

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

DOCKETED
AUG 9 2012
G. HART
CIVIL ADMINISTRATION

CC PIZZA LLC, : April Term 2010
Plaintiff, :
v. : No. 1218
LIBERTY/COMMERZ, LIBERTY PROPERTY :
PHILADELPHIA CORPORATION IV EAST, : COMMERCE PROGRAM
LIBERTY PROPERTY TRUST, :
Defendants. : Control Nos. 12040616/12041893

ORDER

AND NOW, this 9th day of August, 2012, upon consideration of Plaintiff's Motion for Partial Summary Judgment and Defendants' response in opposition and Defendants' Motion for Summary Judgment and Plaintiff's response in opposition, it hereby is **ORDERED** as follows:

1. Plaintiff's Partial for Summary Judgment is **Denied**.
2. Defendants' Motion for Summary Judgment is **Granted** and Plaintiff's complaint is dismissed in its entirety.

BY THE COURT,


GLAZER, J.

Cc Pizza Llc Vs Liberty-ORDOP



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LIBERTY PROPERTY TRUST,	:	
	:	
Defendants.	:	Control Nos. 12040616/12041893

OPINION

This action arises from a commercial lease at the Comcast Center Building. The Comcast Center is a high-rise office building in Center City Philadelphia that serves as the corporate headquarters of Comcast Corporation. The Comcast Center includes a 58 story office tower consisting of 56 occupied floors and two mechanical floors and a concourse-level Gourmet Food Market with restaurants and food vendors. Comcast leases approximately 93% of the rentable space in the Office Tower. Comcast operates a corporate cafeteria in its lease space in the Office Tower for its employees and their guests know as Ralph’s Cafe. The other tenants of the Office Tower are Citizens Bank, the Judge Group, TelAmerica, and Center City Film and Video. Citizens Bank leases the entire twenty second floor. TelAmerica Media and the Judge Group lease space on the twenty fifth floor, while Center City Film and Video leases space on the twenty-fourth floor which is shared with Comcast.

Plaintiff CC Pizza LLC (“CC Pizza”) is a limited liability company whose principals are Robert La Scala and Scott Homel. La Scala is a restaurant owner and operator who has been in the business for 15 years and currently owns or operates 17 restaurants. Homel is a real estate investor and landlord who is also an investor in eight or nine pizza restaurants jointly owned with and operated by LaScala.

Liberty/Commerz initially began negotiations to lease commercial retail space for a pizza restaurant in the Comcast Center's food court with James Lessor. Defendant Liberty/Commerz 1701 JFK Boulevard, L.P. ("Liberty/Commerz"), a limited partnership, owns, operates and was authorized to manage the Comcast Center. Defendant Liberty Philadelphia Corporation IV East ("Liberty Property") is one of the partners in Liberty/Commerz. Defendant Liberty Property Trust is the general partner in Liberty/Commerz.¹ Lessor was not affiliated with CC Pizza.

During the negotiation process, Lessor contacted La Scala about the lease with Liberty/Commerz. LaScala subsequently stepped into Lessor's shoes. At the time La Scala came into the picture, an initial draft of the lease had already been negotiated by Lessor. CC Pizza had the lease reviewed by its counsel, Chris Tarr, Esquire before it was executed. The lease was executed on or about July 2, 2007 with a term of ten years.

On June 18, 2008, CC Pizza opened its pizza restaurant known as La Scala's. In June 2008, CC Pizza approached Liberty/Commerz to negotiate an extension of the lease from ten to twenty years. On August 6, 2008, CC Pizza and Liberty/Commerz entered into a First Lease Agreement, extending the term of the lease to twenty years. The First Lease Amendment ratified and affirmed all other terms of the existing lease.

The lease provides in pertinent part as follows:

1.4 LEASED PREMISES: Concourse Gourmet Food Market Space No. 12

2. Premises. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the "Lease Premises" described in Section 1.4 above (hereinafter also referred to as the "Premises") substantially as shown on the plan attached hereto as Exhibit "A", in the Building erected or to be erected on the south side of Arch Street at 17th Street, Philadelphia, Pennsylvania, for the Term (defined below) and subject to the covenants, terms, provisions and condition of this Lease, together with the right of non-exclusive use of elevators, stairways, loading docks, food market seating area, concourses, lobbies and corridors as they may exist from time to time in the Building for common use and access to the Premises.

¹ Plaintiff has dismissed all claims against defendant Liberty Property Trust.

The concourse area of the Comcast Center, including the Food Market, may be accessed by elevators from the lobby down to the concourse, escalators from the lobby down to the concourse, the stairways from the lobby to the concourse area, the loading dock and the freight elevators from the loading dock down to the concourse. Food Market tenants have access to the escalators, stairways, and elevators that provide access from the lobby to the concourse. The elevators that lead up in to the Office Tower are separate from the elevators that lead down to the concourse Food Market area. These elevators are located beyond security and the lobby turnstiles on the first floor the building.

For security and other reasons, Liberty/Commercz does not permit outside delivery personnel to pass through security and up into the Office Tower to personally make deliveries but it did establish a “delivery intercept room” procedure to facilitate such deliveries to Office Tower Tenants. The delivery intercept room is located on the ground floor of the building and outside vendors and couriers may deliver food and other products through the delivery intercept room. When a delivery arrives, security personnel notify the recipient who then can come down to the delivery intercept room.

CC Pizza instituted the instant action by writ of summons on April 9, 2010. On April 13, 2011, CC Pizza filed a complaint alleging it was being refused access to the Office Tower of the building for the purpose of delivering food and that defendant landlord leased two full floors of the Office Tower to a commercial entity that is operating a food venue known as Ralph’s Café. The complaint alleges claims for breach of contract, fraud in the inducement, fraud in the execution, unjust enrichment and declaratory judgment against Liberty/Commercz and Liberty IV East and tortious interference with contract against Liberty Property Trust.

Defendants filed preliminary objections. On August 8, 2011, the court sustained in part the preliminary objections to the claims for fraud in the inducement and unjust enrichment, dismissed portions of the breach of contract claim² and declaratory judgment claims. The court also struck CC Pizza's jury demand except as it pertained to the claim for tortious interference of contract. On April 30, 2012, CC Pizza discontinued the claim for tortious interference of contract against Liberty Property Trust.³ Presently before the court is CC Pizza's partial motion for summary judgment⁴ on the breach of contract claim and defendants' motion for summary judgment on all remaining claims.

DISCUSSION

I. The lease does not provide CC Pizza with unfettered access to the Office Tower elevators.

Leases between landlords and tenants are governed by contract law.⁵ Interpretation of a contract, poses a question of law for the court to decide.⁶ In construing a contract, the intention of the parties is paramount and the court will adopt an interpretation which under all

² CC Pizza alleged defendants breached the lease by allowing the operation of a restaurant in the Office Tower portion of the building and by denying CC Pizza access to the entire building. The breach of contract claim based on the operation of a restaurant in the Office Tower portion of the building was dismissed.

³ Plaintiff contends this court has already determined 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, lobbies and corridors as they may exist from time to time in the building for common use and access to the premises" in its opinion dated August 8, 2011. Although the court ruled plaintiff sufficiently pled a claim for breach of contract, no determination was made regarding whether "the non-exclusive use of elevators" included the Office Tower elevators.

⁴ CC Pizza filed a praecipe with the court requesting oral argument. Upon review of the papers, the court determined that oral argument was not necessary and counsel was so advised.

⁵ Cambria-Stoltz Enters v. TNT Invest, 747 A.2d 947, 950 (Pa. Super.2000)(*quoting* Stonehedge Square Ltd. Pshp v. Movie Merchants, 454 Pa. Super. 468, 685 A.2d 1019, 1025 (Pa. Super. 1996)).

⁶ Charles D. Stein Revocable Trust v. General Felt Indus. Inc., 749 A.2d 978, 980 (Pa. Super. 2000).

circumstances provides the most reasonable, probable and natural conducts of the parties.⁷

When the language in the agreement is clear and unambiguous, the parties' intent must be discerned solely from the plain meaning of the words used. A court will not imply a contract different than that which the parties have expressly adopted. 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.⁸

Here, defendant landlord leased to CC Pizza the leased premises known as the Concourse Gourmet Food Market Space #12 located in the concourse level of the building. Defendant landlord also granted CC Pizza the “right of non-exclusive use of elevators, stairways, loading docks, food market seating area, concourses, lobbies and corridors as they may exist from time to time in the Building for common use and access to the Premises.” CC Pizza argues that the “right of non-exclusive use of elevators” includes the Office Tower elevators. A review of the lease as well as the record demonstrates that the “right of non-exclusive use of elevators” does not include the Tower Office elevators.

Defendant landlord granted CC Pizza the right to use the elevators in the Building for access to the premises. The elevators providing access to the “premises” as defined in the lease are those located in the lobby of the Building that lead from the lobby to the concourse. The Office Tower elevators do not provide access to the “premises” and therefore CC Pizza has no right or purpose to use them.

The defendant landlord also granted CC Pizza the right to use the elevators in the building for common use. Section 9.1.5 of the lease captioned Public Areas, provides in part as follows:

⁷ *Id.* (quoting *Village Beer & Beverage Inc. v. Vernon D. Cox & Co. Inc.*, 327 Pa. Super. 99, 107, 475 A.2d 117, 121 (1984)).

⁸ *Id.*

...Upon the express agreement of the Tenant that it will use the Common Areas in harmony with Landlord, other tenants of the Concourse Gourmet Food Market and other owners, tenants and licenses of other portions of the Project, Landlord grants to Tenant and its agents, employees and customers, a non exclusive license to use the Common Areas, subject to the exclusive control and management thereof at all times by Landlord and/or other owners of other portions of the project, and subject further to the rights of Landlord set forth in the Lease....

The Lease defines "Common Areas" as follows:

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. Atrium space located in the Building shall not be included as "Common Area".

A plain reading of these provisions demonstrate that although CC Pizza may have a non exclusive license to use the Office Tower elevators, the non exclusive license is subject to the exclusive control and management of defendant landlord. The record evidence demonstrates defendant landlord indeed implemented certain restrictions in accessing the Office Tower elevators which are permitted under the terms of the lease.

Specifically, the Office Tower elevators, which are separate from the elevators leading to the concourse Food Market, are located beyond security and the lobby turnstiles on the first floor of the building. Hence, in order to access the Office Tower elevators one must first pass security.

Defendant landlord also prepared a Tenant Handbook which set forth rules and regulations restricting Office Tower access. The Tenant Handbook provides:

BUILDING ACCESS AND SECURITY

ACCESS – DURING AND AFTER BUSINESS HOURS

Normal operating hours for the building are:

Monday-Friday

7:00 AM -7:00 PM

Saturday

8:00 AM -1:00 PM

The main lobby is open 24 hours. A security pass is required to access the tower. Upon occupancy, a sufficient number of cards will be assigned to each employee within your organization. Additional or replacement cards can be ordered through the management office at a cost of \$12 each.

Please provide the management office with a list of the names and home phone of at least three individuals who may be called to authorize admittance of an employee into the building without an access card. These individuals would also be contracted in the event of an emergency.⁹

Additionally, defendant landlord does not permit outside delivery personnel to pass through security and access the Office Tower to personally make deliveries. Defendant landlord established a “delivery intercept room” procedure to facilitate food deliveries to Office Tower tenants. The delivery intercept room is located on the ground floor. When deliveries arrive, security personnel notify the recipients who then proceed to the delivery intercept room to retrieve the delivery. CC Pizza is not prohibited from using the delivery intercept room to make pizza deliveries to Office Tower tenants.

CC Pizza agreed to observe the rules and regulations attached to the lease which specifically grant defendant landlord the “exclusive right to prescribe the method and manner in which same [merchandise] shall be brought in or taken out of the Building.”¹⁰ Since the terms of the lease specifically provide defendant landlord with the authority to restrict CC Pizza’s access to the Office Tower elevators, the court finds that summary judgment on the breach of contract must be granted in favor of defendant landlord and the claim for breach of contract is dismissed.

⁹ Exhibit “3” to Plaintiff’s Motion for Summary- Tenant Handbook.

¹⁰ Exhibit “G” to the Lease.

II. Plaintiff failed to produce evidence that the executed lease omitted terms regarding access to the Office Tower to make pizza deliveries and location of food vendors.

Count II of the complaint purports to state a claim for fraud in the execution. "Fraud is a generic term used to describe anything calculated to deceive, whether by a single act or combination, or by suppression of the truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture."¹¹ To prove fraud, a plaintiff must demonstrate by clear and convincing evidence: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Parol evidence of prior representations is inadmissible as to a matter covered by the written agreement with an integration clause, unless the parties agreed that those representations would be added to the written agreement but they were omitted because of fraud, accident or mistake. This situation is commonly referred to as "fraud in the execution" as the party proffering the evidence contends that he executed the agreement because he was defrauded by being led to believe that the documents contained terms that were actually omitted therefrom.¹²

Plaintiff contends defendants' agents Henry Steinberg and Jim Sunday represented to Plaintiff's principal Scott Homel that the lease terms were different than what is contained in the executed lease. Homel testified in deposition that defendant landlord gave CC Pizza the right to deliver food to the Office Tower tenants and that the food court location would be the only

¹¹ Blumenstock v. Gibson, 811 A.2d 1029, 1034 (Pa. Super. 2003), appeal denied, 573 Pa. 714, 828 A.2d 349 (2003).

¹² Blumenstock, at 1036 (internal citations omitted).

location within the physical structure of the property where food would be sold other than Table 31.

CC Pizza has failed to produce any evidence that a term was omitted from the lease. Instead, CC Pizza relies upon parole evidence prior to execution and its interpretation of the lease to support its claim for fraud in the execution. As it pertains to location of food vendors, CC Pizza relies upon the following testimony of Mr. Homel, a principal in CC Pizza:

I recalled that the lease clarified that the food court would be located in the concourse level, that there would be another restaurant, which is now called Table 31, that there was no other mention in the lease that there would be food anywhere else, and that the tower was specifically an office building, and that confirmed also to what was told to me that I should expect to see in the lease by Mr. Steinberg and again Mr. Sunday. Mr. Sunday didn't specifically discuss our exclusively (sic) of our food menu, that was more Mr. Steinberg, and I did read that component in the lease too where we had the exclusivity that we were looking for certain food items.¹³

As is demonstrated from the above testimony, Mr. Homel never testified that a term was omitted from the lease regarding location of food vendors in the Office Tower. The lease was silent as to the location of other food vendors in the Comcast Center. A review of the lease in issue also demonstrates that it too is silent as to the location of other food vendors. Since, CC Pizza has failed to present any evidence of an omission in the lease regarding the location of food vendors, defendant landlord's motion for summary judgment is granted.

Similarly, CC Pizza's claim for fraud in the execution also fails as it pertains to the access to the Office Tower to make deliveries. As discussed supra., CC Pizza was granted a non exclusive license to use the Office Tower elevators subject to the control and management of the defendant landlord. Notwithstanding the foregoing, CC Pizza relies upon Homel's interpretation

¹³ Exhibit "10" to Plaintiff's response to defendants' motion for summary judgment Homel deposition transcript p. 32, 48.).

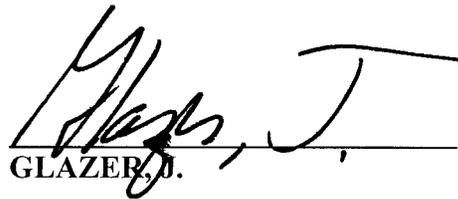
of an existing provision of the lease, the CAM (common area maintenance) charge, as evidence that CC Pizza was promised access to the Office Tower to deliver pizza.¹⁴ Homel's interpretation of the CAM charge is irrelevant.

The lease at issue is a triple net lease and all operating expenses associated with the building are passed through to all of the tenants in the building on a proportionate share. Nothing in the lease, makes the payment of said expenses a condition for access to the Tower Office elevators. Based on the forgoing, defendant landlord's motion for summary judgment is granted and the claim for fraud in the execution is dismissed.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed. Plaintiff's motion for summary judgment is denied.

BY THE COURT,


GLAZER, J.

¹⁴Exhibit "10" to Plaintiff's response to defendants' motion for summary judgment Homel deposition transcript p. 89-90).