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

RICHARD J. SCHULTZ and DORIS SCHULTZ, H/W	:	CIVIL ACTION
v.	:	
THE PET FOOD GIANT, INC. and PETsMART, INC.	:	NO. 96-4457

MEMORANDUM AND ORDER

HUTTON, J. January 22, 1998

Presently before this Court is the Motion of Defendants The Pet Food Giant, Inc. and PETsMART, Inc. for Summary Judgment (Docket No. 17). For the reasons stated below, the defendants' Motion is **GRANTED in part and DENIED in part**.

I. BACKGROUND

Taken in the light most favorable to the non-moving parties, the facts are as follows. The plaintiffs, Richard and Doris Schultz, owned a 24,000 square foot tract of land located at 1056 East Baltimore Pike in Media, Pennsylvania (the "property"). On June 28, 1994, defendant Pet Food Giant, Inc. ("Giant") sent the plaintiffs a letter of intent to enter into a lease with the plaintiffs for part of the property. Williams Dep. at 11-12. On December 7, 1994, the plaintiffs and Giant entered into a lease agreement (the "lease").

Pursuant to the lease, Giant agreed to lease approximately 18,000 square feet of the property for ten years.\[1] Davidson Dep. Ex. 4 ¶ 1(A). Furthermore, the plaintiffs agreed to construct, at their expense, a Giant store (the "store") on the property. Id. ¶ 3(D). Moreover, the plaintiffs agreed to acquire all necessary approvals, permits, and licenses, and to commence construction of the store within 150 days. Id. ¶ 3(G). The parties attached "Site Plans" and "Sketch Plans" to the lease, which clearly set forth the gross sales area on the property as 16,000 square feet. Pls.' Ex. B. Furthermore, a "Work Letter" was attached to the lease, which documented the "basic minimum requirements for the build out of THE PET FOOD GIANT STORES." Davidson Dep. Ex. 4 at Ex. D.

The plaintiffs agreed that their architect would prepare plans and submit them to Giant, incorporating the items specified in the Work Letter. Davidson Dep. Ex. 4 ¶ 3(D). Giant agreed to review these plans and make the necessary modifications within thirty days of receipt. Id. Moreover, the parties agreed that if the plaintiffs "shall not have obtained all necessary approvals, licenses and building permits and shall not have diligently commenced construction . . . within one hundred and fifty (150) days from the date of this Lease," the defendants would have the option to terminate the lease upon written notice

1. Avellinos, an automobile tire company, agreed to lease the remaining 6,000 square feet of the property.

to the plaintiffs within twenty days after the one hundred and fifty day period. Id. ¶ 3(G). Finally, the parties included an integration clause, which reads:

> This Lease contains all of the agreements of the parties hereto, and no prior agreements or understandings, written or oral, shall be effective for any purpose. No provision of this Lease may be amended or added to except by an agreement in writing signed by the parties hereto or their respective successors in interest. This Lease shall not be effective or binding on any party until fully executed by both parties hereto.

Id. ¶ 34(F).

The plaintiffs commenced construction within 150 days. Schultz Dep. of 9/17/97 at 154. Moreover, within the 150 day period, the plaintiffs successfully obtained almost all of the necessary permits. Id. at 153. The plaintiffs encountered problems, however, because Giant did not submit their "prototypical plans," as defined in Section 1A of Exhibit D to the lease, until January 23, 1995, over six weeks from the time the lease was executed. Schultz Dep. of 9/25/97 at 258-59.

On February 26, 1995, the parties entered into a First Amendment of the lease, pursuant to which Giant agreed to lease the full 24,000 square feet of the premises. Davidson Dep. Ex. 5 ¶ 1. Except as expressly amended, all other provisions of the lease remained in effect. Id. ¶ 7.

Despite Richard Schultz's requests, Giant failed to produce plans for the new, enlarged store until April 3, 1995.

Schultz Dep. of 9/25/97 at 276-78, 285-86. At that time, the plaintiffs had approximately one month to obtain the remaining building and plumbing permits. Id. at 276-78. However, the plans produced by Giant were inadequate. Id. at 307-09. Because of the delays caused by Giant, the plaintiffs were unable to obtain the necessary building and plumbing permits by the required dates. Pl.'s Mem. at 13.

On May 24, 1995, Giant attempted to terminate the lease pursuant to paragraph 3(G), because of the plaintiffs' failure to obtain these permits within the 150 day period. Davidson Dep. Ex. 4 ¶ 3(G); Pls.' Ex. G. On September 18, 1995, PETsMART, Inc. ("PETsMART") acquired Giant, making Giant a wholly-owned subsidiary of PETsMART. Defs.' Mem. at 7. In the months following Giant's termination of the lease, the plaintiffs and Giant entered into negotiations for a Second Amendment to the lease, which would have revived the lease. Id. at 6. However, the parties never agreed to the material terms of the Second Amendment. Id. at 7.

On May 28, 1996, the plaintiffs filed suit in the Court of Common Pleas of Delaware County, Pennsylvania, alleging that Giant breached the lease agreement and that PETsMART tortiously interfered in the plaintiffs' business relations. Pls.' Compl. ¶¶ 25, 30. On June 18, 1996, the defendants filed a Notice of Removal, removing this case to the United States District Court

for the Eastern District of Pennsylvania. The defendants filed the instant Motion for Summary Judgment on September 29, 1997.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers 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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which 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).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or

weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

B. Applicable Law

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. When, as in the present case, this court sits in diversity, it must apply the substantive law of the state in which it is located, including the forum state's choice of law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Accordingly, Pennsylvania's choice of law rules apply in the instant case.

Under Pennsylvania's choice of law rules, courts will follow a contractual choice of law provision set out by the parties provided that the state chosen bears a reasonable relation to the parties or the transaction. Lang Tendons, Inc. v. The Great Southwest Mktg. Co., No.CIV.A.90-7847, 1994 WL 159014, at *3 (E.D. Pa. Apr. 25, 1994); Novus Franchising Inc. v. Taylor, 795 F. Supp. 122, 126 (M.D. Pa. 1992); Nova Ribbon

Prods., Inc. v. Lincoln Ribbon, Inc., No.CIV.A.89-4340, 1992 WL 211544, at *3-5 (E.D. Pa. Aug. 24, 1992), aff'd, 995 F.2d 218 (3d Cir. 1993) (table). Section 34(I) of the lease, entitled "Choice of Law", provides that "[t]his Lease shall be governed by the laws of the state in which the Premises are located." The "premises", as defined by the lease, are located in the Commonwealth of Pennsylvania. Accordingly, Pennsylvania's substantive law applies provided that the parties or the transaction bear a reasonable relationship to Pennsylvania.

Both the parties and the transaction bear a reasonable relationship to Pennsylvania so as to warrant upholding the parties' contractual choice of law provision. Specifically, the subject premises are located in Pennsylvania, the plaintiffs live in Pennsylvania, and the defendants conduct business within Pennsylvania. Thus, both the transaction and the parties bear a reasonable relationship to Pennsylvania. Accordingly, the Court shall apply Pennsylvania's substantive law.

C. Analysis of Defendants' Motion for Summary Judgment

1. Breach of the Lease Agreement

a. Failure to Obtain the Building Permit

On May 24, 1995, Giant informed the plaintiffs that Giant was terminating the lease because the plaintiffs failed to "obtain the required building permit" within 150 days following the date of the execution of the lease, as required by paragraph

3(G) of the lease. Davidson Aff. Ex. 9. The plaintiffs claim that their failure to obtain the building permit was caused by Giant's failure "to provide Plaintiffs with prototypical floor plans as required by the Lease." Pls.' Mem. at 11-13 (citing Davidson Aff. Ex. 4 ¶ 3(D)); Schultz Dep. of 9/25/97 at 276-78, 285-86, 307-09.

It is well established "that leases are in the nature of contracts" and are to be construed according to principles of construction applicable to contracts. 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies of Greater Philadelphia, 466 A.2d 132, 136 (Pa. Super. Ct. 1983), aff'd, 489 A.2d 733 (Pa. 1985). "[I]t is well settled that where one party to a contract is himself the cause of a failure of performance by the other party, he cannot advantageously utilize his own fault as an exit of his contractual obligations." Rainier v. Champion Container Co., 294 F.2d 96, 103 (3d Cir. 1961) (citations omitted); Slater v. General Cas. Co. of Am., 25 A.2d 697, 699 (Pa. 1942); Miles v. Metzger, 173 A. 285, 287 (Pa. 1934); see In re Stroud Ford, Inc., 190 B.R. 785, 787 (Bankr. M.D. Pa. 1995). A party "may not, in fact, take advantage of an insurmountable obstacle placed, by himself, in the path of the other party's adherence to an agreement. By preventing performance he also excuses it." Craig Coal Mining Co. v. Romani, 513 A.2d 437, 440 (Pa. Super. Ct. 1986) (citations omitted).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc., 974 F.2d at 1363. Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. While Giant denies "prevent[ing] the plaintiffs from timely obtaining a building permit," Defs.' Mem. in Further Supp. at 11, this is a matter clearly in controversy. Accordingly, this Court finds that there is a genuine issue of material fact concerning Giant's termination of the lease.

b. Condition Precedent to Formation of the Lease

In an alternative argument, Giant contends that there was never an enforceable lease between the parties because the parties failed to agree on final construction plans and specifications relating to the leased property. In other words, Giant maintains that the parties' ability to agree on the final plans was a condition precedent to the formation of the lease. Because that condition was never satisfied, Giant asserts that it cannot be liable for any breach on its part.

"A condition may be either a condition precedent to the formation of a contract or a condition precedent to performance under an existing contract." W & G Seaford Assocs. v. Eastern Shore Mkts., Inc., 714 F. Supp. 1336, 1340 (D. Del. 1989) (citing

J. Calamari & J. Perillo, Contracts § 11-5, at 440 (3d ed. 1987)). "In the former situations, the contract itself does not exist unless and until the condition occurs." Id. However, "[w]ith a condition precedent to performance, occurrence of the condition triggers the parties' duties under the contract." Id.

In support of the proposition that the parties' final approval constituted a condition precedent to the formation of the lease, Giant cites the following cases: Jacobs v. Schneider, 313 P.2d 142 (Cal. Ct. App. 1957); Intaglio Serv. Corp. v. J.L. Williams & Co., Inc., 420 N.E.2d 634 (Ill. App. Ct. 1981); Brooks v. Smith, 269 S.W.2d 259 (Ky. 1954); Lake Shore Investors v. Rite Aid Corp., 461 A.2d 725 (Md. Ct. Spec. App. 1983), aff'd, 471 A.2d 735 (Md. 1984); Saxon Theatre Corp. v. Sage, 200 N.E.2d 241, 245 (Mass. 1964); Rosenfield v. United States Trust Co., 195 N.E. 323 (Mass. 1935); Hansen v. Catsman, 123 N.W.2d 265 (Mich. 1963).\[2] In each of these cases, the courts held that the "plans and specifications for a building on leased real property, as provided in an agreement to lease, were not certain or not complete." John C. Williams, Requirements as to Certainty and Completeness of Terms of Lease in Agreement to Lease, 85 A.L.R.3d 414, 472 (1978). Thus, the courts found that the leases at issue were unenforceable.

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2. Although none of these cases represent Pennsylvania law, Giant argues that these cases are directly on point.

The cases cited by Giant are clearly distinguishable from the instant matter. In the line of cases mentioned above and relied on by Giant, the plans contained in the leases for the construction of buildings on the real property were much less specific and complete than the plans currently at issue. See Jacobs, 313 P.2d at 143 (Cal. Ct. App. 1957) (parties' agreement mentioned only location of building and square footage, with all plans to be approved at a later date); Intaglio Serv. Corp., 420 N.E.2d at 636 (same); Brooks, 269 S.W.2d at 260 (parties had agreed only on the color of the building and "that it was to be similar to a certain service station" in another location); Saxon Theatre Corp., 200 N.E.2d at 242 n. 1 (agreement merely set forth number of seats, location of premises, and obligation of lessor to deliver toilets, air conditioning, and utility lines); Rosenfield, 195 N.E. at 324-26 (no binding agreement between the parties where lessor orally offered to put a "'bang up' store front in and 'build a nice place' for the lessees so they could do business"); Hansen, 123 N.W.2d at 266 (agreement included only location and "[a]pproximate" dimensions, and merely stated that lessor would build a "brick and masonry building for use as a drug store").

In the instant case, the lease contained a twenty-one page "Work Letter," which included Giant's detailed construction specifications. Davidson Aff. Ex. 4 at Ex. D. The lease

specified the building materials to be used in the store and the parking lot. Id. Moreover, the lease described aspects of the parking lots, lighting, curbs, sidewalks, loading docks, doors, windows, ceilings, floors, toilets, fixtures, exterior signs, fire suppression and detection systems, and electrical requirements. Id. Obviously, the lease included plans in much greater detail than the leases discussed in the cases cited by Giant.

Moreover, in the cases advanced by Giant the surrounding facts led the courts to find a lack of intent by the parties to be bound by their agreements. Lake Shore Investors, 461 A.2d at 727 (signed lease was "subject to agreement on certain plans and specifications for construction of the store" and thus not binding absent the parties' agreement on those items); Saxon Theatre Corp., 200 N.E.2d at 242 n. 1 (agreement stated "[p]lans and specifications of both parties to be mutually agreed upon"); Rosenfield, 195 N.E. at 325 (agreement was merely list of items contemplated in the future draft of the lease, as evidenced by lessee's statements as he signed agreement that he would not be bound and that a lease would later be drawn). Those courts found, based on the language contained in the lease or the statements made by the parties at the time the agreement was signed, that the parties merely agreed to enter into a contract at a later date.

In the instant case, the parties' clearly intended to enter into a binding agreement. First, the language of the lease illustrates the intent to be bound. The plaintiffs agreed to submit plans to Giant, incorporating the items specified in the "Work Letter." Davidson Aff. Ex. 4 ¶ 3(D). Upon receipt, Giant agreed to "make necessary modifications and approve in writing such . . . [p]lans." Id. (emphasis added). Thus, the parties intended to form an enforceable agreement, with Giant making and approving any modifications to the plans.

Second, Giant included specific instructions in the "Work Letter," providing details on several aspects of the store that the plaintiffs agreed to build. Moreover, the parties signed a twenty-nine page lease agreement, including specific items such as the rent due, the term of the lease, and the parties responsible for paying the taxes on the property. Thus, the lease was not merely an unenforceable "'contract to make a contract.'" Hansen, 123 N.W.2d at 266 (quoting 1 Corbin on Contracts § 29, p. 68). Instead, the parties negotiated and agreed upon the essential terms of the lease.

Third, Giant has failed to offer any evidence to prove their lack of intent to be bound at the time the lease was entered into. Neither party presented facts regarding the formation of the lease that could lead this court to find that

the lease was not meant to be enforceable. Accordingly, this Court finds that the parties formed an enforceable lease.

Furthermore, this Court finds that the requirement concerning Giant's approval of the plans constitutes a condition precedent to the performance of the contract.

> [A] condition precedent may be defined as a condition which must occur before a duty to perform under a contract arises. See Village Beer and Beverage, Inc. v. Vernon D. Cox & Co., 327 Pa. Super. 99, 475 A.2d 117 (1984). While the parties to a contract need not utilize any particular words to create a condition precedent, an act or event designated in a contract will not be construed as constituting one unless that clearly appears to have been the parties' intention. See Estate of Barilla, 369 Pa. Super 213, 535 A.2d 125 (1987); see also Joseph Paolino & Sons v. City of Philadelphia, 429 Pa. Super. 191, 631 A.2d 1353 (1993). In addition, we note that the purpose of any condition set forth in a contract must be determined in accordance with the general rules of contractual interpretation.

Acme Mkts., Inc. v. Federal Armored Express, 648 A.2d 1218, 1220 (Pa. Super Ct. 1994). From the language of the lease, the parties clearly intended to make their future agreement a condition precedent to their performance under the contract. See Village Beer and Beverage, Inc., 475 A.2d at 111 (finding intent of the parties to create an enforceable lease).

However, the fact that the condition was not satisfied by the later agreement of the parties does not definitely absolve

Giant. The “non-occurrence of a condition” does not necessarily discharge the parties from their duties under the contract.

> The non-occurrence of a condition of a duty is said to be “excused” when a condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds . . . . It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing.

In re Stroud Ford, Inc., 190 B.R. at 787 (citing Restatement of Contracts 2nd, § 205); see Scherer v. Nase, 591 A.2d 1086, 1089 (Pa. Super Ct. 1991) (imposing requirement of good faith to a condition precedent of obtaining adequate financing). Thus, if Giant breached the duty of good faith and fair dealing, it would still be liable for the breach of the lease.

The plaintiffs have set forth evidence that Giant breached its duty of good faith by failing to cooperate in the exchange of documents and other information that was necessary for the plaintiffs to submit final plans for Giant’s approval. Schultz Dep. of 9/25/97 at 276; Pls.’ Mem. Ex. E; Slostad Dep. at 42-43. Moreover, the plaintiffs have offered evidence that the plans eventually submitted by Giant were clearly inadequate. Pls.’ Mem. Ex. D; Schultz Dep. of 9/25/97 at 307-09. The defendants have failed to offer any evidence to contradict the plaintiffs’ presentation. Accordingly, this Court, taking all reasonable inferences in favor of the plaintiffs, must find that

there is a genuine issue of material fact concerning Giant’s breach of its duty of good faith.

2. Tortious Interference with Business Relations

In Pennsylvania, a plaintiff must show the following elements to state a claim for tortious interference with prospective contractual relations: (1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) actual damage resulting from the defendant's conduct. Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979). PETsMART does not dispute that it interfered with the prospective Second Amendment between Giant and the plaintiffs, which would have revived the lease. Instead, PETsMART argues that its interference was justified by economic interests, and therefore is not actionable. Hall Aff. at 5.

When deciding whether an interfering party was privileged or justified:

> the court must examine a number of factors and determine "whether, upon consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another." Restatement (Second) of Torts, § 767 comment b (1979).
>
> Among the factors that the court must examine in a tortious interference case are "the actor's conduct," "the actor's motive," "the interests sought to be advanced by the actor," and "the relations between the parties." Id. § 767(a), (b), (d) & (g).

Green v. Interstate United Management Servs. Corp., 748 F.2d 827, 831 (3d Cir. 1984). Applying these factors, courts have held that a parent company is justified when it instructs its wholly-owned subsidiary to avoid a bad bargain. Id.; Schulman v. J.P. Morgan Inv. Management, Inc., 35 F.3d 799, 809 (3d Cir. 1994); Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 673 (3d Cir. 1991). "[I]n that situation, . . . interference is proper because the defendant's motive was to prevent the dissipation of its subsidiary's resources." Advent Sys. Ltd., 925 F.2d at 673. "'[T]he social interests in protecting the freedom of the actor' outweigh 'the contractual interests of the other.'" Green 748 F.2d at 831 (quoting Restatement (Second) of Torts, § 767(e)).

In the instant case, PETsMART has offered the affidavit of Charles L. Hall ("Hall"), a PETsMART Vice-President of Real Estate, to substantiate its argument that its interference was justified. Hall testified that PETsMART found:

> in light of the inability to reach an agreement with the plaintiffs, and upon further reflection of the desirability of the location of the proposed Store, it was not in Pet Food Giant's economic or business interests to execute the Second Amendment. It was decided to cease negotiations. This decision was in accord with my view (based upon my 23 years of experience in retail real estate) that the potential profitability of the proposed Store was questionable due to the physical characteristics of the Property, including the fact that cars traveling on the Property's surrounding highways passed at high speed.

Hall. Aff. ¶ 10. The plaintiffs fail to offer any evidence to the contrary.

PETsMART has shown that its decision to terminate negotiations surrounding the Second Amendment was based on economic and business interests. Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Celotex Corp., 477 U.S. at 324. The plaintiffs have failed to oppose PETsMART's showing by offering evidence to demonstrate that PETsMART's acts were not privileged or justified. Accordingly, PETsMART is entitled to summary judgment.

III. CONCLUSION

For the foregoing reasons, the plaintiffs have demonstrated that a reasonable jury could find that Giant breached the lease entered into by the parties. However, PETsMART has shown that no reasonable jury could find that PETsMART tortiously interfered with the plaintiffs' business relations. Thus, the defendants' Motion for Summary Judgment is granted in part and denied in part.

An appropriate Order follows.

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

RICHARD J. SCHULTZ and DORIS SCHULTZ, H/W	:	CIVIL ACTION
v.	:	
THE PET FOOD GIANT, INC. and PETsMART, INC.	:	NO. 96-4457

O R D E R

AND NOW, this 22nd day of January, 1998, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 17), IT IS HEREBY ORDERED that the Motion is **GRANTED in part and DENIED in part**.

IT IS FURTHER ORDERED that all claims against Defendant PETsMART, Inc. are **DISMISSED WITH PREJUDICE.**

BY THE COURT:

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HERBERT J. HUTTON, J.