

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

CC PIZZA LLC,	:	April Term 2010
	:	
Plaintiff,	:	
	:	
v.	:	No. 1218
	:	
LIBERTY/COMMERZ 1701 JFK BOULEVARD,	:	
L.P., LIBERTY PROPERTY PHILADELPHIA	:	COMMERCE PROGRAM
CORPORATION IV EAST, and LIBERTY	:	
PROPERTY TRUST,	:	Control Number 11050520
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this 8TH day of August 2011, upon consideration of Defendants' Preliminary Objections to Plaintiff's complaint and Plaintiff's response in opposition, it hereby is

ORDERED that the Preliminary Objections are **Sustained** in part as follows:

1. Defendants' preliminary objection to counts I (breach of contract) and V (declaratory judgment) to the claim for allowing food vendors in the "Office Space" of the building is sustained.
2. Defendants' preliminary objection to counts II (fraud in the inducement) is sustained.
3. Defendants' preliminary objection to count IV (unjust enrichment) is sustained.
4. Defendants' motion to strike the jury demand as it pertains to Defendants Liberty/Commerz 1701 JFK Boulevard, L.P. and Liberty Property Philadelphia Corporation IV East only is granted.

All other preliminary objections are overruled.

BY THE COURT,

ARNOLD L. NEW, J.

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Defendants.	:	
	:	
	:	

OPINION

This action arises from a commercial lease entered between plaintiff CC Pizza LLC (“Plaintiff”) and defendant Liberty/Commerz 1701 JFK Boulevard, L.P. (“Liberty/Commerz”) the owner of the Comcast Center real estate and the lessor of the premises that plaintiff rents. Defendant Liberty Property Philadelphia Corporation IV East (“Liberty Property Philadelphia”) is the general partner of Liberty/Commerz. Defendant Liberty Property Trust is the property management entity for the Comcast Center.

On or about July 2, 2007, plaintiff and Liberty/Commerz entered into a lease wherein plaintiff would operate a pizza restaurant¹ in the Concourse Gourmet Food Market section of the Comcast Building. Plaintiff alleges that defendants made the following representations 1) the Concourse Gourmet Food Market location would be the only location within the physical structure of the Comcast Building where food would be sold other than Table 31 restaurant in the building lobby at street level and 2) plaintiff would have access to the entire building. In April 2010, plaintiff instituted suit against defendants alleging it is being refused access to the entrance of the building, including tenants for the purpose of delivering food and defendants have leased

¹ La Scala is the pizza restaurant plaintiff runs in the Concourse Gourmet Food Market section of the Comcast Building.

two full floors of the Office Space to a commercial entity that is operating a for-profit food venue known as “Ralph’s Café”. The complaint alleges claims for breach of contract (count I), fraud in the inducement (count II), fraud in the execution (count III), unjust enrichment (count IV) and declaratory judgment (count V) against defendant Liberty/Commercz and Liberty Property Philadelphia. The complaint also alleges that Liberty Property Trust tortuously interfered with plaintiff’s contractual relations (count VI). Defendants have now filed preliminary objections seeking dismissal of plaintiff’s complaint.

DISCUSSION

I. Preliminary Objections to count I (breach of contract) are sustained in part.

Count I² of the complaint purports to state a claim for breach of contract for failing to provide plaintiff with access to the entire building to deliver its product to tenants and for permitting a restaurant in the upper floors of the building in the areas designated “Office Space”. Defendants argue that the breach of contract claim should be dismissed because the plain language of the written commercial lease upon which plaintiff has sued contradicts its claims and establishes that no contractual duty has been breached.

In Pennsylvania, the law is well established with regard to a court faced with preliminary objections asserting legal insufficiency. In order to sustain a demurrer, it is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery.³ In the case *sub judice*, it is clear from the explicit and unambiguous language of the lease that defendant landlord leased to plaintiff, in addition to the premises, the “right of non-exclusive use of elevators, stairways, loading docks, food market seating area, concourses,

² Count V of the complaint seeks a declaration that the terms and definition of the lease support plaintiff’s allegation of breach. See Complaint ¶ 67.

³ Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. 1999).

lobbies and corridors as they may exist from time to time in the building for common use and access to the premises.”⁴ Section 9.1.5 of the Lease, “Public Areas,” also gives “Tenant and its agents, employees and customers, a non-exclusive license to use the Common Areas.” Common areas are defined in the Lease as “the portions of the Building and the Plaza that are not leaseable to tenants and are intended for the common use and benefit of the Building’s tenants and users of the Plaza.” Based on the foregoing contractual provisions contained within the lease the court finds plaintiff has sufficiently pled a claim for breach of contract for denial of access to elevators.

This, however, is not the case with plaintiff’s breach of contract claim for permitting a restaurant to operate in the upper floors of the building in the areas designated “Office Space”. The language of the contract does not support plaintiff’s allegations of a breach. The Lease makes no representations that food vendors would only be located on the street and concourse levels of the building or that the upper floors were solely restricted to “Office Space.”⁵ The lease does however contain a restriction as it pertains to the sale of retail pizza in the Concourse Gourmet Food Market. Section 45.1 provides:

45.1 Except as otherwise specifically set forth in this Section 45, from and after the date of this Lease and for so long as Tenant is not in default hereunder beyond any applicable cure period, Landlord shall not enter into any lease for any space in the Concourse Gourmet Food Market, which permits the primary use of the premises demised therein to be the sale at retail of pizza (the “Use Restriction”).

However, no such use restriction exists as it pertains to the area of the building designated “Office Space”. Based on the foregoing, plaintiff’s breach of contract claim

⁴ Lease § 2.

⁵ Office Space is defined as “The Rentable Area of the Building other than the Parking Garage, the Concourse Gourmet Food Market Space, the Concourse Retail Space and below street level Storage Space.”

regarding the restaurant in the area designated “Office Space” is dismissed and defendants’ preliminary objection is sustained.⁶

II. Count II (fraud in the inducement) is barred by the parole evidence rule.

In count II of the complaint, plaintiff purports to state a claim for fraud in the inducement. Specifically, plaintiff alleges that prior to the execution of the written lease, defendants represented to plaintiff that the food court location would be the only location within the physical structure of the property where food would be sold other than Table 31.⁷ Additionally, plaintiff alleges that plaintiff would have access to the entire building for the purpose of delivering food to tenants in the building.⁸

The parole evidence rule provides as follows:

"Where the parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract. . . and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms and agreements cannot be added to nor subtracted from by parole evidence."⁹

Therefore, for the parole evidence rule to apply there must be a writing that represents the "entire contract between the parties."¹⁰ To determine whether or not a writing is the parties' entire contract, the writing must be looked at and "if it appears to be a contract complete within itself, couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the [parties'] engagement, it is conclusively presumed that [the writing

⁶ For these reasons, this claim in count V (declaratory judgment), seeking a declaration that any restaurants and dining courts in the building must be located in the Commercial Space not the “Office Space”, is also dismissed.

⁷ Complaint ¶ 45.

⁸ Complaint ¶ 46.

⁹ Gianni v. R. Russell & Co., 281 Pa. 320, 126 A. 791, 792 (Pa. 1924) (citations omitted); *see also* Scott v. Bryn Mawr Arms, Inc., 454 Pa. 304, 312 A.2d 592, 594 (Pa. 1973).

¹⁰ Gianni, 126 A. at 792.

represents] the whole engagement of the parties" ¹¹ This is commonly referred to as an integration clause.

Once a writing is determined to be the parties' entire contract, the parole evidence rule applies and evidence of any previous oral or written negotiations or agreements involving the same subject matter as the contract is almost always inadmissible to explain or vary the terms of the contract. However, where a party avers that a term was omitted from the contract because of fraud, accident, or mistake ¹² or where a term in the parties' contract is ambiguous, parole evidence may be introduced to vary a writing meant to be the parties' entire contract or clarify or resolve the ambiguity. ¹³

In this case, the Lease is a fully integrated written commercial contract that disavows any representations not reduced to writing in the lease itself. Sections 34 and 35 of the lease provide:

34. No Representation by Landlord. Landlord and Landlord's agents have made no representation, agreements, conditions, warranties, understandings, or promises, either oral or written, other than as herein set forth, with respect to the Lease, Building, Property, Developments or Premises, or otherwise....

35. Whole Agreement Amendments. This Lease and the exhibits attached hereto set forth all of the promises, agreements, conditions, warranties, representations and understandings between Landlord and Tenant relative to the Premises and this leasehold...

Since the lease is a fully integrated document, the parole evidence rule bars plaintiff's claim for fraud in the inducement. ¹⁴

¹¹ *Id.*

¹² See HCB Contractors v. Liberty Place Hotel Assoc., 539 Pa. 395, 652 A.2d 1278, 1279 (Pa. 1995).

¹³ Estate of Herr, 400 Pa. 90, 161 A.2d 32, 34 (Pa. 1960); see also Waldman v. Shoemaker, 367 Pa. 587, 80 A.2d 776, 367 Pa. 587, 80 A.2d 776, 778 (Pa. 1951).

¹⁴ While parole evidence may not be admitted based on a claim that there was fraud in the inducement of contract, parole evidence may be admitted based on a party's claim that there was a fraud in the execution of the contract, i.e.,

III. Count IV (unjust enrichment) is dismissed for failing to allege a benefit and unjust enrichment.

In count IV of the complaint, plaintiff purports to state a claim for unjust enrichment. Plaintiff alleges that as a result of defendant's leasing of "Office Space" for use as a cafeteria style restaurant, and defendants' denying plaintiff's access to "Office Space" to deliver food to the tenants, benefits have been conferred on defendant by plaintiff in the form of rent received for food sales to tenants. An unjust enrichment claim requires proof of "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value."¹⁵ Plaintiffs have failed to allege how defendants were unjustly enriched by plaintiff. Defendants leasing of "Office Space" for use as a cafeteria style restaurant and defendants denying plaintiff access to "Office Space" to deliver food to the tenants does not constitute a benefit conferred upon defendants by plaintiff. Although, the payment of rent by plaintiff to defendants constitutes a benefit, the benefit conferred upon defendants is not unjust since a lease agreement is in place. As such, the preliminary objection for unjust enrichment is sustained and count IV is dismissed.

IV. The motion to strike the jury demand is granted.

It is well-settled that the right to a jury trial may be waived either by conduct or by express statement.¹⁶ In section 30.3 of the Lease, plaintiff expressly waived any right to a jury trial in this matter. Section 30.3 provides:

that a term was fraudulently omitted from the contract. See HCBC Contractors v. Liberty Place Hotel, 652 A.2d at 1279.

¹⁵ Lackner v. Glosser, 892 A.2d 21, 34 (Pa. Super. 2006).

¹⁶ Krugh v. Lycoming Fire Ins. Co., 77 Pa. 15 (1874); Rodney v. Wise, 347 Pa. Super. 537, 500 A.2d 1187 (Pa. Super. 1985); Warden v. Zanella, 283 Pa. Super. 137, 423 A.2d 1026 (Pa. Super. 1980); Downs v. Scott, 201 Pa. Super. 278, 191 A.2d 908 (Pa. Super. 1963).

LANDLORD AND TENANT HEREBY ACKNOWLEDGE AND AGREE THAT ANY CONTROVERSY WHICH MAY ARISE UNDE RTHE LEASE WOULD BE BASED UPON DIFFICULT AND COMPLEX ISSUES, AND THEREFORE, EACH PARTY KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVES ANY RIGHT EACH PARTY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING OUT OF, UNDER OR IN CONNECTION WITH THE LEASE OR ITS NEGOTIATIONS OR REALTIONSHIP OF ONE PARTY WITH THE OTHER...

All of plaintiff's claims against defendants Liberty/Commercz and Liberty Property Philadelphia arise under or in connection with the Lease. As such, since plaintiff expressly waived its right to a jury trial, the demand for jury is stricken only as it pertains to defendants Liberty/Commercz and Liberty Property Philadelphia only. The demand for jury remains as it pertains to defendant Liberty Property Trust since Liberty Property Trust is not a signatory to the Lease.

CONCLUSION

For the foregoing reasons, plaintiff's preliminary objections are sustained in part and overruled in part as follows: Defendants' preliminary objection to counts I (breach of contract) and V (declaratory judgment) to the claim for allowing food vendors in the "Office Space" of the building is sustained; Defendants' preliminary objection to counts II (fraud in the inducement) is sustained; Defendants' preliminary objection to count IV (unjust enrichment) is sustained; Defendants' motion to strike the jury demand as it pertains to Defendants Liberty/Commercz 1701 JFK Boulevard, L.P. and Liberty Property Philadelphia Corporation IV East only is granted. All other preliminary objections are overruled.

BY THE COURT,

ARNOLD L. NEW, J.

