You are receiving this periodical based upon previous specific and general contacts with the Goldstein Law Group regarding franchise law issues. We look forward to keeping you updated on the current trends in franchise court decisions around the country in both state and federal courts.

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FRANCHISE TRENDS

Franchisor Competency, Video 4

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Gulf Franchisee Evicted for Refusing to Complete Purchase of Gas Station

Scarsdale Central Service Inc. v. Cumberland Farms, Inc. and Gulf Oil Limited Partnership, CCH ¶15,247. U.S. District Court, S.D. New York (March 7, 2014)

Plaintiff Scarsdale Central Service Inc. ("Plaintiff" or "franchisee") was a tenant and franchisee of Defendants Gulf Oil Limited Partnership and Cumberland ("Gulf Oil" or "Defendants") operating a Gulf gas station in Scarsdale, New York ("Premises"). Gulf Oil is a subsidiary of Cumberland.

Franchisee Plaintiff filed suit seeking, among other remedies, to enjoin the sale of the Premises to a third party purchaser, 880 Central Park Avenue LLC ("880 CPA"), to enjoin Defendants from evicting Plaintiff from the Premises, to prevent Defendants from terminating the franchise relationship, and to order Defendants to honor Plaintiffs right of first refusal under terms consistent with a bona fide aim's length transaction. Defendants asserted counterclaims against Plaintiff, including a trademark infringement claim under the Lanham Act and a declaratory judgment regarding the federal Petroleum Marketing Practices Act ("PMPA").

In their counterclaim Defendants sought a determination that nonrenewal of Plaintiff's franchise was properly effected. Under the PMPA, "[p]rior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification ... to the franchisee ... (2)... not less than 90 days prior to the date on which such termination or nonrenewal takes effect." Further, upon giving written notification, the PMPA requires the franchisor to send notification by certified mail or hand delivery and must state its intent to terminate or not renew, the reasons for termination or nonrenewal, the effective date thereof, and a summary statement published in the Federal Register.

Grounds for nonrenewal under the PMPA include "a determination by the franchisor in good faith and in the normal course of business ... to sell [the] premises ...." Where the premises are leased to the franchisee, the franchisor must also "offer the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such

Franchise Law – Franchise Discrimination 1:2 - Jeff Goldstein: Franchise Lawyer

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Franchise Law: Fraud and Good Faith in Franchise Law

Franchise Law – Franchisees' Franchise Termination Damages

franchisor's interest in such premises." The statute's "good faith" test is meant "to preclude sham determinations from being used as an artifice for termination or non-renewal." The court pointed out that the PMPA's "normal course of business" test requires that the franchisor's decision be "the result of the franchisor's normal business decision making process." The court recognized that "These tests provide protection from arbitrary and discriminatory nonrenewal yet 'avoid judicial scrutiny of the business judgment itself.'"

After the short preliminary trial, the court agreed with Gulf's assertions that it was likely to succeed on its counterclaim because it: (1) determined to sell the Premises in the normal course of business, (2) offered Plaintiff the right of first refusal of 880 CPA's offer and gave Plaintiff 45 days to exercise the right, and (3) gave Plaintiff 109 days' notice of nonrenewal in writing by certified mail and hand delivery stating the reason for the nonrenewal. In this case, the reason for the nonrenewal was the franchisor's decision to sell the Premises. Miller of Gulf testified that Gulf's real estate department evaluated the $1.3 million offer from the third party using its normal procedures, and that the decision to sell the Premises was purely business related.

Interestingly, Plaintiff did not argue that the franchisor's decision to sell to third-party 880 CPA was done outside the "normal course of business." Plaintiff contended instead that the franchisor did not act in good faith because the franchisor, Gulf, through Gulf Oil's Business and Asset Development Manager, Ronald Mals, made multiple oral representations to Plaintiff that the franchise would be renewed before deciding otherwise. Plaintiff asserted that Gulf's June 26, 2013, letter asking Plaintiff to make a bona fide offer to purchase the Property, followed closely by Gulf Oil's June 28, 2013 letter purporting to terminate the franchise for failure to operate for 7 consecutive days, clearly showed Defendants' bad faith in seeking to sell the franchisee's franchise.

Plaintiff also alternatively contended that Gulf tried to evict Plaintiff in order to make the negotiations with 880 CPA more lucrative. However, the Court pointed out that Plaintiff already knew by June 19, 2013, that Gulf had received a $1.3 million offer, and Plaintiff provided no evidence that Gulf sought a higher sales price from 880 CPA. As the Court concluded, in rejecting the franchisee's argument, "The June 28 letter purporting to terminate the franchise is the only piece of evidence to which Plaintiff clings in speculating that Gulf attempted to negotiate a more lucrative contract."

Plaintiff finally asserted that the terms of the contract Gulf offered to 880 CPA were unlawfully materially different than those offered to the franchisee because: (a) the financing provision was different and (b) the 880 CPA sales contract did not include the Mutual Release agreement. The Court promptly noted that, contrary to Plaintiff's argument, the financing provision was on its face more favorable to Plaintiff. Although Gulf offered to sell the Premises to Plaintiff for the same $1.3 million purchase price, it in fact had lowered the down payment from $750,000 to $130,000 to reflect the poor financial situation of the Plaintiff. All other substantive provisions were "the same." With regard to the Mutual Release issue, the Court stated that "Since Gulf sought to divest itself of the Premises, it also sought to divest itself of the franchise relationship with Plaintiff, thus requiring Plaintiff to execute the Mutual Termination agreement. The Mutual Termination was necessary because Gulf sought to execute the Premises sale contract with Plaintiff by November 6, 2013, before the franchise agreements were to expire." Thus, according to the Court, this was a difference without any legal meaning.

Accordingly, because the Court found that Gulf was likely to succeed on its claims, and that the franchisee's continuing occupation of the premises after refusing to enter the sales contract impeded Gulf's ability to make productive use of its property, the Court granted the franchisor's motion and ordered that the franchisee be evicted and terminated.

Court Rules Summarily Against Hotel Franchisee Refusing to

Tire Franchisee's Claims of Racial Discrimination Rejected in Face of Poor Performance

B&S Transport, Inc v. Bridgestone Americas Tire Operations, LLC, CCH ¶15,239. U.S. District Court, N.D. Ohio (February 27, 2014)

The United States District Court for the Northern District of Ohio rejected a terminated tire dealer's motion for a preliminary injunction that would have enjoined the franchisor, Bridgestone Americas Tire Operations, from terminating the dealer. The Court held that the dealer failed to show a likelihood of success on the merits of its three claims including racial discrimination, breach of contract, or promissory estoppel. The dealer claimed that, after Bridgestone sent the termination letter, the dealer lost contract awards to a competing dealer, Pomp's Tire Service, Inc., a non-minority tire franchisee.

Ronnie Harris was the founder and majority shareholder of plaintiff B&S Transport, Inc. (collectively, the "dealer") an African-American company. Harris became an authorized dealer of Firestone tires sometime between 1977 and 1979 and of Bridgestone tires after Bridgestone acquired Firestone. B&S primarily served government entities, and the dealer alleged that the parties' relationship was governed by a 1988 or 1990 contract of indefinite duration that provided for termination only for good cause. Mysteriously, the alleged contract -- partly written and partly oral -- was not produced by the franchisor or franchisee.

With regard to Section 1981, which prohibits intentional race discrimination in the making and enforcing of contracts involving both public and private actors, the Court held that the franchisee simply did not present evidence that showed a high likelihood

Consider Franchisor's Alleged Breach and Fraud

Days Inn Worldwide, Inc. v. Khan Group, LLC, Sharif Khan, and Shibly Khan, CCH ¶15,241. U.S. District Court, D. New Jersey (March 12, 2014)

This case arose out of the premature termination of a licensing agreement ("the Agreement") between Plaintiff Days Inn Wordwide, Inc. ("Days Inn") and Defendant Khan Group, LLC ("the Khan Group"). Days Inn sued the franchisee on six grounds, asserting claims against the Khan Group for an accounting (Count One), liquidated damages under the Agreement (Count Two), or, in the alternative, actual damages (Count Three), Recurring Fees under the Agreement (Count Four), unjust enrichment (Count Five), and against Sharif and Shibly Khan for liquidated or actual damages under the Agreement, Recurring Fees under the Agreement, interest, costs, and attorneys' fees (Count Six). The franchisor's claim amounted to about $200,000.

Although the facts showed clearly that the franchisee had itself sent a letter to the franchisor terminating the agreement, the franchisee argued that the franchisor was not entitled to summary judgment because the franchisor had not in its legal papers 'disproved' the franchisee's fraud and breach of contract allegations. Specifically, the defendants argued that the Court could not permissibly grant summary judgment on liability because Days Inn failed to address their affirmative defenses that Days Inn: (1) materially breached the Agreement; (2) fraudulently induced Defendants into entering into the Agreement and Guaranty; and (3) breached the implied covenant of good faith and fair dealing. According to the Defendants, a showing of any of the above would have relieved Defendants of their obligations under the Agreement, Addendum and Guaranty.

The franchisee cited in support of its argument Florida and California law. The Court rejected these arguments stating that:

> Unfortunately for Defendants, neither the Florida nor California summary judgment standards carry any authority in this Court. Under the federal summary judgment standard, it is not the burden of the moving party to specifically negate any and all affirmative defenses that the non-moving party might have set forth in an Answer. Rather, it is the non-moving party's burden to set forth specific facts, through competent evidence, suggesting that a dispute of material fact exists with respect to a claim or defense.

In so doing, the Court, in granting summary judgment for the franchisor, failed to consider the merits of the franchisee's argument that Days Inn failed to provide proper marketing support; failed to respond to defendants' repeated inquiries and requests; failed to perform the services for which it was to be paid fees; failed to properly provide advertising and promotional services; failed to provide business leads and take proper steps to assist in generating business; failed to provide proper training; and otherwise completely abdicated its role as franchisor and failed to fulfill its obligations under the License Agreement." The Court also pointed out that "Under the federal summary judgment standard, mere recitations of allegations from the pleadings do not create a dispute of material fact. Indeed, Defendants' interrogatory response provides no basis from which a reasonable jury could infer that Days Inn breached one or more provisions of the Agreement."

The court also rejected promptly the franchisee's argument regarding fraud.

> Similarly, the evidence set forth in support of Defendants' affirmative defense that they were fraudulently induced into entering into the Agreement and Guaranty fails to defeat summary judgment in favor of Days Inn ... This evidence fails for several reasons, two of which the Court will note here. First, it fails to indicate "a material misrepresentation of a presently existing or past fact," which is the first element of a fraud claim under New Jersey law. Second, it makes clear that Defendants' fraudulent inducement defense is wholly duplicative of their aforementioned defense for breach of the Agreement. Indeed, the basis of their fraudulent inducement defense is rooted solely in Days Inn's promise to perform under the Agreement.

After rejecting both the breach of contract and fraud affirmative defenses of the franchisee, in part because of a pleading defect, the Court stated that "Even if that claim or defense had been properly set forth in Defendants' pleading, Defendants provide absolutely no evidence to support it. They merely recite the allegations set forth in their interrogatory responses in support of their affirmative defense that Days Inn materially breached the Agreement."

of success on the merits. Specifically, the district court focused on the legitimate (non-racial) reasons that existed for the franchisor's having terminated the franchisee. The court pointed out that in the February 2013 termination letter Bridgestone cited its change in distribution to market solutions strategies to justify terminating the dealer as a supplier. Bridgestone explained in the termination letter that it was now requiring its suppliers to stock Bridgestone inventory in warehouses and provide full tire-related services to customers, neither of which the dealer was equipped to do. Moreover, with regard to the alleged favored non-minority franchisee, the Court stated that Bridgestone offered a legitimate, non-discriminatory reason for retaining Pomp's: Pomp's offered better services.

With regard to the dealer's breach of contract claim, the district court held that the dealer failed to show that a specific termination-without-cause contract applied. Without a written agreement or a more definite expression that the parties assented to an indefinite good cause contract, the Court ruled that it would be difficult for the dealer to overcome the general rule of Ohio law that indefinite contracts are terminable at will.

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Hawaii's Franchise Statute prohibits a franchisor from "Establish[ing] a similar business or to grant a franchise for the establishment of a similar business at a location within a geographical area specifically designated as the exclusive territory in a franchise previously granted to another franchisee in a currently effective agreement, except under the circumstances or conditions prescribed in such agreement. The fact that other franchisees or the franchisor may solicit business or sell goods or services to people residing in such geographical territory shall not constitute the establishment of a similar business within the exclusive territory."

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NEWLY-FILED CASES

Sweet Frog Stony Brook Inc. v. Sweetfrog Enterprises, LLC, April 11, 2014 NY U.S. DIST. CT. (Defendants allegedly fraudulently induced Plaintiffs to enter a franchise agreement by allegedly claiming that the location chosen for the business would earn substantial profits).

7-Eleven, Inc. v. Victor, April 03, 2014 NJ U.S. DIST. CT. (Defendants allegedly breached the franchise agreement by allegedly intentionally diverting store receipts to their own account and using them and also intentionally removing or destroying video surveillance equipment belonging to plaintiff).

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