

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

RICK'S ORIGINAL PHILLY STEAKS, INC.,	:	JULY TERM, 2007
	:	
Plaintiff,	:	NO. 03822
	:	
v.	:	COMMERCE PROGRAM
	:	
READING TERMINAL MARKET	:	Control Nos. 090785, 091374
CORPORATION, PAUL STEINKE, RICARDO	:	
DUNSTON, and TONY LUKE'S OLD PHILLY	:	
STYLE SANDWICHES,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 20th day of February, 2008, in accordance with the court's Opinion issued simultaneously, it is **ORDERED** as follows:

1. The Preliminary Objections of Reading Terminal Market Corporation, Paul Steinke and Ricardo Dunston to the Complaint are **SUSTAINED in part** and Counts I, II, III, IV, V, VI, VII and IX of the Complaint, and the claim for punitive damages in Count VIII of the Complaint, are **DISMISSED**. The remainder of the Preliminary Objections are **OVERRULED**.
2. The Preliminary Objections of Tony Luke's Old Philly Style Sandwiches to the Complaint are **SUSTAINED**, and all claims against Tony Luke's Old Philly Style Sandwiches are **DISMISSED**.

BY THE COURT,

MARK I. BERNSTEIN, J.

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	:	
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OPINION

Plaintiff Rick's Original Philly Steaks, Inc. ("Rick's"), brought this action against its landlord, Reading Terminal Market Corporation ("RTM"), and two agents of RTM, Paul Steinke and Ricardo Dunston. Rick's bases its claims on RTM's failure to enter into a written lease renewal with Rick's and RTM's attempt to evict Rick's from the space it currently occupies at the Reading Terminal Market (the "Premises"). Rick's also asserts claims in this action against Tony Luke's Old Philly Style Sandwiches ("Tony Luke's"). Tony Luke's is apparently a potential new tenant to which RTM may lease the Premises currently occupied by Rick's.

Rick's asserts claims against RTM, Steinke and Dunston for: 1) breach of an oral agreement to renew Rick's written lease; 2) a mandatory injunction directing RTM to execute a written lease agreement with Rick's; 3) breach of certain written "Guidelines" promulgated by RTM; 4) fraud for omitting to tell Rick's that RTM would not renew Rick's lease; 5) breach of the duty of good faith and fair dealing for attempting to evict Rick's;¹ 6) breach of the duty to negotiate in good faith for failing to negotiate and execute a renewal lease; 7) declaratory

¹ This claim was not asserted against Steinke and Dunston.

judgment that a renewal lease exists between RTM and Rick's; 8) promissory estoppel based on RTM's representations that a renewal lease would be executed; and 9) conspiracy by the board members of RTM to evict Rick's from the Premises. RTM, Steinke and Dunston filed Preliminary Objections to all of the above claims, as well as to Rick's request for punitive damages. Those Preliminary Objections are before the court.

In addition to the claims against RTM, Steinke and Dunston, Rick's asserts claims against Tony Luke's for tortious interference with existing and prospective contractual relations and for tortious interference with prospective economic advantage.² Tony Luke's has filed Preliminary Objections to all the claims against it, which Preliminary Objections are also before the court.

I. Count I For Breach Of Oral Contract, Count II For Injunction, Count III For Breach Of Written Guidelines, And Count VII For Declaratory Relief Are Dismissed.

Once Rick's existing lease expired, in June, 2006, the parties entered into a written agreement for a month-to-month tenancy as follows:

To provide additional time for us to engage in lease discussions, [RTM is] willing to extend [Rick's] current Lease under all of the same terms and conditions on a month-to-month-basis. During lease discussions, until such time as you enter into a new Lease agreement with the Landlord, your current Lease term will be automatically extended on a month-to-moth basis, until either party notifies the other in writing (with 30 days advance notice) of its intent not to further extend the Lease term.³

² The claims for declaratory relief and civil conspiracy are asserted "against all defendants" which would appear to include Tony Luke's. However, the allegations in support of such claims do not mention Tony Luke's, nor any wrongful acts committed by Tony Luke's.

³ Complaint, ¶ 39, Ex. B. See also *Clairton Corp. v. Geo-Con, Inc.*, 431 Pa. Super. 34, 40-41, 635 A.2d 1058, 1061 (1993) ("Where a tenant remains in possession of realty after the expiration of his term, and during a period in which he and the landlord are negotiating for a new lease, and the landlord accepts rent for this period, it is uniformly held that such acceptance is not a manifestation of the landlord's consent to an extension or renewal of the lease. . . . Thus, because the parties' conduct evidenced an intent to enter into a new agreement, even though a new lease never actually came to fruition, such conduct was sufficient to . . . hold that tenant's occupation of the premises after the original lease had expired became a month to month tenancy.")

In June, 2007, RTM issued a thirty day termination letter with respect to Rick's month-to-month tenancy.⁴

Rick's alleges that RTM's termination was improper because, as a result of the parties' discussions during the month-to-month tenancy, Rick's and RTM became "parties to a lease by which [RTM] orally agreed to lease the [Premises] in the Reading Terminal Market to Rick's Steaks for a certain monthly sum and upon terms and conditions upon which the parties had previously agreed."⁵ Rick's further alleges that RTM, Steinke and Dunston breached this oral lease agreement by failing to "offer Rick's Steaks a new written lease."⁶

A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages.⁷

Rick's alleges that, at the time RTM attempted to terminate Rick's month-to-month tenancy, "all of the material terms of the new lease between Rick's Steaks and [RTM] had been agreed upon,"⁸ but Rick's does not set forth any of those terms. At the very least, in order to establish a binding lease agreement, Rick's must allege the particular term of years and specific rental amount for the Premises.⁹ Since Rick's failed to do so, its breach of contract claims based on the alleged renewal lease also fail.

In some cases, it may be appropriate to allow a plaintiff who seeks to establish the existence of an oral lease, such as Rick's, to amend its complaint to set forth the specific terms of

⁴ Complaint, Ex. D.

⁵ *Id.*, ¶ 73.

⁶ *Id.*, ¶ 74.

⁷ Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999).

⁸ Complaint, ¶ 62.

⁹ See Emerman v. Baldwin, 186 Pa. Super. 561, 142 A.2d 440 (1958) (court found that letter which set forth term of years and monthly rental amount was an enforceable lease).

the purported lease. However, Rick's has not given the court any reason to believe that Rick's can plead such specific terms. In its lengthy response to defendants' Preliminary Objections, and in its sur-reply, Rick's does not assert any particular term of years or price to which it claims the parties agreed. Rick's simply claims that discovery "can and will reveal (and, in fact, already has revealed) the specific terms of the agreement between the parties," but fails to state what, if any, terms were revealed in discovery.¹⁰ Rick's has not, in the last 6 months of discovery, moved to amend its Complaint to assert the specific terms of the lease to which it claims it agreed. Since Rick's was one of the parties that purportedly agreed to the terms of the renewal lease, it necessarily must have independent knowledge of those terms, and it does not need to await discovery in order to plead them.

In the absence of the necessary allegations to support its request for a renewal lease, Rick's has no basis for requesting the relief set forth in its claims for breach of contract, injunction, breach of certain Lease Administration Guidelines of the RTM, and declaratory judgment. In the first three Counts, Rick's asks this court to order specific performance by "direct[ing] the parties to execute a renewal lease for Rick's Steaks' current location at the Reading Terminal Market."¹¹ In the count for declaratory relief, Rick's asks the court to declare that "(i) a valid agreement for a leasehold exists between [RTM] and Rick's Steaks; and (ii) defendants [RTM, Steinke, and Dunston are] in default and in violation of the oral lease in existence between [RTM] and Rick's Steaks."¹²

¹⁰ Rick's Sur-Reply Brief to the Preliminary Objections of RTM, p. 2.

¹¹ Complaint, p. 14, Wherefore Clause; p. 15, Wherefore Clause; p. 18, Wherefore Clause.

¹² *Id.*, p. 22, Wherefore Clause.

Because real property is unique, the court may order specific performance of a contract regarding such property.¹³ However, the court cannot order specific performance of a non-existent contract. Since Rick's has failed to allege any specific terms of a renewal lease between it and RTM, its claims for breach of contract, injunction, and declaratory judgment to enforce an unspecified lease agreement cannot be sustained and are dismissed.

II. Count IV for Fraud Is Dismissed.

In support of its claim for fraud, Rick's alleges that RTM, Steinke and Dunston "intentionally and/or recklessly misrepresented that Rick's Steaks would receive the new lease necessary for its continued existence at the Reading Terminal Market when, in fact, defendants did not intend to renew Rick's Steaks' lease or offer a new lease to Rick's Steaks, and/or concealed material facts relating to their intent not to offer a new lease to Rick's Steaks."¹⁴

It is well established that a cause of action for fraud must allege a misrepresentation of a past or present material fact. . . . A promise to do something in the future, which promise is not kept, is not fraud.¹⁵

The defendants' promise to provide a renewal lease to Rick's is a promise to do something in the future, which does not give rise to a cause of action for fraud. Instead, such a promise of future performance may give rise to a contract action, if there is adequate consideration for the promise, or an equitable action to enforce the promise, if plaintiff reasonably relied on the promise.¹⁶

Rick's claim for fraud is dismissed.

¹³ Emerman, 186 Pa. Super. at 569, 142 A.2d at 445 ("A contract to lease may be the subject of specific performance the same as any other contract pertaining to the sale of real estate.")

¹⁴ Complaint, ¶ 107.

¹⁵ Krause v. Great Lakes Holdings, Inc., 387 Pa. Super. 56, 67-8, 563 A.2d 1182, 1187 (1989). *See also* Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa. Super. 1997).

¹⁶ Shoemaker, 700 A.2d at 1006-1008.

III. Count IX for Civil Conspiracy Is Dismissed.

As the basis for its claim for civil conspiracy, Rick's alleges that "various members of [RTM's] board entered into an unlawful agreement for the express purpose of eliminating Rick Olivieri, and thus Rick's Steaks, from the Reading Terminal Market."¹⁷

In order for a claim of civil conspiracy to proceed, a plaintiff must allege the existence of all elements necessary to such a cause of action. . . . It must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. . . . [A] single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves.¹⁸

Steinke, Dunston, and the members of the RTM board are all alleged to be agents of RTM. As agents, they cannot be liable for conspiring with RTM or among themselves to oust Rick's from the Premises. Therefore, Rick's claim for civil conspiracy is dismissed.

IV. Counts V For Breach Of The Duty Of Good Faith And Fair Dealing And Count VI For Breach Of The Duty To Negotiate In Good Faith Are Dismissed.

Rick's alleges that the RTM breached its duty of good faith and fair dealing by "wrongfully evicting Rick's Steaks from the Market."¹⁹ Pennsylvania courts recognize a duty of good faith and fair dealing only as part of the obligations imposed under a contract between the parties.²⁰ Since Rick's has not pled any valid contract claim against RTM, it has no claim for breach of the duty of good faith and fair dealing either.

Rick's alleges that "[a]s landlord and manager of the Reading Terminal Market, [RTM] had a duty to negotiate in good faith with Rick's Steaks in connection with its lease at the

¹⁷ Complaint, ¶ 140.

¹⁸ Grose v. P&G Paper Prods., 866 A.2d 437, 440-441 (Pa. Super. 2005).

¹⁹ Complaint, ¶ 116.

²⁰ Murphy v. Duquesne Univ. of the Holy Ghost, 565 Pa. 571, 598, 777 A.2d 418, 434 (2001)("[T]his obligation of good faith is tied specifically to and is not separate from the duties a contract imposes on the parties.")

Market.”²¹ The Pennsylvania Superior Court has twice refused to recognize any cause of action for breach of the duty to negotiate in good faith.²² In considering the claim, the Superior Court has made clear that, if it were to be recognized, it would have to be based upon a detailed letter of intent evidencing both parties’ agreement to be bound to negotiate in good faith. No such letter of intent exists in this case. The parties’ month-to-month tenancy agreement is clearly not such a letter of intent, since it contemplates only “lease discussions,” which are necessarily something less than lease negotiations, and it expressly allows either party to terminate upon 30 days notice.²³ Rick’s claim for breach of the duty to negotiate in good faith, like its claim for breach of the duty of good faith and fair dealing, is dismissed.

V. Count VIII for Promissory Estoppel Is Sufficiently Pled, But the Claim For Punitive Damages Is Dismissed.

Rick’s asserts that, as a result of RTM’s, Steinke’s and Dunston’s promises that a new lease would be forthcoming, Rick’s “purchased and sent a series of conceptual drawings to defendant Steinke regarding the proposed renovations” of the Premises.²⁴ Under a promissory estoppel theory:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.²⁵

²¹ Complaint, ¶ 123.

²² GMH Assoc., Inc. v. The Prudential Realty Group, 752 A.2d 889 (Pa. Super. 2000); Jenkins v. County of Schuylkill, 441 Pa. Super. 642, 658 A.2d 380 (1995).

²³ Complaint, Ex. B.

²⁴ *Id.*, ¶¶ 52, 135.

²⁵ Kreutzer v. Monterey County Herald Co., 560 Pa. 600, 606, 747 A.2d 358, 361 (2000), citing Restatement (Second) Contracts § 90 (1981).

Rick's has pled a claim for promissory estoppel based on the defendants' alleged promise of a renewal lease and Rick's reliance on that promise in having drawings for renovation made.

“[U]nder promissory estoppel, a promisee's recovery is ordinarily limited to recovery of the amounts lost and expended in reliance on the promise.”²⁶ In this case, Rick's recoverable damages are limited to the amount it reasonably spent to renovate the Premises in reliance on the promise of a renewal lease before Rick's learned that its lease would not be renewed. Punitive damages, however, may not be recovered on a promissory estoppel claim.

VI. All Claims Against Tony Luke's Are Dismissed.

Rick's asserts claims against Tony Luke's for tortious interference with existing and prospective contractual relations and prospective economic advantage. The elements of a cause of action for tortious interference with contract are:

(1) the existence of a contractual or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.²⁷

In support of its claim for tortious interference with existing contractual relationship, Rick's claims Tony Luke's interfered “by inducing a breach or otherwise causing [RTM] not to perform its duties under its leasing agreement with Rick's Steaks.”²⁸ However, since Rick's failed to specify any terms of a renewal lease agreement between it and RTM, it has no breach of contract claim against RTM. Rick's cannot assert a claim against Tony Luke's for inducing a breach of a non-existent lease with RTM.

²⁶ Lobolito, Inc. v. N. Pocono Sch. Dist., 562 Pa. 380, 391, n. 10, 755 A.2d 1287, 1293, n. 10 (2000).

²⁷ Strickland v. Univ. of Scranton, 700 A.2d 979, 985 (Pa. Super. 1997).

²⁸ Complaint, ¶ 147.

In support of its claim for interference with prospective contractual relations or economic advantage, Rick's alleges that

Rick's Steaks had a reasonable expectation of economic advantage arising from the anticipated new lease and future years in business, which prospective economic advantage was lost as a result of defendant Tony Luke's tortious and malicious interference with Rick's Steaks' pursuit of a new lease.²⁹

However, Rick's does not specifically allege anything that Tony Luke's actually did which was in any way improper in competing for the lease.

"One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors."³⁰

As rival sandwich makers, Rick's and Tony Luke's are competitors. Tony Luke's was privileged to try to compete with Rick's for a lease from RTM, so long as it did not use any improper methods. Since there is no allegation that Tony Luke's did anything wrong, Rick's claims for tortious interference with prospective contract/economic advantage must be dismissed.

Rick's argues that its claims for declaratory relief and conspiracy implicate Tony Luke's. In its attempts to plead the elements of these claims, Rick's does not even mention Tony Luke's.³¹ A cause of action for conspiracy requires an agreement to commit a unlawful act.³² The Complaint contains no allegation that Tony Luke's agreed to or committed any particular unlawful act.

"An action for declaratory judgment is available to obtain a declaration of the existing legal rights, duties, or status of the parties where the declaration will aid in the determination of a

²⁹ Complaint, ¶ 152.

³⁰ Gilbert v. Otterson, 379 Pa. Super. 481, 489, 550 A.2d 550, 554 (1988) *citing* Restatement (Second) Torts § 768 (1979).

³¹ Complaint, ¶¶ 128-131, 139-142.

³² Grose v. P&G Paper Prods., 866 A.2d 437, 440-441 (Pa. Super. 2005).

genuine, justiciable controversy. . . [D]eclaratory judgment actions are generally available to resolve issues arising under a contract.”³³ The dismissal of the tortious interference claims against Tony Luke’s, as well as the dismissal of all but the promissory estoppel claims against RTM, Steinke and Dunston, means that there is no justiciable controversy between Rick’s and Tony Luke’s.

For all the foregoing reasons, Counts I, II, III, IV, V, VI, VII, IX, X, and XI of the Complaint are dismissed.

BY THE COURT,

MARK I. BERNSTEIN, J.

³³ Warner v. Continental/CNA Ins. Cos., 455 Pa. Super. 295, 301, 688 A.2d 177, 180 (1996).