

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

DUNKIN' DONUTS, INC., et al. : CIVIL ACTION  
Plaintiffs, :  
 :  
v. :  
 :  
GUANG CHYI LIU, et al. :  
Defendants. : No. 99-3344

MEMORANDUM AND ORDER

J. M. KELLY, J.

FEBRUARY 14, 2002

Presently before the Court is the Report & Recommendation ("Report") by Thomas J. Rueter, United States Magistrate Judge (Doc. No. 113), Objections to Magistrate Rueter's Report and Recommendation for Summary Judgment on Defendant's Counterclaims (Doc. No. 116), filed by Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company and the response thereto (Doc. No. 126), filed by Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc. In his Report, Magistrate Judge Rueter considered the following motions: (1) Plaintiffs' Motion for Summary Judgment on Plaintiffs' Claims (Doc. No. 80) and Defendants' response thereto (Doc. Nos. 91 and 110); (2) Defendants' Cross-Motion for Summary Judgment on Counts II and III of Plaintiffs' Complaint (Doc. No. 96) and Plaintiffs' response thereto (Doc. No. 97); and, (3) Plaintiffs' Motion for Summary Judgment on Defendants' Counterclaims and Defendants' response (Doc. No. 91), which was an Omnibus Opposition to Plaintiffs' Motions and a Motion for enlargement of time to seek

additional discovery under Federal Rule of Civil Procedure 56(f). Magistrate Judge Rueter made the following recommendations to this Court: (1) Plaintiffs' Motion for Summary Judgment on Plaintiffs' Claims be denied; (2) Defendants' Cross-Motion for Summary Judgment on Counts II and III be denied; (3) Defendants' Request for an extension of time under Rule 56(f) be denied; and (4) Plaintiffs' Motion for Summary Judgment on Defendants' Counterclaims be granted. Defendants object only to the denial of the Rule 56(f) Motion and the dismissal of Defendants' Counterclaims. For the reasons that follow, Magistrate Judge Rueter's Report is approved and adopted<sup>1</sup>.

#### **BACKGROUND**

The Court approves and adopts the background facts as stated in Magistrate Judge Rueter's Report. A summary of the background facts is provided. On June 30, 1999, Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc. ("Dunkin'") filed a complaint against Defendants Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company who are the Dunkin' Donuts Franchisees and owners of a Dunkin' Donuts retail doughnut shop located at 5100 City Line Avenue, Philadelphia, Pennsylvania. In their Complaint, Dunkin' seeks to terminate the Franchise

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<sup>1</sup> Under 28 U.S.C. § 636(C) (1994), this Court is to make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.

Agreement between Dunkin' and Defendants, based on a violation of the Franchise Agreement, alleging that the Defendants under reported their sales, committed federal tax fraud and made a fraudulent credit application in violation of federal law.

Defendants filed an amended Answer, alleging the following Counterclaims: (1) breach of the Franchise Agreement by requiring excessive remodeling and failing to provide training, marketing support, access to new promotional products, and ongoing assistance with the operation of the business; (2) breach of the Franchise Agreement by wrongful termination; (3) breach of implied covenant of good faith and fair dealing; (4) breach of duty to cooperate/ hindrance of performance; (5) tortious interference with contractual relations<sup>2</sup>; (6) fraud in the inducement and negligent misrepresentation; and (7) unlawful tying in violation of the Sherman Antitrust Act. Plaintiffs moved for summary judgment on the Defendants' Counterclaims. Rather than responding to Plaintiffs' Summary Judgment Motion on the Counterclaims, Defendants, in their Omnibus Opposition, moved to enlarge the time to respond, arguing they needed additional time to obtain discovery on the "unlawful remodeling scheme," which they contend is the factual basis of their Counterclaims.

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<sup>2</sup> Defendants subsequently withdrew Counterclaim Count 5, the tortious interference claim.

## DISCUSSION

### **1. Federal Rule of Civil Procedure 56(f)**

Defendants, rather than specifically responding to Plaintiffs' Motion for Summary Judgment on the Defendants' Counterclaims, sought to enlarge time to respond to the Plaintiffs' Motion in their Omnibus Opposition. Defendants claimed they needed "additional time to take depositions and obtain other discovery relating to Dunkin's unlawful remodeling scheme, which forms the basis of Defendants' counterclaims." Omnibus Opp'n. at 3. As noted by Magistrate Judge Rueter, district courts are "obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery." Dowling v. City of Philadelphia, 885 F.2d 136, 139 (3d Cir. 1988). Parties seeking additional time, however, must comply with Rule 56(f) which states:

When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

First, Magistrate Judge Rueter ruled that Defendants' Motion failed as a procedural matter because the Defendants did not file an affidavit in accordance with Rule 56(f). He therefore granted Plaintiffs' Motion for Summary Judgment on Defendants'

Counterclaims under Rule 56(e) which states: "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Magistrate Judge Rueter further noted that Defendants' attempt to seek additional time for discovery did not comply with Rule 56(f) because Defendants failed to "identify the particular facts they hoped to find and if, uncovered, how these facts would preclude summary judgment." Based on the above grounds, Magistrate Judge Rueter recommended denying Defendants' request for additional time to conduct discovery and dismissing Defendants' Counterclaims.

This Court agrees with Magistrate Judge Rueter's recommendation to deny the Defendants' request for additional discovery. In Radich v. Goode, 886 F.3d 1391, 1394 (3d Cir. 1989), the Third Circuit stated:

The purpose of the affidavit is to ensure that the nonmoving party is invoking the protection of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merits of a party's opposition . . . . An unsworn memorandum opposing a party's motion for summary judgment is not an affidavit . . . . argument [is not] a surrogate for either evidence or fact.

On the other hand, while full compliance with the technical requirements of Rule 56(f) is highly encouraged in the Third Circuit, failure to support the 56(f) motion by affidavit is not fatal to its consideration. St. Surin v. Virgin Island Daily News, Inc., 21 F.3d 1309, 1314 (3d Cir. 1994). However, where a

Rule 56(f) motion does not meet the affidavit requirement, it must still "identify with specificity 'what particular information is sought; how, if uncovered, it would still preclude summary judgment; and why it has not been previously been obtained.'" Id. (citations omitted). In St. Surin, the Rule 56(f) motion provided the necessary details by identifying two depositions and providing the reason for the delay as to one of the witnesses to be deposed. Id.

Here, as Magistrate Judge Rueter pointed out, the Defendants failed utterly to provide any detail, stating only that "Defendants need additional time to take depositions and obtain other discovery relating to Dunkin's unlawful remodeling scheme, which forms the basis of Defendants' counterclaims. . . ." Accordingly, Magistrate Judge Rueter correctly denied the Defendants' request for an extension of time to conduct discovery. As such, this Court approves and adopts the Report and Recommendation of Magistrate Judge Rueter as to the denial of Defendants' Rule 56 (f) Motion seeking enlargement of time.

#### Summary Judgment on Defendants' Counterclaims

While the grant of summary judgment based solely on the technical failure to comply with the affidavit requirements of Rule 56(f) may not have been appropriate, Magistrate Judge Rueter correctly proceeded to dismiss the Defendants' Counterclaims on other appropriate grounds. First, he granted summary judgment

based on the Defendants' failure to comply with Rule 56(e) and then, in the alternative, dismissed the Defendants' Counterclaims on the merits. Defendants main objection rests on one ground, that Magistrate Judge Rueter did not consider the whole "record."

Summary judgment is proper if "the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255.

Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Rule 56(e) makes it clear that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Defendants, however, complain that Magistrate Judge Rueter should have considered the "extensive record established over the last 16 months in this matter, which includes numerous motions to compel, discovery motions, portions of depositions, interrogatories and responses thereto" and letters written by counsel, even though the Defendants themselves did not in any way attempt to point to facts that would tend to support their theory of the unlawful remodeling scheme. Magistrate Judge Rueter was not required to go hunting through the voluminous piles of motions and briefs in this case and do Defendant's counsel's job. The Third Circuit has clearly stated:

Where a party opposing a motion for summary judgment has the burden of persuasion, and the moving party has identified sufficient facts of record to demonstrate that no genuine issue of material fact remains, the nonmoving party is obliged to identify those facts of record which would contradict the facts identified by the movant.

[A]llowing a nonmoving party opposing a motion for

summary judgment to rest on mere denials where there are unidentified facts of record which may contradict the facts identified by the movant would be an unworkable and illogical rule. It would require the district judge to search through an often voluminous written record for facts which might support the nonmovant's claim, and would require [the Appeals] Court to review the district judge's search to insure that no facts were missed. It would permit the party to present facts, and argument based on those facts, to the Court of Appeals where that party had not identified those facts to the district court.

Childers v. Joseph, 842 F.2d 689, 694-5 (3d Cir. 1988). As such, the Court approves and adopts Magistrate Judge Rueter's recommendation to dismiss the Defendants' Counterclaims.

Alternatively, Magistrate Judge Rueter also examined the merits of the Counterclaims and determined them meritless. Hence, Defendants cannot complain that Magistrate Judge Rueter failed to examine the whole record. Moreover, this Court agrees with Magistrate Judge Rueter's analysis on the merits of the Defendants' Counterclaims. That Defendants have no evidence to support their Counterclaims is also apparent by Defendants' repeated failure to explain how specific evidence in the record relates to each Counterclaim. Defendants could have taken the opportunity in their objection to Magistrate Judge Rueter's Report to point out to this Court evidence specifically relating to each Counterclaim which create genuine issues of material fact but utterly failed to do so. Instead, Defendants spend most of their time merely repeating their theory of the unlawful

remodeling scheme and stating conclusions of law.

Accordingly, for the reasons stated above, Defendants' Objections to Magistrate Judge Rueter's Report is denied and the Court approves and adopts the Report and Recommendation of Magistrate Judge Rueter.

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**ORDER**

**AND NOW**, this 14<sup>th</sup> day of February, 2002, upon consideration of the Report and Recommendation by Thomas J. Rueter, United States Magistrate Judge (Doc. No. 113), Objections to Magistrate Rueter's Report and Recommendation for Summary Judgment on Defendant's Counterclaims (Doc. No. 116), filed by Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company and the response thereto (Doc. No. 126), filed by Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc., it is hereby **ORDERED** that United States Magistrate Judge Rueter's Report and Recommendation is **APPROVED** and **ADOPTED**. Accordingly, the Court enters the following Order:

1. Plaintiffs' Motion for Summary Judgment on Plaintiffs' Claims is **DENIED**.
2. Defendants' Cross-Motion for Summary Judgment on Counts II and III of the Complaint is **DENIED**.
3. Defendants' Request For an Extension of Time to Respond to Plaintiff's Motion For Summary Judgment on Defendants'

Counterclaims is **DENIED**.

4. Plaintiffs' Motion For Summary Judgment on Defendants' Counterclaims is **GRANTED**. Judgment is **ENTERED** in favor of Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc. and against Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company, on all counts of the Defendants' Counterclaims.

BY THE COURT:

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JAMES MCGIRR KELLY, J.