No Agreement to Approve Kane's Sublease.**

The first issue before the Court is whether Preferred, acting on behalf of the Landlord,

gave its written consent to Kane's proposed sublease with PFPC. The sole document that Kane's presents as evidence of Preferred's "written consent" clearly contradicts Kane's argument by stating that "[t]he Landlord as per the Lease Agreement (Section 9) between Kane's Office Furniture ("Tenant") and Gulroad Associates, L.P. ("Landlord") reserves the right to review and approve any proposed Sublease Agreement. (the "Muldoon Letter")"<sup>3</sup> Pl.'s Mot. Sum. Judg. Ex. M. This Court finds that Kane's argument on this point is disingenuous, and is a waste of this Court's resources.

Next, the Court will address whether the parties modified the terms of the lease agreement waiving the requirement for the Landlord's written approval of Kane's prospective sublease.<sup>4</sup> Kane's contends that Preferred's statements and actions constituted an oral modification of the lease agreement. To prevail on its claim, Kane's must establish that the parties oral modification of the prior written agreement is "based on valid consideration and is proved by evidence which is clear, precise and convincing." Pellegrine v. Luther, 403 Pa. 212, 215, 169 A.2d 298, 299-300 (1961). Kane's has not proven by clear, precise or convincing evidence that the parties orally, or otherwise, modified the terms of the lease agreement.

Kane's attempts to present a mosaic, which when viewed in total, establishes that Preferred modified the terms of the lease agreement and gave its oral approval to the proposed sublease. First, no reasonable juror could find that the Muldoon Letter constituted approval of a

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<sup>3</sup> Kane's reliance on Deposition Testimony also fails to support Kane's belief that Preferred gave its written approval to Kane's proposed sublease with PFPC. See Pl.'s Mot. Sum. Judg. at 25.

<sup>4</sup> The parties breach of contract dispute can be distilled to the following dispositive element: whether the alleged oral consent can serve to modify the terms of the lease agreement, which expressly provides that written approval is required for any sublease.

sublease that had not yet been drafted. Second, Kane's reliance on deposition testimony of Muldoon and William Hamlet, President of Kane's, does not establish that Preferred modified the lease or approved of the proposed sublease to PFPC. The testimony which Kane's presents to this Court does little more than establish that: (1) Muldoon informed Kane's that PFPC needed more space, and (2) Kane's had the right to sublease its space subject to Landlord's approval. See Pl.'s Mot. Sum. Judg. Ex. K at 37:11-17, 44:16-45:11. Moreover, Hamlet's testimony provides that he understood that there were no oral or written modifications to the lease agreement. Def.'s Mot. Sum. Judg. Ex. C at 90:11-92:6. Thus, Kane's own evidence when viewed in a light most favorable to Kane's does not clearly, precisely or convincingly establish that the parties orally modified the lease agreement.

Furthermore, even if Kane's could establish the alleged oral modification, such modification would be barred by the Statute of Frauds. Kane's lease agreement with Gulroad Associates is for a term of eight (8) years. Under the Pennsylvania Statute of Frauds, leases of more than three years must be in writing. 68 P.S. §250.202. It is settled that contracts subject to the Statute of Frauds can not be orally modified, because modifications are subject to the same requirements as the original contract. Safe Deposit & Trust Co. v. Diamond Coal & Coke Co., 234 Pa. 100, 113, 83 A. 54, 59 (1912); Target Sportswear, Inc. v. Clearfield Foundation, 327 Pa.Super. 1, 474 A.2d 1142 (1984). Kane's purported oral modification would serve to transfer of the remainder of the lease to a third party and, as such, the modification would be governed by the Statute of Frauds. Therefore, Kane's has not presented evidence sufficient to support its claim for breach of contract. Accordingly, this Court grants Defendants' and denies Plaintiff's motion for summary judgment on the issue of breach of contract.



**2. Kane's Fails to Establish the Necessary Elements to Support its Tortious Interference Claim.**

Under Pennsylvania law, a plaintiff claiming tortious interference with contractual relations must establish the following elements:

- 1) a prospective contractual relation;
- 2) the purpose or intent to harm the plaintiff by preventing the relation from occurring;
- 3) the absence of privilege or justification on the part of the defendant; and
- 4) the occasioning of actual damage resulting from the defendant's conduct.

Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 208, 412 A.2d 466, 471 (1979).

Pennsylvania Courts rely on the Restatement of Torts as authority to define the elements of tortious interference with contractual relations. See Glenn v. Point Park College, 441 Pa. 474, 479-80, 272 A.2d 895, 898 (1971). With regard to "prospective contractual relations," the Pennsylvania Supreme Court has held that this element, though not based on a certain contractual right, must be grounded in the reasonable likelihood or probability of an enforceable contractual relationship. Id. However, a party enforcing a legal right or having a financial interest in the business of a third party may interfere with that party's contractual relations so long as the "interference" does not employ wrongful means and the party is acting to protect their interest from being prejudiced. See Restatement (Second) Torts §769 (1979); See also, Schulman v. J.P. Morgan Investment Management Inc., 35 F.3d 799, 809-811 (1994).

In the instant case, Kane's argues that Preferred interfered with Kane's prospective sublease with PFPC. As established above, Kane's lease expressly requires the Landlord's written approval for any sublease. Therefore, the "prospective sublease" between Kane's and PFPC was conditioned on acceptance by the Landlord. Without the Landlord's acceptance, Kane's could

not have entered into agreement with PFPC. Moreover, the Landlord has a legally enforceable right to determine the nature and quality of its tenants.

It is undisputed that Kane's proposed sublease with PFPC was for office use and that without a variance, such use would violate Upper Merion Township's zoning ordinance. Kane's space was zoned for warehouse and retail space, not office space. Def.'s Mot. Sum. Judg. Ex. D, ¶ 1. Without a variance from the Upper Merion township zoning board, PFPC could not legally use the proposed space for office use. Under the terms of the Lease Agreement, the Landlord may reject any proposed sublease that may harm the Landlord's interest. Therefore, the Landlord had a legal right to protect its interest and reject PFPC's proposed sublease.

Accepting as true the facts, in a light most favorable to Kane's, this Court finds that because Kane's prospective sublease agreement required the conditional acceptance of the Landlord, and PFPC's intended use of the property required a zoning variance, no reasonable juror could find that Kane's had an enforceable prospective contractual relationship with PFPC. Moreover, the Landlord had a legal right to withhold its approval of any proposed sublease agreement, especially one that potentially violated township zoning ordinances. Therefore, as a matter of law, Kane's cannot establish all of the necessary elements to prove its tortious interference claim.

### **3. The Facts Do Not Support Kane's Claim for Promissory Estoppel.**

A cause of action for promissory estoppel arises when a party relies on a promise which could be reasonably be expected to influence the action or forbearance of a party.

See Murphy v. Burke, 454 Pa. 391, 398 (1973)(applying the principles of the Restatement (Second) Contracts §90). To recover under the theory of promissory estoppel a plaintiff must

allege an express promise; an implied promise is insufficient to support a claim for promissory estoppel. Constar, Inc. v. National Distribution Center, Inc., 101 F.Supp.2.d 319, 324 (E.D. Pa. 2000)(applying Pennsylvania Law).

In the instant matter, Plaintiff's have not adduced that defendant's expressly promised to approve the Plaintiff's proposed sublease. Kane's can point to no express promise by the Defendants, but rather relies on the fact that Defendants allowed Kane's to explore the possibility of a sublease with PFPC. In fact, the letter that Kane's relies on to establish that Defendants approved of Kane's sublease directly states that the Landlord "reserves the right to review and approve any proposed Sublease Agreement between Kane's Office Furniture ("Tenant") and any Sublessee." Pl.'s Mot. Sum. Judg. Ex. M. Moreover, deposition testimony of Kane's President, William Hamlet, supports the conclusion that Defendants reserved the right to reject the proposed sublease and that such consent was never granted. Def. Mot. Sum. Judg. Ex C. Hamlet Dep. At 102-03, 133-140. Therefore, this Court finds that Plaintiff has failed to allege facts which, if true, would support a finding that Defendants promised to approve a sublease between Plaintiff's and PFPC. Accordingly, summary judgment must be granted in favor of Defendants and Plaintiff's claim for promissory estoppel must be dismissed.

### **CONCLUSION**

For the reasons stated above, this Court finds that Plaintiff has not alleged sufficient facts to establish its breach of contract, tortious interference, and promissory estoppel claims against Defendants. Accordingly, this Court grants the Defendants' Motion for Summary Judgment, denies Plaintiff's Motion for Summary Judgment, and the Plaintiff's case will be dismissed. This Court will issue a contemporaneous Order with this Opinion.

BY THE COURT:

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*COHEN, GENE D.,* J.

DATED: November 21, 2002