

Tulshi v F.K.B. Donuts Inc. of Valley Stream
2012 NY Slip Op 30080(U)
January 5, 2012
Sup Ct, Nassau County
Docket Number: 9454/11
Judge: Anthony L. Parga
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SHORT FORM ORDER

**SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:**

HON. ANTHONY L. PARGA
JUSTICE

-----X **PART 6**
NEESHAM TULSHI and RAJKUMARIE TULSHI,

Plaintiff,

INDEX NO. 9454/11

-against-

MOTION DATE: 11/14/11
SEQUENCE NO. 001, 002

F.K.B. DONUTS INC. OF VALLEY STREAM,
F.K.B. DONUTS OF GREEN ACRES, INC.,
DANIEL J.FEINSTEIN, HOWARD FEINSTEIN,
URI BACK, ELLEN BACK, BASKIN-ROBBINS
FRANCHISED SHOPS LLC, and DUNKIN DONUTS
FRANCHISED RESTAURANTS LLC,

Defendants.

-----X

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Upon the foregoing papers, the motion by defendants, Baskin-Robbins Franchised Shops, LLC and Dunkin' Donuts Franchised Restaurants, LLC (hereinafter collectively referred to as "Dunkin Donuts") for an order dismissing the third cause of action, pursuant to CPLR §3211 (a)(1) and (7) is granted, and plaintiffs' cross-motion to amend their complaint, pursuant to CPLR §3025(b), is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action brought by plaintiffs to recover monetary damages due to breach of

contract (lease agreement), unjust enrichment, and tortious interference with contractual relations.

Dunkin Donuts and Baskin Robbins are the franchisors of food service establishments. In addition to owning trademarks, service marks, logos, etc., they also reserve the right to approve or disapprove of any proposed purchasers of Dunkin Donuts and Baskin-Robbins franchises and to exercise their right of first refusal with respect to same. On February 11, 2008, defendant F.K.B. Donuts of Green Acres, Inc. (hereinafter "FKB Green Acres") purchased a Dunkin' Donuts and Baskin-Robbins franchise (hereinafter "the Sunrise Franchise") located at 600 West Sunrise Highway, Valley Stream, New York (hereinafter "the premises") from a non-party franchisee, F&J Fine Foods, Inc. (whose principals were the plaintiffs' son-in-law and daughter, Nimish Desai and Felicia Tulshi-Desai). Plaintiffs are the owners of the premises located at 600 West Sunrise Highway, Valley Stream. Together with the sale of the Sunrise Franchise to FKB Green Acres, the lease for plaintiffs' premises was assigned to FKB Green Acres. Thereafter, between February 2008 and December 2010, FKB Green Acres operated a Dunkin' Donuts franchise at plaintiffs' premises.

It is alleged by plaintiffs that in or around December 2010, defendant FKB Green Acres breached the lease agreement by failing to pay rent and by abandoning the property prior to the expiration of the lease term. It is further alleged that defendants Dunkin Donuts "forced" plaintiffs to assign the lease to FKB Green Acres, rather than to an assignee of their choosing, by exercising its right of first refusal with respect to the sale of the Sunrise Franchise. Plaintiffs allege tortious interference with contractual relations with respect to Dunkin Donuts, as F&J had entered into an agreement to sell the franchise to a different entity prior to Dunkin Donuts' exercise of its right of first refusal, and, had Dunkin Donuts not exercised its right to nominate FKB Green Acres to purchase the Sunrise Franchise, plaintiffs would have been able to assign the lease to an entity whose principals agreed to personally guarantee its lease obligations.

Prior to the asset purchase of the Sunrise Franchise by FKB Green Acres from former franchisee F&J Fine Foods, Inc. (hereinafter "F&J"), in or around June 2007, F&J entered into an agreement to sell its Sunrise Franchise to an entity called Russell Donuts, LLC (hereinafter

“Russell”). In connection with the proposed sale of the franchise to Russell, the plaintiffs had agreed to the assignment and assumption of the lease by Russell, and the principals of Russell agreed to personally guaranty the financial obligations of Russell under the lease. Pursuant to F&J’s Franchise Agreement with Dunkin Donuts, however, Dunkin Donuts had the “right of first refusal” with regard to the sale of the Sunrise Franchise by F&J. In accordance with same, Dunkin Donuts exercised their right of first refusal to purchase or have their nominee purchase the Sunrise Highway Franchise on the terms and conditions set forth in the Asset and Purchase Agreement. As such, Dunkin Donuts designated FKB Green Acres as its nominee with regard to the purchase of the Sunrise Franchise, and, at the closing on February 11, 2008, FKB Green Acres purchased the Sunrise Franchise from F&J, and the lease of plaintiffs’ premises was assigned to FKB Green Acres.

At the same time, non-party N&R Food, LLC (hereinafter “N&R”), whose principal was plaintiff’s daughter, Felicia Tulshi-Desai, also entered into an Asset and Purchase Agreement for the sale of a Dunkin Donuts and Baskin Robbins franchise located at 208-233 West Merrick Road, Valley Stream, New York (hereinafter the “Merrick Road Franchise”). Prior to the ultimate sale of the Merrick Road Franchise, in or around June 2007, N&R entered into an agreement to sell its Merrick Road Franchise to Russell. Pursuant to N&R’s Franchise Agreement with Dunkin Donuts, however, Dunkin Donuts had the “right of first refusal” with regard to the sale of the Merrick Road Franchise by N&R. In accordance with same, Dunkin Donuts exercised their right of first refusal to purchase or have their nominee purchase the Merrick Road Franchise on the terms and conditions set forth in the Asset and Purchase Agreement. In accordance with same, at the closing on February 11, 2008, Dunkin Donuts also exercised their right of first refusal of the Merrick Road Franchise by designating F.K.B. Donuts of Valley Stream, Inc. (hereinafter “FKB Valley Stream”) as its nominee with regard to the purchase of the Merrick Road Franchise from N&R. Defendant FKB Valley Stream is a separate entity from FKB Green Acres, and FKB Valley Stream operates Dunkin’ Donuts and Baskin Robbins franchises at 208-233 West Merrick Road, Valley Stream, New York.

Defendants Daniel J. Feinstein, Howard Feinstein, Uri Back, and Ellen Back are the principals of both FKB Green Acres (which operated at the plaintiff’s Sunrise Highway

premises) and FKB Valley Stream (which operates at the Merrick Road premises).

In or around December 2010, FKB Green Acres breached the terms of the lease agreement for the Sunrise premises with plaintiffs, precipitating the instant action against the named defendants herein. With respect to defendants Dunkin Donuts, plaintiff alleges that “it is verily believed” that there were untoward ulterior motives behind Dunkin Donuts’ Business Development Manager, Adolphe Lopez’s decision to exercise the right of first refusal for the benefit of FKB Green Acres and FKB Valley Stream. Plaintiffs allege that as a result of Dunkin Donuts’ exercise of the right of first refusal, F&J’s agreement with Russell was null and void and FKB Green Acres became the only parties that F&J could sell the Sunrise Franchise to. Plaintiffs allege that as a result of the restriction placed upon F&J with regard to who they could negotiate a sale of the franchise to, Dunkin Donuts put both F&J and the plaintiffs in a position whereby they had to proceed with the transaction on FKB Green Acres’s terms or none at all. Plaintiffs allege that Dunkin Donuts thereby deprived the plaintiffs of the personal guarantees by the principals of the purchaser/assignee, which they would have had with a franchise sale and lease assignment to Russell.

Plaintiffs further contend that the FKB defendants were anxious to enter the specific Dunkin Donuts territory where the Sunrise Franchise and Merrick Road Franchise operated. Plaintiffs contend, however, that the only way that FKB Green Acres and FKB Valley Stream could enter the territory was by purchasing the two Dunkin Donuts Franchises (the Sunrise and Merrick Road Franchises) from plaintiffs’ daughter and son-in-law. Plaintiff Rajkumaric Tulshi submits an affidavit in which she attests that plaintiffs were “informed” during the course of the sale of the franchises that the defendants were more interested in the Merrick Road Franchise, but because of the Franchise Agreement, they were “forced” to purchase both locations. By securing both the Merrick Road Franchise and the Sunrise Franchise, FKB Green Acres, FKB Valley Stream, and their principals, would be able to expand into a territory that they had been attempting to access for a period of time. Ms. Tulshi also attests that she and her husband, plaintiff Neesham Tulshi, purchased the Sunrise premises in an effort to assist her children in securing a profitable location for their Dunkin Donuts franchise and because they believed that the rent derived therefrom would cover their expenses.

Plaintiffs allege that after FKB Green Acres took possession of the Sunrise premises, they attempted to negotiate a reduction in the rent in 2010. After the plaintiffs refused to lower the rent, and after plaintiffs began a landlord/tenant proceeding for non-payment of the rent, FKB Green Acres abandoned the property, breaking the lease (which was not set to expire until January 30, 2023). Prior to vacating the premises, plaintiffs contend that FKB Green Acres informed them that if plaintiffs did not reduce the rent of the premises, FKB had already secured the permission and consent of Dunkin Donuts to relocate the franchise. Plaintiffs contend that FKB Green Acres would not have been permitted to relocate the franchise without the permission and consent of Dunkin Donuts and would have then had to forfeit its financial investment of \$1.4 million for the purchase of the Sunrise Franchise from F&J in order to abandon the property. Plaintiffs contend that Dunkin Donuts deprived the plaintiffs of the personal guaranty by FKB Green Acres that the Russell principals were willing to provide and that Dunkin Donuts did not use “good faith” in exercising its subsequent “business decision” to waive its right to enforce the provision of the Franchise Agreement with FKB Green Acres by permitting FKB Green Acres to close its business at the Sunrise premises.

The third cause of action in plaintiffs’ complaint is asserted against Dunkin Donuts and alleges Dunkin Donuts’ tortious interference with contractual relations. Plaintiffs allege that Dunkin Donuts intentionally assisted, encouraged and/or permitted the defendants’ default and breach of the lease by, “among other things,” permitting the defendants to abandon the property and relocate the Sunrise Franchise with Dunkin Donuts’ permission. Defendants Dunkin Donuts moves to dismiss said cause of action against them for failure to state a cause of action upon which relief can be granted and upon the ground that a defense is founded upon documentary evidence. Defendants Dunkin Donuts contends that there are no facts from which it can be inferred that Dunkin Donuts intentionally induced FKB Green Acres to break its lease with plaintiffs.

Tortious interference with a contract consists of four elements: “(1) the existence of a contract between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) defendant’s intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff.” (*Kronox, Inc. v. AVX Corporation*, 81 N.Y.2d 90, 595

N.Y.S.2d 931 (1993); *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996); *Israel v. Wood Dolson Co., Inc.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1 (1956). In addition, the motive for the interference must be solely malicious. (*M.J.&K. Co., Inc. v. Matthew Bender and Co., Inc.*, 220 A.D.2d 448, 631 N.Y.S.2d 938 (2d Dept. 1995)). In order to sustain a cause of action for tortious interference with contractual relations, a plaintiff must allege “defendant’s intentional procurement of the third-party’s breach of the contract without justification.” (*Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996)). The plaintiff must also allege that the contract would not have been breached but for the defendant’s conduct.” (*Ferrandino & Son, Inc. v. Wheaton Builders, Inc., LLC*, 82 A.D.3d 1035, 920 N.Y.S.2d 123 (2d Dept. 2011); *Burrowes v. Combs*, 25 A.D.3d 370, 808 N.Y.S.2d 50 (1st Dept. 2006); *Washington Avenue Associates, Inc. v. Euclid Equipment, Inc.*, 229 A.D.2d 486, 645 N.Y.S.2d 511 (2d Dept. 1996)).

In the instant action, there is no evidence that Dunkin Donuts intentionally induced FKB Green Acres to break its lease with the plaintiffs by failing to pay its rent and abandoning the property. Dunkin Donuts exercised its contractual right of first refusal to have its nominee purchase the Sunrise Franchise from F&J. While plaintiffs allege that FKB Green Acres was chosen as the nominee in bad faith, there is no evidence to support said allegation. There is also no evidence in the submissions before this Court that any of the documents signed by the parties hereto contained a representation by Dunkin Donuts as to the financial stability of FKB Green Acres or any of the other defendants to this action. There is further no evidence that any of the documents signed by the parties hereto required Dunkin Donuts to provide such a representation to the landlords of the Sunrise premises (the plaintiffs) before exercising its right of first refusal. Additionally, Dunkin Donuts did not owe a duty to plaintiffs in exercising their right of first refusal.

Additionally, there is no evidence that Dunkin Donuts “forced” the plaintiffs to consent to the assignment of the lease. Pursuant to the Asset and Purchase Agreement for the Sunrise Franchise, F&J was obligated to obtain plaintiffs’ consent to any assignment of the lease of the Sunrise premises before the sale to FKB Green Acres could be completed. In addition, paragraph 11 of the lease between the plaintiffs and F&J’s principal, Nimesh Desai, specifically requires the

owners' consent to any assignment of the lease. In determining whether to consent to the assignment of the lease, plaintiffs could have investigated the financial solidity of the proposed assignee. Plaintiffs also had the contractual option of withholding their consent to the assignment of the lease to FKB Green Acres, but chose not to do so, possibly in an effort to aid F&J sell its franchise. Dunkin Donuts' exercise of their right of first refusal under the Franchise Agreement did not have an effect upon plaintiffs' right to accept or reject a proposed assignee of the lease. As such, the documentary evidence demonstrates that plaintiffs were not "forced" to consent to an assignment of the lease.

Additionally, plaintiffs allege that Dunkin Donuts caused them to lose the opportunity to have the principals of the company buying the Sunrise Franchise execute personal guarantees for the assignees obligations under the lease. Plaintiffs had all of the rights afforded to them by their lease, however, and there is no evidence that the plaintiffs' lease required principals of assignees to execute personal guarantees as a condition of assignment. If the lease had such a requirement, plaintiffs could have refused the assignment of the lease unless personal guarantees were executed. The Rider to the Asset Purchase Agreement required the plaintiffs, as landlords, to agree to certain modifications of the lease, regarding rent and option periods, but did not make personal guarantees a prerequisite to the sale of the franchise. There is no documentary evidence that the exercise by Dunkin Donuts of their contractual right of first refusal deprived plaintiffs of the ability to obtain personal guarantees from the principals of FKB Green Acres.

Lastly, while the Franchise Agreement between Dunkin Donuts and FKB Green Acres requires FKB Green Acres to operate Dunkin' Donuts and Baskin-Robbins franchises at the Sunrise premises, the decision by Dunkin Donuts to waive its right to enforce said provision of the Franchise Agreement by permitting FKB Green Acres to close its business at the Sunrise premises does not constitute tortious interference with a contract. There is no evidence that Dunkin Donuts waived said requirement for solely malicious purposes, that Dunkin Donuts intended to induce FKB Green Acres to breach its lease, or that but for Dunkin Donuts' waiver of said right, FKB Green Acres would not have breached the lease. The election by an enterprise to terminate its business operation is not, without more, a basis for an action by contracting parties

adversely affected by its decision. (*Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 744 N.Y.S.2d 384 (1st Dept. 2002), quoting, *Megarix Furs, Inc. v. Gimbel Brothers, Inc.*, 172 A.D.2d 209, 568 N.Y.S.2d 581 (2d Dept. 1991)).

Accordingly, plaintiff's third cause of action for tortious interference with contractual relations against Dunkin Donuts is hereby dismissed.

Plaintiffs cross-move to amend their complaint to add two additional causes of action against Dunkin Donuts. The fourth cause of action in plaintiffs' proposed amended complaint alleges that Dunkin Donuts breached an implied covenant of good faith and fair dealing. Within every contract there exists an implied covenant of good faith and fair dealing. (*Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 188 N.E. 163 (1933)). There is no evidence in the record, however, that Dunkin Donuts and the plaintiffs were parties to the same contract. As no contact existed between Dunkin Donuts and the plaintiffs, there can be no breach of any implied covenant of good faith and fair dealing by Dunkin Donuts. (*See, Levine v. Yokell*, 258 A.D.2d 296, 685 N.Y.S.2d 196 (1st Dept. 1999); *Lakeville Pace Mechanical, Inc. v. Elmar Realty Corp.*, 276 A.D.2d 673, 714 N.Y.S.2d 338 (2d Dept. 2000)).

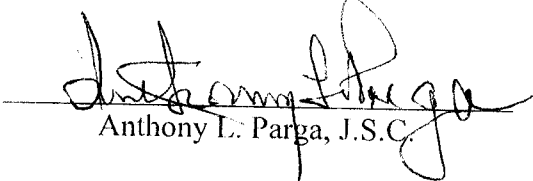
Plaintiffs' fifth cause of action in plaintiffs' proposed amended complaint alleges that Dunkin Donuts was negligent in the exercise of their right of first refusal to the harm and detriment of plaintiffs. There is no evidence, however, that Dunkin Donuts owed a duty of care to the plaintiffs herein. Dunkin Donuts had a contractual right to exercise its right of first refusal with respect to the Asset and Purchase Agreement of the Sunrise Franchise, and the plaintiffs had a contractual right, by the terms of the lease, to consent to, or deny consent to, an assignment of the lease. There is also no documentary evidence that Dunkin Donuts had a duty to the plaintiffs to ensure the financial stability of FKB Green Acres, or that Dunkin Donuts owed any duty to plaintiffs in its determination to waive the relevant provision of the Franchise Agreement to permit FKB Green Acres to close its franchise business at the Sunrise premises. Absent a duty running directly to the injured person, there can be no liability in damages, however careless the conduct or foreseeable the harm. (*532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 96 N.Y.2d 280, 727 N.Y.S.2d 49 (2001)).

In addition, as the plaintiffs fifth Cause of action alleges that Dunkin Donuts was

negligent in properly qualifying its nominee, FKB Green Acres, to take over the franchise before asserting its right of first refusal over the Russell transaction, said cause of action for negligence is barred by the applicable statute of limitations. As Dunkin Donuts exercised their right of first refusal on October 23, 2007 and plaintiffs signed the Assignment of Lease on February 11, 2008, the three year statute of limitations for this cause of action expired prior to plaintiffs' commencement of this action on June 27, 2011.

Accordingly, plaintiffs' cross-motion to amend their complaint to add a fourth and fifth cause of action is denied, and plaintiffs' action as against Baskin-Robbins Franchised Shops, LLC and Dunkin' Donuts Franchised Restaurants, LLC is hereby dismissed.

Dated: January 5, 2012


Anthony L. Parga, J.S.C.

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