

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

S&C Restaurant Corporation	:	
Plaintiffs,	:	
	:	
	:	CIVIL ACTION
	:	
v.	:	NO. 98-5972
	:	
	:	
Sofia’s Diner Restaurant, Inc.	:	
and Demetrios “Jimmy” Tsatsanis	:	
Defendants.	:	

C.S.GREEN, S.J. **August , 1999**

MEMORANDUM and ORDER

Presently before the Court is Defendants’ Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), and the Plaintiff’s response thereto. For the reasons set forth below, Defendants’ Motion to Dismiss, will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Demetrios “Jimmy” Tsatsanis is the president of two separate Pennsylvania corporations, Sofia’s Diner Restaurant Inc., (“Sofia’s”) and The Big Apple Grill of Bristol Inc., (“The Big Apple”). The corporations separately owned two restaurants. Sofia’s owned and operated The Club House Diner in Bensalem, Pennsylvania, and The Big Apple owned and operated The Plaza Diner in Bristol, Pennsylvania.

On April 21, 1998, Plaintiff, S&C Corporation (“S & C”) entered into an Agreement of Sale of Assets (“Agreement of Sale”) with Sofia’s to purchase The Club House Diner. The Agreement of Sale contains three relevant provisions: (1)the preamble, which identifies the assets

of the Club House Diner as “equipment, inventory, liquor license, goodwill, and the name ‘Club House Diner’”; (2) Section 1, which later outlines the agreement between Sofia’s and S&C to sell and purchase all of the assets delineated in the preamble; and (3) the non-competition clause, found in section 10, which contains the following language:

Non-Competition Clause:

- 10.1 In order to induce Buyer to enter into this Agreement, Seller covenants that it shall not, either individually, corporately, or in any other business form, directly or indirectly, whether as principal, agent, workman, servant, employee, investor, or strawparty, enter into competition with Buyer or Buyer’s successor in title in a restaurant business for a period of ten (10) years from the date of Closing (the “restrictive period”) and in a radius of fifteen (15) miles from the Property, provided that Seller may continue to own and operate a restaurant at Route 13 and Bristol Pike, Bristol, PA. (currently known as the Plaza Diner) (the Exempt Location).
- 10.2 During the Restrictive Period Seller shall not employ at the Exempt Location, without prior written consent of Buyer, any employee of Buyer who has left his or her employment voluntarily, except for [Slelli Onori, Janet, Steve(baker), and Danny].

The sale of The Club House Diner subsequently took place on July 20, 1998. At that time, Defendant Demetrios “Jimmy” Tsatsanis, signed the Agreement of Sale on Sofia’s behalf.

On or about September 16, 1998, the Defendants allegedly placed advertisements in newspapers, including but not limited to, the Bucks County Midweek and the Northeast Times.

The first advertisement contained the following information:

CLUB HOUSE DINER
2494 Street Road, Bensalem, PA 19020
215-639-4287
JIMMY WOULD LIKE TO THANK
ALL OF HIS PATRONS FOR THE

**MANY YEARS 1994-1998
YOUR LOYALTY AND PATRONAGE
HAS BEEN APPRECIATED**

The second advertisement appeared directly below the first and read as follows:

**THE PLAZA DINER - NOW OPEN
RTS 13 & 413 BRISTOL, PA (Caldor Shopping Center)
788 - 5008
Jimmy from the Clubhouse Diner Is Here!**

After learning of the advertisements, S&C initiated this action by filing a Complaint in federal district court alleging Lanham Act violations, pursuant to 15 U.S.C. § 1125(a) (1988), and various other state law claims against the Defendants.

Specifically, S&C's Complaint alleged that the placement of the two advertisements by the Defendants created a right of action under 15 U.S.C. 1125(a) of the Lanham Act and Pennsylvania state law. Defendants moved to dismiss the Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6), alleging, *inter alia*, that S&C could not establish a valid Lanham Act claim because S&C failed to identify a nexus between the conduct of which it complained and the interstate commerce requirement of the Lanham Act.

The parties presented oral argument on the Motion to Dismiss on February 9, 1999. After hearing oral argument on matters relating to whether the Plaintiff sufficiently alleged an adequate nexus between the Defendants' alleged activities and interstate commerce, the Court granted Defendants' Motion to Dismiss without prejudice, allowing S&C to file an Amended Complaint specifically setting forth the nexus between the Defendants' alleged conduct and interstate commerce as required by 15 U.S.C. §1125(a).

S&C subsequently filed a First Amended Complaint containing three new paragraphs:

¶ 8. The name “Club House Diner” is used in interstate commerce inasmuch as the restaurant is between and adjacent to Interstate 95, which connects all of the Atlantic Seaboard states, and the Pennsylvania Turnpike such that automobiles traveling from one highway to another pass directly by the Club House Diner. Moreover, the Club House Diner serves patrons from the entire Mid-Atlantic region who travel to the area to shop at the Franklin Mills Mall, a regional outlet center.

¶ 19. A substantial portion of the food and supplies utilized by the Club House Diner and the Plaza Diner move in interstate commerce and therefore the Defendants’ improper use of the name “Club House Diner,” which diverts business from the Club House Diner to the Plaza Diner, effects interstate commerce.

¶ 20. The Northeast Times and the Bucks County Midweek reach residents of New Jersey, among other states, through, among other methods, subscriptions sold over the Internet.

(Pl.’s First Am. Comp. at pp. 2 and 5).

Defendants’ again moved to dismiss the Plaintiff’s First Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), asserting that the First Amended Complaint, like the original Complaint, should be dismissed for failure to allege a sufficient connection to interstate commerce as required by the Lanham Act.

For the reasons outlined below, the Defendants’ Motion to Dismiss will be denied.

II. LEGAL STANDARD

Defendants move to dismiss the plaintiff’s Complaint by relying upon Fed.R.Civ.P. 12(b)(6). Therefore, the factual allegations of the Complaint are presumed to be true, and the Court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the allegations therein. Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). Moreover, any ambiguities concerning the sufficiency of the claims must be resolved in favor of

the plaintiff. Id.

Following the well-established principles governing motions to dismiss, this court may only dismiss the instant case if it is clear that no relief could be granted under any set of facts consistent with the allegations set forth in the plaintiff's First Amended Complaint. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229 (1984).).

III. DISCUSSION

A. Claims Brought Pursuant to the Lanham Act and Pennsylvania's Unfair Competition Statute¹

Section 43(a) of the Lanham Act creates a federal cause of action for any false description or representation of a product or service.² To adequately plead a claim brought pursuant to the Lanham Act, a plaintiff must set forth the following elements:

¹ Since the elements of a Lanham Act violation and Pennsylvania's common law tort of unfair competition through false advertising are the same, except for the interstate commerce requirement, the Court will address Count I and II of the First Amended Complaint together.

² 15 U.S.C. §1125(a) states:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which: (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

1) the defendant has made false or misleading statements as to his own product [or another's]; 2) there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; 3) the deception is material in that it is likely to influence purchasing decisions; 4) the advertised goods traveled in interstate commerce; and 5) there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.

U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 922 (3d Cir. 1990), cert. denied, 498 U.S. 816 (1990). In their Motion to Dismiss, the Defendants assert that the Plaintiff has failed to adequately plead the interstate commerce and false and misleading statement requirements of the Lanham Act, therefore, Counts I and II of the Amended Complaint should be dismissed as a matter of law.

The standard for dismissing a claim pursuant to Fed.R.Civ.P. 12(b)(6) is clear; dismissal is only proper when it is certain that no relief could be granted under any reasonable interpretation of, or inference from the facts pleaded. In the Amended Complaint, the plaintiff alleges, that the name "Club House Diner" is used in interstate commerce inasmuch as the restaurant is located next to Interstate 95 and attracts out of state customers, a substantial portion of the food and supplies utilized by the Club House Diner and the Plaza Diner move in interstate commerce, and, its service mark has been advertised in publications having interstate circulation. Based on these allegations, a reasonable jury could find that the Plaintiff has satisfied the interstate commerce requirement of the Lanham Act. Therefore, granting the Defendants' Motion to Dismiss on this issue is not appropriate.

The Amended Complaint also alleges that the "two advertisements were intentionally false and misleading in implying that the Club House Diner . . . ceased doing business and that

the Plaza Diner opened as a replacement or substitute for the Club House Diner.” (Pl’s First Am. Compl. at 5). Plaintiff avers, therefore, that as a result of the Defendants’ publication of the aforementioned advertisements, the public was intentionally deceived into believing that the Club House Diner ceased business operations. Id. at 6. The question of whether the advertisements were implicitly false or misleading, however, is one of fact, not one that can be decided as a matter of law. At this stage of the proceedings, therefore, dismissal of the Lanham Act claim is not appropriate.

B. Defendant’s Motion to Dismiss the Plaintiff’s Pendant State Law Claims

In its Amended Complaint, Plaintiff alleges claims of : (1) Fraudulent or Negligent Misrepresentation in Count III; (2) Breach of Contract in Count IV; (3) Breach of Implied Duty of Good Faith and Fair Dealing in Count V; and (4) Interference with Contractual Relations in Counts VI and VII. In their renewed motion to dismiss, Defendants reassert their arguments that all of the Plaintiff’s pendent state law claims must be dismissed as a matter of law. In determining whether the Plaintiff’s claims must be dismissed, pursuant to Fed.R.Civ.P. 12(b)(6), each claim will be reviewed for compliance with the liberal pleading requirements of the Federal Rules of Civil Procedure.

1. Fraudulent or Negligent Misrepresentation

To state a claim for negligent misrepresentation a plaintiff must plead : (1) misrepresentation of material fact; (2) made under circumstances in which misrepresenter ought to have known its falsity; (3) with intent to induce another to act on it; and (4) which results in injury to party acting in justifiable reliance on misrepresentation. Bortz v. Noon, ___ Pa. ___, 729 A.2d 555, 561 (1999). Construing the allegations in favor of the Plaintiff, the complaint may be fairly read to encompass such a claim.

On the other hand, a claim for fraudulent misrepresentation requires a plaintiff to show: "(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." Id. While state law governs the elements that must be identified in the complaint to sustain a claim for fraudulent misrepresentation, and the Plaintiff has adequately plead those required elements, the Court must also determine whether the Plaintiff's complaint meets the requirements set forth in Federal Rule of Civil Procedure Rule 9(b). Craftmatic Securities Litigation v. Kraftsow, 890 F.2d 628, 645 (3d Cir.1989).

Rule 9(b) requires plaintiffs to plead the circumstances of the alleged fraud with particularity to ensure that the defendant is placed on notice of the "precise misconduct with which [it] is charged, and to safeguard defendant against spurious charges of fraud." Id. While it will usually be necessary to plead the "time, place and content of the misrepresentation and damages" to satisfy the specificity requirement of Rule 9(b), all that is required is to put the defendant on sufficient notice of the claims to which a response is necessary. Id. If the defendant can prepare an adequate answer to the complaint, the requirements of Rule 9(b) have been met.

Count III of the Plaintiff's Amended Complaint alleges that each of the Defendants intentionally and fraudulently represented that they were willing and would sell the goodwill of the Club House Diner and would take no action to impair or devalue it. (Pl.'s First Amended Complaint at ¶ 35). Plaintiff further alleges that it relied upon these representations and was subsequently induced into entering into the Agreement of Sale. Id. at ¶ 37. These allegations are sufficiently specific to identify the circumstances underlying the fraud and will adequately notify the Defendants of the claims against them. Defendant's motion to dismiss will therefore be denied.

2. Breach of Contract

A breach of contract is a nonperformance of any contractual duty of immediate performance. See Roman Mosaic and Tile Co. v. Thomas P. Carney, Inc., 1999 Pa. Super. 73, 729 A.2d 73 (1999). What is sufficient performance and what is breach depends upon surrounding circumstances and construction given to the contract. Id. In the Amended Complaint, the Plaintiff alleges that the defendants entered into the Agreement of Sale, whereby they agreed to sell the name “Club House Diner” and then later used the name in advertisements in breach of that Agreement. Although the Plaintiff does not specifically aver that the contract prohibited the Defendants from using the name in the manner that is alleged in the Amended Complaint, I must resolve every reasonable inference in favor of the Plaintiff. Here, a reasonable jury could infer that the surrounding circumstances and construction given to the contract prohibit the Defendants from placing the ads. Thus, the Motion to Dismiss Count IV of the Amended Complaint will be denied.

3. Breach of Duty of Good Faith and Fair Dealing

Pennsylvania law imposes upon each party to a contract a duty of good faith and fair dealing in its performance and its enforcement. However, the breach of the obligation to act in good faith cannot be precisely defined in all circumstances. See Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 318, 671 A.2d 716, 722 (1996). Good faith has been defined as honesty in fact in the conduct or transaction concerned. See 13 Pa.C.S.A. § 1201. Examples of bad faith conduct, on the other hand, include “evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party’s performance. Id. Whether the Defendants’ conduct in placing the advertisements at issue amounts to bad faith sufficient to constitute a breach of the implied duty of good faith and fair dealing is a question of fact. At this stage of the proceedings, therefore, Count V of the First Amended Complaint will

withstand the Defendants' motion to dismiss.

4. Interference with Business Relations

The elements of a claim for tortious interference with contracts or prospective contractual relations include: (1) intention and improper interference with the performance of a contract; (2) between another and a third person; (3) by inducing or causing a third person not to perform or enter into the contract ; (4) resulting in loss to the other from the third person's failure to enter or perform. R.P. Russo Contractors & Engineers, Inc. v. C.J. Pettinato Realty & Dvlpmt., Inc., 334 Pa. Super. 72, 482 A.2d 1086, 1090 (1984). Therefore, at minimum, the Plaintiff in this case must sufficiently plead that an actual contract or a sufficiently definite economic relationship existed between it and the customers with which the Defendants allegedly interfered. In the Amended Complaint, S&C alleges that, as a result of the Defendants' placement of the advertisements at issue, customers were diverted from the Club House Diner to the Plaza Diner. These allegations sufficiently satisfy the liberal notice pleading requirements of the Federal Rules of Civil Procedure, in that, the Plaintiff has alleged the elements necessary to raise a prima facie case of intentional interference. Therefore, Defendants Motion to Dismiss Counts VI and VII of the Plaintiff's First Amended Complaint will be denied.

IV CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss the Plaintiff's First Amended Complaint will be denied. An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

S&C Restaurant Corporation	:	
Plaintiffs,	:	
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v.	:	NO. 98-5972
	:	
	:	
Sofia's Diner Restaurant, Inc.	:	
and Demetrios "Jimmy" Tsatsanis	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of August, 1999, upon consideration of Defendants Sofias Diner Restaurant, Inc. and Demetrios "Jimmy" Tsatsanis' Motion to Dismiss the Plaintiff's First Amended Complaint, and the Plaintiff's response thereto, **IT IS HEREBY ORDERED** that the Motion to Dismiss is **DENIED**.

BY THE COURT,

CLIFFORD SCOTT GREEN, S.J.