

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

MERCY HEALTH SYSTEM OF
SOUTHEASTERN PENNSYLVANIA,

Plaintiff

v.

METROPOLITAN PARTNERS
REALTY LLC, et al.,

Defendants

CIVIL ACTION

No.02-1015

MEMORANDUM

July ____, 2002

In this action, plaintiff Mercy Health System of Southeastern Pennsylvania (“Mercy”) has alleged seven claims against defendants Metropolitan Partners Realty LLC, Philadelphia Wellness Partners, Anchor Health Properties, and Metropolitan Partners, Ltd. Specifically, Mercy has asserted claims for: (1) rescission of the parties’ leases based on defendants’ failure to make the disclosures required of franchisors by the Franchise Rules promulgated by the Federal Trade Commission (“FTC”), 16 C.F.R. § 436.1 et seq.; (2) a declaratory judgment that defendants have breached the leases and that Mercy’s obligation to perform under the leases is at an end; (3) breach of the parties’ leases; (4) breach of a contract implied in fact; (5) breach of the duty of good faith and

fair dealing that is implied in the parties' leases; (6) breach of fiduciary duty; and (7) unjust enrichment. Defendants removed the action to this court from the Court of Common Pleas, Philadelphia County, invoking jurisdiction pursuant to 28 U.S.C. § 1331, on the ground that Mercy stated a cause of action which arises under a federal statute in Count I of its complaint.

Both defendants' motion to dismiss the complaint, filed pursuant to Federal Rule of Civil Procedure 12(b)(6), and plaintiff's motion for deposit of funds, filed pursuant to Federal Rule of Civil Procedure 67, are pending in this action. For the reasons which follow, the action will be remanded to the court of common pleas pursuant to 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction.

Factual Background

Mercy is a tenant of Wellness Partners under two leases pertaining to properties in Upper Darby, Pennsylvania and the Eastwick section of Philadelphia, Pennsylvania, where Mercy operates health care facilities. Mercy has alleged that defendants were contractually obligated to develop and promote the facilities, by undertaking such steps as maintaining a "promotional fund," developing a "one-stop shopping" health care concept for the facilities, and recruiting tenants for the facilities. Mercy has alleged that defendants have breached these obligations. Mercy further alleges that it has consequently incurred losses in the amount of several million dollars, in the form of (a) monthly payments in excess of the fair rental value of the properties, and (b) promotional

and leasing efforts which Mercy has undertaken in order to remedy the breaches.

Remand pursuant to 28 U.S.C. § 1447(c)

A federal court has an ongoing obligation to consider its jurisdiction over an action, whether upon motion of the parties or sua sponte. See Meritcare v. St. Paul Mercury Ins. Co., 166 F.3d 214, 217 (3d Cir. 1999) (quoting Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir.1995)); Employers Ins. of Wausau v. Crown Cork & Seal Co., Inc., 905 F.2d 42, 45 (3d Cir. 1990). In cases which have been removed to federal court, that obligation is reinforced by 28 U.S.C. § 1447(c), which states that “if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”

Mercy’s Claim under the FTC’s Franchise Rules

The parties to this action differ as to the proper construction of Count I of Mercy’s complaint. Regardless of the construction given to that claim, it is clear that Mercy has not stated a cause of action under the FTC’s Franchise Rules, or under any other aspect of federal law.

In their motion to dismiss, defendants have correctly argued that there is no private right of action for alleged violations of the FTC’s Franchise Rules. The FTC promulgated a series of “Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures” at 16 C.F.R. §§ 436.1- 438.10, pursuant to the Federal Trade Commission Act (“FTCA”), 15 U.S.C. §§ 41-58. In Freedman v.

Meldy's, Inc., 587 F. Supp. 658 (E.D. Pa. 1984), Judge Van Artsdalen gave an exhaustive analysis of the legislative history of the FTCA and the Franchise Rules, as well as reviewing the multiplicity of federal courts which refused to find an implied right of action thereunder. See id. at 659-60 (citing cases); see also Brill v. Catfish Shaks of America, Inc., 727 F.Supp. 1035, 1041 (E.D. La. 1989); Days Inn of America Franchising, Inc. v. Windham, 699 F.Supp. 1581, 1582-83 (N.D. Ga. 1988); Mon-Shore Management, Inc. v. Family Media, 1985 WL 4845 *1 (S.D.N.Y. 1985). In short, as these cases have amply demonstrated, the Rules do not imply a private right of action. Assuming that in Count I of its complaint, Mercy—contrary to its own characterization of the complaint—had purported to bring a claim under the FTC's Franchise Rules, such a claim would not have been tenable.

In response to defendants' motion to dismiss, Mercy argues that defendants have misconstrued the nature of Count I of its complaint—i.e., that Count I does not represent a claim for damages for violation of the Franchise Rule. Mercy has argued: "Rather, because defendants' failure to make the disclosures required by the Franchise Rule is an illegal act contaminating the formation of the parties' contract, Mercy is suing for relief from the illegal contract." Pl.'s Mem. in Opposition to Defs.' Mot. at 7. In response, defendants have argued that "Pennsylvania law does not permit a court to rescind a contract based upon a party's failure to make the disclosures required by the FTC's Franchise Rule." Defs.' Reply Br. at 7. The merit of defendants' evaluation of

Pennsylvania law on rescission is incidental in this context. Assuming, arguendo, that Count I may indeed be construed as a claim for rescission based on illegality, it is not a claim that “aris[es] under the Constitution, laws, or treaties of the United States” in the manner comprehended by the federal question jurisdiction statute. 28 U.S.C. § 1331. The Franchise Rules would be relevant to this action only to the extent that they have implications for the legality of the contract under Pennsylvania law. Thus, Count I of Mercy’s complaint is not a sufficient basis upon which federal question jurisdiction may be premised.

Conclusion

This court is without jurisdiction to consider the claims asserted in this action. Count I of Mercy’s complaint does not constitute a claim arising under the laws of the United States and does not, therefore, satisfy the requirements of 28 U.S.C. § 1331. Pursuant to 28 U.S.C. § 1447(c), this case will be remanded to the Court of Common Pleas in the accompanying Order.

Pollak, J.

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v.

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ORDER

July ____, 2002

For the reasons articulated in the accompanying Memorandum, this case is hereby
REMANDED to the Court of Common Pleas, Philadelphia County, pursuant to 28 U.S.C.
§ 1447(c), for lack of subject matter jurisdiction.

Pollak, J.