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| LOUIS A. CUPICCIA and L.P.L., INC., | : | IN THE COURT OF COMMON PLEAS OF |
| Plaintiff | : | LYCOMING COUNTY, PENNSYLVANIA |
| | : | JURY TRIAL OF 12 DEMANDED |
| vs. | : | NO. 97-01,817 |
| | : | |
| WEST COAST ENTERTAINMENT | : | |
| CORPORATION, formerly known as | : | |
| RKT ACQUISITION CO., WEST COAST | : | |
| FRANCHISING COMPANY, INC., | : | |
| VIDKO, INC., and FOX VIDEO, | : | CIVIL ACTION - LAW & EQUITY |
| Defendants | : | SUMMARY JUDGMENT MOTION |

***OPINION and ORDER***

We are currently asked to determine the Summary Judgment Motion filed by Defendants in the above captioned matter, filed July 28, 1999. Pa.R.C.P. No. 1035.2, 42 Pa.C.S.A., provides any party may move for summary judgment as a matter of law after the relevant pleadings are closed whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or, if after the completion of relevant discovery, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issue be submitted to a jury. In a summary judgment case, the nonmoving party must adduce sufficient evidence on the issue(s) essential to his case and on which he bears the burden of proof, such that a jury could return a verdict in his favor. Failure to do so establishes there is no genuine issue of material fact and entitles the moving party to judgment as a matter of law. In a summary judgment case, the record is viewed in the light most favorable to the nonmoving party; all doubts, as to the existence of a genuine issue of material fact must be resolved against the moving party. ***Ertel v. Patriot-News Co.,*** 554 Pa. 93, 674 A.2d 1038 (1996), *reargument denied, certiorari denied.*

Initially, we note Plaintiffs' counsel indicated at argument[1] this date that Count III of the Second Amended Complaint has been withdrawn. The allegations of Count IV are also withdrawn, although factual averments within Count IV, "to the extent they are relevant to Count I" are not withdrawn. Therefore, as briefed and argued by counsel, there are three remaining contentions under the Motion, which we will address *seriatim.*

First, Defendants argue Plaintiffs have not made out a cause of action under Count I of the Complaint because the count is actually a cause of action for a "breach of good faith" rather than a breach of contract, a purported cause of action not recognized under Pennsylvania law. *See, e.g.*, Defendants' Supplemental Brief pp. 1-2. However, we find Plaintiffs have properly relied upon ***Creeger Brick v. Mid-State Bank***, 560 A.2d 151 (Pa.Super. 1989), wherein the Pennsylvania Superior Court stated:

> Section 205 of the Restatement (Second) of Contracts suggests that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." A similar requirement has been imposed upon contracts within the Uniform Commercial Code by 13 Pa.C.S. §1203. The duty of "good faith" has been defined as "[h]onesty in fact in the conduct or transaction concerned." See: 13 Pa.C.S. §1201; Restatement (Second) of Contracts §705, Comment a. Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts. ***AM/PM Franchise Association v. Atlantic Richfield Co.***, 373 Pa.Super. 572, 579, 542 A.2d 90, 94 (1988). See also: ***Clay v. Advanced Computers Applications, Inc.***, 370 Pa.Super. 497, 505 n. 4, 536 A.2d 1375, 1379, n. 4 (1988), *allocatur granted,* 518 Pa. 647, 544 A.2d 959 (1988).
>
> In this Commonwealth the duty of good faith has been recognized in limited situations. *Most notably, a duty of good faith has been imposed upon franchisors in their dealings with franchisees.* (Citations omitted).

[1] The parties have presented supporting briefs and oral argument.

***Creeger Brick*** at 153-154 (emphasis added). Contrary to the argument of Defendants counsel, we believe the ***Creeger Brick*** case is still good law. Accordingly, Plaintiffs have sufficiently stated a cause of action under Count I of the Second Amended Complaint.

We do note Defendants correctly point out the question raised by the averments of that Count as to the identity of the contact to which Plaintiffs refer as being the subject of the breach. Specifically, Defendants argue that Paragraph 30 indicates Plaintiffs' claim a breach of the Proposed Summary of Terms and Conditions, rather than the Franchise Agreements. At argument, Plaintiffs' counsel admitted the paragraph was "inartfully" drawn, but that the averment must be read as a whole, together with the foregoing paragraphs. Plaintiffs' intent was to claim a breach of the Franchise Agreements. Paragraph 30 reads as follows:

> Plaintiffs believe and therefore aver that the conduct of Defendants in failing to go forward with the transaction whereby it will acquire the assets of Plaintiffs' video stores, while, at the same time illegally competing with Plaintiffs by operating the "Fox Video" stores and attempting to interfere with the contractual relations between Plaintiffs and their employees represents a lack of good faith and therefore constitutes a breach of the agreement represented by the accepted Proposed Summary of Terms and Conditions.

We have reviewed the "Purchase of Assets/Summary Terms and Conditions," as set forth in Exhibit "C" of the Amended Complaint. The document contains no provisions regarding agreements not to compete, nor terms with respect to interference of contractual relations between Plaintiffs and their employees. However, references to these matters are incorporated in Paragraph 30. It is reasonable to accept Plaintiffs' counsel's contention that the reference to the Proposed Summary was meant to indicate nothing more than this was one of the representations that support Plaintiffs' overall claim. Further, Defendants know full well it is

the Franchise Agreements which are in issue in this case. In fact, it was defense counsel who pointed out to the Court that this Proposed Summary was not the final agreement between the parties and was not binding. This Court concludes that a fair reading of Count I, inclusive of Paragraph 30, is that a breach of contract claim with respect to the Franchise Agreements has been sufficiently pled by Plaintiffs.

Defendants next argue the Franchise Agreements never guaranteed Plaintiffs freedom from competition. "The only grant which West Coast gave Cupiccia was protection from West Coast using the same or **similar system**, *i.e.*, the West Coast Video System, licensed to Cupiccia, Sr." Defendants' Supplemental Brief p. 3 (emphasis in original). Defendants argue that the word "system" is defined in the Franchise Agreements in Article I, Paragraph 2, sufficiently to indicate the name "West Coast" must be included in the Video Store operation to constitute the operation as being a "similar system." Instantly, the Defendants opened *Fox* Video stores in proximity to Plaintiffs' operations. Defendants would have us declare the Fox Video stores were different systems and therefore not prohibited by the Franchise Agreements, because they use the identity as "Fox" as opposed to "West Coast."

The Court disagrees that Article I, Paragraph 2 necessarily restricts the terminology in issue as urged by Defendants. It is clear there is a substantial and material issue as to what constitutes a "similar system" as the term is used in the franchise agreement.

Further, we note Plaintiffs' argument that, as a practical matter, it would be difficult to imagine that any franchisee would accept a franchise agreement wherein the franchisor could establish direct competition within the franchisee's territory. We believe it is for the jury to determine whether the operation of the Fox Video stores by Defendants constituted the operation of a same or similar system, in breach of the Franchise Agreements.

Finally, Defendants contend that "L.P.L., Inc." cannot be a named Plaintiff as L.P.L., Inc. was not a Franchisee.

Paragraph 7 and 8 of the Second Amended Complaint aver that "Plaintiffs" own and operate two retail stores for the sale and rental of video motion pictures, games and related products, which stores are operated by the "Individual" Plaintiff as Franchisee. These averments were admitted[2] by Defendants in their Answer. *See* Defendants' Answer to Plaintiffs' Second Amended Complaint, paragraphs 7-8. Moreover, the "Asset Purchase Agreement By and Among West Coast Entertainment Corporation and the Sellers and Principals Identified on Schedule I hereto" (*see* "Defendants West Coast Entertainment Corporation's and West Coast Franchising, Inc.'s Appendix in Support of their Motion for Summary Judgment, Exhibit "J") identify and therefore acknowledge "LPL, Inc." as a seller and/or principal to the agreement (*see* p. 41 of the Agreement and the following page, entitled "Schedule I." This document was obviously prepared by Defendants. Defendants are estopped from now claiming L.P.L., Inc. is not a proper party to this suit.

Accordingly, the following Order is entered.

[2] Defendants denied only that certain Exhibits were attached to the Second Amended Complaint as claimed.

***ORDER***

***AND NOW***, this 9th day of September, 1999, Defendants' Motion for Summary Judgment is hereby DENIED.

BY THE COURT,

William S. Kieser, Judge

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