

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>TWO BROTHERS SCOTTO, INC. t/a SCOTTO PIZZA</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>SDG MACERICH PROPERTIES, L.P., SIMCO ACQUISITIONS, INC. t/a SDG MACERICH PROPERTIES, L.P., SIMON PROPERTY GROUP, INC., SPG PROPERTIES, INC., and SD PROPERTY GROUP, INC. t/a SIMON PROPERTY GROUP, L.P., and HOT TOPIC, INC.</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 99-5485</b>

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<b>SDG MACERICH PROPERTIES, L.P.</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>TWO BROTHERS SCOTTO, INC. d/b/a SCOTTO PIZZA</b>	:	
	:	
<b>Defendant.</b>	:	<b>NO. 99-6395</b>

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<b>SDG MACERICH PROPERTIES, L.P.</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>TWO BROTHERS SCOTTO, INC. t/a SCOTTO'S PIZZA</b>	:	
	:	
<b>Defendant.</b>	:	<b>NO. 99-6398</b>

**MEMORANDUM**

**DUBOIS, J.**

**JULY 24, 2000**

## **I. BACKGROUND**

These three, consolidated cases center around a dispute over a commercial lease for a pizza parlor located in the Granite Run Mall (“Granite Run” or the “mall”) in Media, Pennsylvania. Presently before the Court are three motions: one filed by SDG Macerich Properties, LP to dismiss Two Brothers Scotto, Inc.’s (“Scotto”) Complaint in civil action number 99-5485; one to vacate and/or open confessed judgment and to stay execution of that judgment filed by Scotto in civil action number 99-6398; and one filed by SDG Macerich Properties, LP (“SDG”)<sup>1</sup> for a writ of possession and for disposition of, or a prompt hearing on, Scotto’s motion to vacate and/or open confessed judgment and to stay execution in civil action number 99-6398.

The facts can be summarized as follows:

Scotto operates a pizza parlor in store 287 at Granite Run. On February 17, 1988, Scotto signed a ten-year lease for store 287 (the “store 287 lease”). In 1997, Scotto’s then-landlord at Granite Run, Granite Run Mall Associates (“GRMA”) undertook to renovate a section of the mall that included store 287 to establish a wing containing clothing outlets. As part of the

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<sup>1</sup>In civil action number 99-5485, Scotto names as defendants, inter alia, SDG, Simco Acquisitions, Inc. (“Simco”), Simon Property Group, Inc., SPG Properties, Inc. (“SPG”), SD Property Group, Inc. (“SD”), and Simon Property Group, L.P. In the response to the motion to dismiss filed in civil action number 99-5485, SDG is identified as a limited partnership with Simco as its general partner. The other entities listed above are identified as Simco’s corporate parent, the real estate investment trust that is the umbrella entity for the SDG limited partnership, the limited partnership that is the operating entity for the real estate investment trust, and that limited partnership’s corporate general partner. However, the motion does not identify which of these entities fulfills each of the above roles. The motion to dismiss states only that these entities are all related to SDG and that they do not own or operate Granite Run. Because these parties are all related, the Court will refer to them all as the “SDG defendants”, unless otherwise noted.

renovation plans, GRMA and Scotto agreed that Scotto would move from store 287 to store 153, a larger store in a different part of the mall.

GRMA subsequently conveyed the mall to Equitable Life Assurance Society of the United States (“Equitable”), and, on February 3, 1998, Scotto executed a ten-year lease with Equitable for store 153 (the “store 153 lease”). The store 153 lease stated that Scotto would be responsible for renovating the store and included a rider which provided “Landlord [SDG] and Tenant [Scotto] hereby agree that the Lease shall supersede that certain Lease Agreement dated February 17, 1988 for Space No. 287 [the store 287 lease]. The aforementioned Lease Agreement for Space No. 287 is terminated for obligations accruing in Space No. 287 after the date of Tenant’s opening for business pursuant to the provisions of this Lease Agreement [the store 153 lease].” Pursuant to paragraph 1(i) of the store 153 lease, the ten-year term of the store 153 lease was to commence either 60 days after possession of store 153 was delivered to Scotto or when Scotto opened for business in store 153, whichever came first.

In March, 1998, Equitable conveyed Granite Run to SDG. As Scotto prepared to renovate store 153, it claims that it notified SDG that it needed access beyond the exterior walls of store 153 to route its exhaust duct-work, either through another tenant’s premises or through the common area or substructure of the mall, but that SDG would not provide such access. SDG claims that Scotto never asked for and was never denied access beyond the exterior walls of store 153; according to SDG, Scotto determined that it could not move to store 153 economically and asked to be let out of the store 153 lease.

In June, 1998, Scotto claims that SDG approached Scotto and asked it to remain in store 287 and remodel that store. As a result of this request, Scotto delayed renovating and opening

store 153, instead waiting for SDG to send a new lease for store 287. Scotto alleges that SDG orally agreed to a ten-year lease for store 287 (the “store 287 extension”) and that, in reliance on such promises, Scotto engaged an architect and engineer to draw up plans to renovate store 287. Scotto alleges that SDG never sent it a written copy of the new lease.

SDG subsequently leased store 153 to defendant Hot Topic, Inc. (“Hot Topic”). Scotto alleges that SDG did so without ever cancelling the store 153 lease; SDG responds that Scotto asked to be released from the store 153 lease and Scotto knew about the lease with Hot Topic.

In November, 1998, SDG orally confirmed the store 287 extension to Scotto. Scotto sent SDG a letter confirming this conversation on November 2, 1998. On November 18, 1998, SDG sent Scotto a cancellation of the store 153 lease, but did not include a written copy of the store 287 extension. Scotto informed SDG that it would not sign the cancellation for the store 153 lease until it received a written copy of the store 287 extension.

In December, 1998, SDG asked Scotto for Scotto’s plans to renovate store 287. On December 21, 1998, SDG informed Scotto by letter that its “construction documents for remodeling Store 287 had been reviewed and approved.”

For the first half of 1999, Scotto remained in store 287, and set rent payments to SDG. SDG accepted these rent payments. Scotto alleges that, when it did not receive a written copy of the store 287 extension, it asked SDG to deliver possession of store 153 pursuant to the store 153 lease, but that SDG ignored such requests. In June, 1999, SDG mentioned to Scotto that SDG was considering bringing a different pizza store into store 287--Villa Pizza.

On September 29, 1999, SDG gave Scotto thirty-days notice of termination of the store 287 lease and demanded that Scotto surrender possession of store 287 by November 1, 1999. As

part of this notice, SDG demanded that Scotto pay holdover rent of \$77,990.40 due under section 21.02 of the store 287 lease. Section 21.02 of the store 287 lease provides, in relevant part, “Should Tenant [Scotto] hold over in possession of the demised premises after the expiration of the term hereof without the execution of a new lease agreement or extension or renewal agreement, Tenant, at the option of Landlord, shall be deemed to be occupying the demised premises from month to month, subject to such occupancy being terminated by either party upon at least 20 days’ written notice, at one hundred fifty percent (150%) of the rental ....”

Scotto did not vacate store 287, and these suits ensued.

## **II. PROCEDURAL HISTORY**

### **A. Civil Action No. 99-5485**

On November 4, 1999, Scotto filed an eight-count Complaint in this Court against the SDG defendants and Hot Topic (case no. 99-5485), asserting causes of action for specific performance and declaratory relief in Count I, injunctive relief in Count II, ejectment in Count III, fraud and fraudulent misrepresentation in Count IV, civil conspiracy in Count V, breach of contract in Count VI, breach of contract in Count VII and promissory estoppel in Count VIII.

On November 30, 1999, the SDG defendants filed a motion to dismiss the Complaint, which Hot Topic joined on December 17, 1999. Scotto filed a response on January 7, 2000.

### **B. Civil Action No. 99-6395**

On September 15, 1999, SDG filed a praecipe for writ of summons against Scotto in the Pennsylvania Court of Common Pleas for Delaware County. On December 15, 1999, Scotto

removed this action to this Court.<sup>2</sup> SDG filed a Complaint in this action on February 14, 2000 asserting causes of action under Pennsylvania law for declaratory judgment as to the store 153 lease (Count I); declaratory judgment as to the store 287 lease (Count II); breach of the store 287 lease and unlawful occupancy of store 287 (count III); tortious interference with economic relationships (Count IV); and intentional interference with SDG's performance of SDG's performance of contractual obligations (Count V).

Scotto filed an answer on March 21, 2000. No motion is pending in this case.

**C. Civil Action No. 99-6398**

On November 15, 1999, SDG commenced an eviction action in the Pennsylvania Court of Common Pleas for Delaware County seeking confession of judgment in ejectment for possession of store 287 and for the holdover rent. The Common Pleas Court entered the confession of judgment that same day. On November 17, 1999, SDG mailed Scotto a notice of judgment and execution advising Scotto that it had thirty days after service to seek relief from the confession of judgment. On December 15, 1999, Scotto removed the eviction action to this Court (civil action number 99-6398).

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<sup>2</sup>Scotto's removal on the basis of a praecipe for writ of summons was proper. See Foster v. Mutual Fire, Marine & Island Ins. Co., 986 F.2d 48, 54 (3d Cir. 1993). It appears that Scotto failed to remove this action to this Court within 30 days of receiving after receipt of an initial pleading which put Scotto on notice of the federal nature of the case against it. See id. at 50; 28 U.S.C. § 1446(b). Such failure does not destroy this Court's subject matter jurisdiction because the thirty-day requirement of § 1446(b) is procedural rather than jurisdictional and can be waived. See Korea Exchange Bank v. Trackwise Sales Corp., 66 F.3d 46, 50-51. Any motion to remand on the basis of a procedural irregularity which does not destroy the Court's subject matter jurisdiction must be filed within 30 days of the notice of removal. See id. Because SDG has not made such a motion, the Court need not consider the issue of a remand.

On December 17, 1999, Scotto filed a motion to vacate and/or open the confessed judgment and to stay execution of that judgment (the “motion to open the confessed judgment”) and a brief in support of that motion. SDG filed a response on January 13, 2000.

On May 18, 2000, SDG filed a motion for a writ of possession and for disposition of, or a prompt hearing on, Scotto’s motion to open the confessed judgment. Scotto filed a response and a brief in support of that response on June 6, 2000.

#### **D. Consolidation**

On December 28, 1999, Scotto filed a motion to consolidate the three cases. SDG responded to these motions by letter dated February 4, 2000. On February 7, 2000, the Court ordered the cases consolidated for all pretrial matters and deferred ruling on consolidation for trial.

### **III. DISCUSSION**

#### **A. Motion to Dismiss (Civil Action No. 99-5485)**

In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the Complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). A complaint should be dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishin v. King & Spaulding, 467 U.S. 69, 73 (1984).

In their motion to dismiss, SDG defendants argue: (1) Scotto has no right to occupy store 287; (2) Scotto has no claim for fraudulent misrepresentation or promissory estoppel because

Scotto's reliance on SDG's statements was unreasonable as a matter of law; and, (3) Scotto has failed to allege the elements of a civil conspiracy. Scotto denies SDG defendants' contentions and argues that many of SDG defendants' arguments are premature and that it is entitled to discovery before the Court rules on the merits of the case.

**1. Scotto's right to occupy store 287**

SDG defendants present three arguments why Scotto has no right to occupy store 287: (1) Scotto's occupancy was on a month-to-month basis under the store 287 lease and was properly terminated under that lease; (2) the statute of frauds bars Scotto from relying on any oral statements that were made by SDG regarding a new lease for store 287; and, (3) Scotto abandoned and/or is in breach of the store 153 lease.

With regard to the first argument--that the store 287 lease was properly terminated--SDG defendants argue that Scotto's occupancy of store 287 became a month-to-month tenancy when the store 287 lease expired on April 30, 1998. Specifically, SDG defendants point to section 21.02 of the store 287 lease, which provides for Scotto's continued tenancy in store 287 on a month-to-month basis after the termination of the store 287 lease.

Scotto responds that the rider to the store 153 lease superseded the store 287 lease and constitutes a valid lease for store 287. Scotto alleges that it attempted to make the necessary renovations to store 153, but that SDG prevented it from doing so by refusing access for the exhaust duct-work. SDG defendants argue that Scotto did not fulfill its obligations under the store 153 lease and therefore either abandoned that lease or breached it completely.

The store 153 lease permits Scotto to remain in store 287 until 60 days after SDG tendered possession of store 153 or Scotto opened for business in store 153, whichever came

first. Scotto alleges that neither of these events occurred and it is therefore entitled to remain in store 287. SDG defendants argue that Scotto either abandoned or totally breached the store 153 lease, but the facts, as alleged by Scotto in the Complaint, do not support such a conclusion. According to Scotto, it attempted to renovate store 153 and SDG prevented it from doing so. Because the Court must accept the facts in the Complaint as true for purposes of a motion to dismiss, the Court concludes that Scotto's allegations support a conclusion that it continues to occupy store 287 pursuant to the store 153 lease.

Even if Scotto is not properly occupying store 287 pursuant to the store 153 lease, Scotto argues that it has an oral contract for an extension of the store 287 lease. SDG defendants argue that all leases for more than three years in Pennsylvania must be in writing to be valid and the statute of frauds bars Scott from relying on any oral statements about the store 287 extension. See 68 Pa.C.S.A. § 250.202 (West 2000). SDG defendants argue that under this provision, an oral lease of more than three years duration has the force of a tenancy at will unless the parties recognize its existence and by paying and accepting rent for more than one year, in which case the oral lease has the force of a year-to-year tenancy. See id.; Blumer v. Dorfman, 289 A.2d 463, 468-69 (Pa. 1972).

Scotto argues that it has alleged facts sufficient to overcome the statute of frauds. First, Scotto argues that the statute of frauds defense to a specific performance claim cannot be raised at a preliminary state of the proceedings. Scotto also argues that this case constitutes an exception to the statute of frauds because there are equitable considerations which make it impossible to do justice save by specific performance. Finally, Scotto argues that, at a minimum, the Store 287 lease converted to a year-to-year tenancy because Scotto occupied store 287 for

more than a year after the termination of the store 287 lease and paid rent--which SDG accepted--for that time.

As the Third Circuit has noted, Pennsylvania courts “have concluded that a waivable statute of frauds defense may serve as a basis for judgment on the pleadings only when trial would be a ‘fruitless exercise’ because the plaintiff fails to allege facts in his pleadings that take an oral contract outside the statutory prohibition.” Flight Systems, Inc. v. Electronic Data Systems Corp., 112 F.3d 124, 127 (3d Cir. 1997) (citing Keil v. Good, 467 Pa. 317 (1976)). The statute of frauds, as it applies to leases, is a waivable defense and cannot be used by a defendant as a sword at the motion to dismiss stage. See id.; Blumer v. Dorfman, 447 Pa. 131 (1972).

Scotto has alleged in its Complaint that there may exist a “written lease, term sheet or other documents signed by or on behalf of the Landlord confirming the Lease Extension for Store 287 in the possession and control of the Landlord.” Under Pennsylvania law, any written memorandum indicating the terms of an oral lease can satisfy the statute of frauds. See Keil, 256 A.2d at 771. The writing need not be titled a “lease” and no particular form of words is necessary to constitute a lease. See Flight Systems, 112 F.3d at 128. The Court concludes that Scotto’s allegations, accepted as true for purposes of this motion, are sufficient to except the oral contract from the provisions of the statute of frauds.

Scotto also alleged in the Complaint that, in response to SDG’s oral promise regarding the store 287 extension, it did not renovate or occupy store 153, had its architect and engineer draft construction plans for store 287 and passed up the opportunity to lease a Scotto Pizza location at Exton Square Mall in Exton, Pennsylvania. See Complaint, ¶¶ 28, 36. Under Pennsylvania law, the statute of frauds does not bar performance of a lease where there is

continuous and exclusive possession under the parol contract and improvements not readily compensable in money or where there are other equitable considerations which make it impossible to do justice save by specific performance. See Haskell v. Heathcote, 363 Pa. 184, 188 (1949). The Court concludes that Scotto's allegations, accepted as true for purposes of this motion, present the Court with equitable considerations which, if proven, would entitle Scotto to specific performance.

The Court has concluded that Scotto alleged facts sufficient to except the oral store 287 from the operation of the statute of frauds. Accordingly, the Court will deny SDG defendants' motion to dismiss to the extent it applies to Scotto's right to occupy store 287.

**2. Scotto's claims for fraudulent misrepresentation and promissory estoppel**

Scotto asserts claims in the Complaint for fraud and fraudulent misrepresentation (Count IV) and promissory estoppel (Count VIII). To prove either of these claims, Scotto must prove that SDG made some statement upon which Scotto reasonably relied. See Scaife Co. v. Rockwell-Standard Corp., 285 A.2d 451, 454 (Pa. 1971) (fraudulent misrepresentation); Thomas v. E.B. Jermyn Lodge No. 2, 693 A.2d 974, 977 (Pa. Super. 1997) (promissory estoppel). Scotto alleges that it relied to its detriment upon SDG's oral promise to extend the store 287 lease.

SDG defendants argue that, to the extent such reliance occurred, it was unreasonable as a matter of law. SDG defendants argue that the law in Pennsylvania is that reliance on an oral promise in the course of a sophisticated business transaction is unreasonable and will defeat a claim for either fraudulent misrepresentation or promissory estoppel. In support of this argument, SDG defendants cite this Court to a number of cases, including Mellon Bank Corp. v.

First Union Real Estate and Mortgage Investments, 750 F. Supp. 711 (W.D.Pa. 1990); Greenberg v. Tomlin, 816 F. Supp. 1039 (E.D.Pa. 1993); and Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc., 636 A.2d 156 (Pa. 1994). These cases hold that, in a transaction between sophisticated business parties, reliance upon a vague, uncertain promise which contradicts a writing is unreasonable. See, e.g., Mellon Bank, 750 F. Supp. at 718 ("Given the sophistication of the parties, the complicated nature of the transaction and the considerable amount of money involved, Mellon would have been wholly unjustified in relying on such a vague oral promise by Schofield to alter the terms of the written agreements."); Thatcher's Drug Store, 636 A.2d at 160 (noting that the promise made by defendant directly contradicted the lease that defendant had with both parties' landlord).

The allegations by Scotto in this case go beyond the facts of the cases cited by SDG defendants. The promise on which Scotto allegedly relied is distinguishable from the vague promises at issue in the cases cited by SDG defendants. Scotto alleges that it orally agreed with SDG to a lease with the following terms: (1) ten years duration; (2) \$49 per square foot minimum rent; (3) percentage rent equal to 10% over \$1.4 million sales; (4) \$3.50 per square foot for advertising; (5) \$7 per square foot for common area maintenance; (6) \$.25 per square foot for sprinklers; (7) prevailing local charges for trash and utilities; (8) pro rata share of real estate taxes; and (9) Scotto's remodeling and construction costs for store 287 with the renovation to take place in early 1999. See Complaint, ¶ 30. Second, there is no allegation that Scotto's oral lease for store 287 directly contradicted a written document. The Court concludes that, under these circumstances, Scotto has alleged facts sufficient to make out a claim of reasonable reliance on SDG's oral promise to extend the store 287 lease. Accordingly, the Court will deny SDG

defendants' motion to dismiss to the extent it applies to Scotto's claims of fraud and fraudulent misrepresentation and promissory estoppel.

### **3. Scotto's claim for civil conspiracy**

In Count V of the Complaint, Scotto asserts a cause of action for civil conspiracy against SDG, alleging that SDG engaged in a fraudulent scheme and conspiracy to deprive Scotto of its rights in stores 287 and 153. Specifically, Scotto alleges that "at some time beginning shortly after acquiring Granite Run Mall, [SDG] made arrangements and agreements with Villa Pizza or intended to do so in order to replace Scotto Pizza with Villa Pizza at Granite Run Mall, and to deprive Scotto of its leasehold interests there." Complaint, ¶ 46.

To prove a civil conspiracy under Pennsylvania law, 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. Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211 (1979). SDG defendants argue that the Complaint is deficient because Pennsylvania law requires allegations regarding "the manner in which a conspiratorial scheme was devised and carried out." Burnside v. Abbott Laboratories, 505 A.2d 973, 982 (Pa. Super. 1986). The Burnside court concluded that the Complaint in that case was deficient because it contained "no averments of meetings, conferences, telephone calls, joint filings, cooperation, consolidation or joint licensing." Id.

Federal courts in diversity actions apply state substantive law and federal procedural law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Pennsylvania is a fact-pleading jurisdiction, i.e., a pleading must not only apprise the opposing party of the asserted claim, it must formulate the issues by summarizing those facts essential to support the claim, see Corestates Bank, N.A. v.

Cutillo, 723 A.2d 1053, 1057 (Pa. Super. 1999); however, the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. Instead, the Federal Rules require a “short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Conley v. Gibson, 355 U.S. 41, 47 (1957); see Fed.R.Civ.P. 8(a).

Scotto has alleged facts sufficient to place SDG defendants on notice of the claim against them. Scotto averred that shortly after SDG purchased Granite Run in March, 1998, SDG, SIMCO, Simon and Villa Pizza entered an agreement to deprive Scotto of its leasehold interests at Granite Run. See Complaint, ¶¶ 46, 82. The Court concludes such allegations are sufficient to place SDG defendants on notice of the claim being asserted against them and therefore satisfies the requirement of notice pleading in federal court.

In a footnote, SDG defendants argue that the intercorporate conspiracy doctrine--the notion that a corporation cannot conspire with its agents and employees--limits their liability for civil conspiracy. See SDG Defendants’ Memorandum, p.26 n.15. SDG defendants cite Siegel Transfer, Inc. v. Carrier Exp., Inc., 856 F. Supp. 990 (E.D.Pa. 1994) for the proposition that there can be no liability for a civil conspiracy between parent corporations and their wholly owned subsidiary.

Since Siegel Transfer was decided, the Superior Court of Pennsylvania has held that there is “no compelling reason to ignore legal corporate form in the common law conspiracy context,” and refused to adopt a per se rule that parent corporations cannot conspire with their subsidiaries. Shared Communications Services of 1800-80 JFK Blvd. V. Bell Atlantic Properties, Inc., 692 A.2d 570, 573-74 (Pa. Super. 1997). The Shared Communications court accepted the trial

court's reasoning that liability for a conspiracy could exist where each "entity performs distinct operations, under its own management and with its own goals." Id. at 574. In Pennsylvania, "courts will disregard the corporate entity only in limited circumstances when used to defeat public convenience, justify wrong, protect fraud or defend a crime." Kashner v. Geisinger Clinic, 638 A.2d 980, 984 (1994) (quoting Kiehl v. Action Mfg. Co., 535 A.2d 571, 574 (Pa. 1987)).

According to Scotto, Simon Property Group, L.P. managed Granite Run after SDG purchased the mall, and SD, SPG, and Simon Property Group, Inc. are the three corporate general partners of Simon Property Group, L.P. Scotto contends that it was Simon with whom it dealt in many of its transactions regarding store 287. The Court concludes that the intercorporate conspiracy doctrine does not bar liability in these circumstances on the present state of the record because Scotto has plead facts to support a conclusion that these entities performs distinct operations with its own management and its own goals.

For all the above-stated reasons, the Court will deny SDG defendants' motion to dismiss, joined by Hot Topic.

**B. Motion to Vacate (Civil Action No. 99-6398)**

Scotto argues that it has alleged and presented evidence of three meritorious defenses to SDG's confessed judgment: (1) Scotto has a valid lease for store 287; (2) Scotto is not liable for holdover rent under the store 287 lease; and, (3) the store 287 lease did not authorized SDG to confess judgment against Scotto. Although not delineated as such, Scotto's motion to open the confessed judgment raises issues addressed in motions to open a confessed judgment and to strike a confessed judgment. By motion to open a confessed judgment, a defendant may assert defenses related to the merits of the alleged default. See FDIC v. Deglau, 207 F.3d 153, 159 (3d

Cir. 2000). In contrast, a motion to strike a confessed judgment tests the sufficiency of the record on which the confessed judgment was entered. See id.

Scotto's first two arguments--that it has a valid lease to occupy store 287 and it is not liable for holdover rent under the store 287 lease--pertain to the merits of the case and will be treated as arguments in support of its motion to open the confessed judgment. Scotto's third argument--the store 287 lease did not authorize the confessed judgment--challenges the record on which the confessed judgment was entered and will be treated as an argument in support of a motion to strike the confessed judgment.

### **1. Motion to open the confessed judgment**

In order to open a confessed judgment, a party must: (1) act promptly to contest the judgment; (2) allege a meritorious defense to the ejectment action; and, (3) present evidence of that defense sufficient to warrant submission of the issue to a jury. See Homart Development Co. v. Sgrenci, 443 Pa. Super. 538, 549 (1995). Scotto removed civil action number 99-6398 to this Court on December 15, 1999--28 days after receiving notice of the confessed judgment against it. On December 17, 1999--one month after receiving such notice--Scotto filed its motion to open the confessed judgment. The Court concludes, and the parties do not dispute, that such actions satisfy the first requirement to open a confessed judgment--prompt action.

With respect to the second and third requirements listed above--allegation of and presentation of evidence of a defense sufficient to warrant submission of the issue to a jury--the applicable standard of sufficiency is that of a directed verdict, i.e., viewing all the evidence in the light most favorable to the petitioner and accepting as true all evidence and proper inferences therefrom supporting the defense while rejecting allegations of the party obtaining the judgment.

See Suburban Mechanical Contractors, Inc. v. Leo, 348 Pa. Super. 324, 327 (1985). “The Pennsylvania rules regarding challenges to confessed judgment require the petitioner to offer ‘clear, direct, precise and believable evidence’ of his meritorious defenses.” FDIC v. Deglau, 207 F.3d 153, 168 (3d Cir. 2000).

**a. Scotto’s right to occupy store 287**

Scotto argues that SDG had no right to terminate the store 287 lease and confess judgment against Scotto because the store 287 lease never expired. According to Scotto, the rider to the store 153 lease provided that the term of the store 287 lease would continue in full force and effect until Scotto opened in store 153. Scotto argues that it complied with the terms of the store 153 lease by preparing to move into store 153 but that SDG refused it the access it needed for its exhaust vents.

Scotto provides no evidence in support of this position. A copy of the store 153 lease is attached to the motion to open the confessed judgment, but there is no evidence to support its argument that it complied with the store 153 lease. Scotto failed to provide the Court with copies of any correspondence between it and SDG concerning renovations to store 153 or copies of plans to renovate store 153. The Court concludes that Scotto has failed to provide clear, precise, direct and believable evidence that it complied with the store 153 lease sufficient to submit the issue to a jury.

Scotto also argues that it has a valid oral agreement with SDG to remain in store 287--the store 287 extension. In support of this position, Scotto directs the Court to a letter written by Anthony Bruce of Scotto to Paul Katz of Simon confirming that Scotto would cancel the store 153 lease and receive a new lease for store 287. Scotto also points to a letter it received from Flo

M. Bland--the tenant coordinator for Simon--informing Scotto that Simon reviewed the documents that Scotto submitted regarding plans to remodel store 287 and that those plans were approved. The Court concludes that such evidence constitutes clear, precise, direct and believable evidence that Scotto received an oral lease for store 287 sufficient to submit the issue to a jury.

SDG argues that the statute of frauds bars Scotto's reliance on the oral store 287 extension, meaning that Scotto's alleged defense cannot be meritorious for purposes of a motion to open the confessed judgment. As discussed above, the statute of frauds in Pennsylvania will not bar an oral contract where there are equitable considerations which make it impossible to do justice except by specific performance. See Haskell, 363 Pa. at 188. Scotto presented evidence--including the letter from Flo Bland of Simon approving Scotto's plans to renovate store 287--of equitable circumstances which support its position that the oral store 287 extension is enforceable.

In addition, where an oral lease is recognized by the parties by payment and acceptance of rent, the lease is transformed into a year-to-year tenancy. See Blumer, 289 A.2d at 468-69; 68 Pa.C.S.A. § 250.202 (West 2000). Scotto presented evidence--a letter from Mark Payne of Simon to John Scotto of Scotto--that Scotto paid rent and Simon accepted such rent from May, 1998 through October, 1999. Accepting such evidence as true and drawing all favorable inferences therefrom, the Court concludes that Scotto has submitted evidence of a meritorious defense--that it had an enforceable oral lease for store 287. Accordingly, Scotto's motion to open the confessed judgment will be granted.

**b. Scotto's liability for holdover rent**

Scotto argues that it is not liable for holdover rent under section 21.02 of the store 287 lease because: (1) Scotto did not unjustifiably refuse to vacate store 287; (2) SDG is estopped from asserting that Scotto is liable for holdover rent; and, (3) section 21.02 imposes an unenforceable penalty on Scotto. However, as SDG argues, the confessed judgment SDG obtained was in ejectment only, and was not for holdover rent. Thus, the Court need not consider Scotto's arguments regarding holdover rent in ruling on the motion to open the confessed judgment. The holdover rent issue will be addressed at trial.

**2. Motion to strike**

A motion to strike tests the sufficiency of the record on which a confessed judgment was entered. The Court takes all the plaintiff's allegations as true and will grant the motion only to remedy a fatal defect or irregularity appearing on the record. See Deglau, 207 F.3d at 159. An allegation that a party lacked the authority to confess judgment is appropriately considered pursuant to a motion to strike. See id.; Germantown Sav. Bank v. Talacki, 657 A.2d 1285, 1291-92 (Pa Super. 1995). Scotto argues that the store 287 lease did not authorize SDG to confess judgment against it. Although not explicitly called a motion to strike the confessed judgment, because Scotto's motion calls into question the sufficiency of the confession of judgment, the Court will treat such an argument as a motion to strike.

Section 19.06(b) of the store 287 lease governs confessions of judgment in the event the lease is terminated or cancelled. Section 19.06(b) states, in relevant part, "When this lease shall be terminated or cancelled ...it shall be lawful for any attorney as attorney for Tenant [Scotto] to file an agreement for entering in any court of competent jurisdiction an amicable action and

confession of judgment in ejectment against Tenant ....” Motion to Vacate, Ex. A, § 19.06(b).

Scotto argues that this provision does not expressly permit SDG’s attorney to confess judgment but presents no argument why this is so.

The above-quoted provision allows any attorney, acting as attorney for Scotto, to confess judgment in the event the lease is terminated or cancelled. There is no language excluding SDG’s attorney as an attorney who can enter judgment on Scotto’s behalf. The Court concludes that Scotto has not produced evidence of a defect on the face of the record of the confessed judgment.

**C. Motion for Writ of Possession (Civil Action No. 99-5485)**

SDG moved for a writ of possession for store 287 upon denial of Scotto’s motion to open. The Court has already concluded that Scotto’s motion to open the confessed judgment will be granted; accordingly the Court will deny SDG’s motion for a writ of possession for store 287.

**IV. CONCLUSION**

The Court will deny SDG defendants’ motion to dismiss filed in civil action number 99-5485.

The Court will grant Scotto’s motion to open the confessed judgment filed in civil action number 99-6398 and will deny SDG’s motion for writ of possession in that case.

An appropriate order follows:

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>TWO BROTHERS SCOTTO, INC. t/a SCOTTO PIZZA</b>	<b>: CIVIL ACTION</b>
<b>Plaintiff</b>	:
<b>vs.</b>	:
<b>SDG MACERICH PROPERTIES, L.P., SIMCO ACQUISITIONS, INC. t/a SDG MACERICH PROPERTIES, L.P., SIMON PROPERTY GROUP, INC., SPG PROPERTIES, INC., and SD PROPERTY GROUP, INC. t/a SIMON PROPERTY GROUP, L.P., and HOT TOPIC, INC.</b>	:
<b>Defendants.</b>	<b>: NO. 99-5485</b>

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<b>SDG MACERICH PROPERTIES, L.P.</b>	<b>: CIVIL ACTION</b>
<b>Plaintiff,</b>	:
<b>vs.</b>	:
<b>TWO BROTHERS SCOTTO, INC. d/b/a SCOTTO PIZZA</b>	:
<b>Defendant.</b>	<b>: NO. 99-6395</b>

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<b>SDG MACERICH PROPERTIES, L.P.</b>	<b>: CIVIL ACTION</b>
<b>Plaintiff,</b>	:
<b>vs.</b>	:
<b>TWO BROTHERS SCOTTO, INC. t/a SCOTTO'S PIZZA</b>	:
<b>Defendant.</b>	<b>: NO. 99-6398</b>

**ORDER**

AND NOW, to wit, this 24th day of July, 2000, upon consideration of Defendant SDG Macerich Properties, L.P., Simco Acquisitions, Inc., Simon Property Group, Inc., SPG

Properties, Inc. and SD Property Group, Inc.’s Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim Upon which Relief Can be Granted (Document No. 3, Case. No. 99-CV-5485, filed November 30, 1999), Joinder of Hot Topic in Motion to Dismiss Plaintiff’s Complaint (Document No. 5, Civil Action No. 99-CV-5485, filed December 17, 1999), Plaintiff Two Brothers Scotto, Inc.’s Brief in Opposition to Defendants’ Motion to Dismiss Complaint (Document No. 7, Civil Action No. 99-CV-5485, filed January 7, 2000), Defendant Two Brothers Scotto, Inc.’s Motion to Vacate and/or Open Confessed Judgment and to Stay Execution (Document No. 2, Civil Action No. 99-CV-6398, filed December 17, 1999), Brief in Support of Defendant Two Brothers Scotto, Inc.’s Motion to Vacate and/or Open Confessed Judgment and to Stay Execution (Document No. 3, Civil Action No. 99-CV-6398, filed December 17, 1999), Plaintiff’s Verified Response in Opposition to Defendant’s Motion to Vacate and/or Open Confessed Judgment and to Stay Execution (Document No. 5, Civil Action No. 99-CV-6398, filed January 13, 2000), Plaintiff, SDG Macerich Properties, L.P.’s Motion for A Writ of Possession and for Disposition of, or a Prompt Hearing on, Defendant’s Motion to Vacate and/or Open Confessed Judgment and to Stay Execution (Document No. 9, Civil Action No. 99-CV-6398), Defendant Two Brothers Scotto’s Answer to Plaintiff, SDG Macerich Properties, L.P.’s Motion for A Writ of Possession and for Disposition of, or a Prompt Hearing on, Defendant’s Motion to Vacate and/or Open Confessed Judgment and to Stay Execution (Document No. 11, case No. 99-CV-6398, filed June 6, 2000) and Defendant Two Brothers Scotto’s Brief in Opposition to Plaintiff, SDG Macerich Properties, L.P.’s Motion for A Writ of Possession and for Disposition of, or a Prompt Hearing on, Defendant’s Motion to Vacate and/or Open Confessed Judgment and to Stay Execution (Document No. 12, Civil Action No. 99-CV-6398,

filed June 6, 2000), for the reasons stated in the attached memorandum, it is **ORDERED** as follows:

1. Defendant SDG Macerich Properties, L.P., Simco Acquisitions, Inc., Simon Property Group, Inc., SPG Properties, Inc. and SD Property Group, Inc.'s Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim Upon which Relief Can be Granted is **DENIED**;

2. Defendant Two Brothers Scotto, Inc.'s Motion to Vacate and/or Open Confessed Judgment and to Stay Execution is **GRANTED** and the confessed judgment obtained by SDG Macerich Properties, L.P. in the Court of Common Pleas for Delaware County is **OPENED**;

3. Plaintiff, SDG Macerich Properties, L.P.'s Motion for A Writ of Possession and for Disposition of, or a Prompt Hearing on, Defendant's Motion to Vacate and/or Open Confessed Judgment and to Stay Execution is **DENIED**.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**