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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
2284CV02233-BLS2

HOOD PARK LLC

v.

PIAGGIO FAST FORWARD, INC. AND PIAGGIO GROUP AMERICAS, INC.

DECISION AND ORDER ALLOWING MOTION TO DISMISS

Hood Park LLC negotiated the terms of a lease of commercial space with Piaggio Fast Forward, Inc. ("PFF") and a guaranty of PFF's obligations by its parent Piaggio Group Americas, Inc. ("PGA"). Then PFF walked away, contending that it never entered into an enforceable lease. Hood asserts claims for breach of contract, seeks a declaratory judgment that the lease is enforceable, and contends that defendants engaged in fraud and violated G.L. c. 93A by engaging in unfair or deceptive conduct.

The Court will **allow** defendants' motion to dismiss this action. The facts alleged by Hood establish that PFF never entered into an enforceable lease because (i) the lease provides that it would take effect only upon execution and unconditional delivery by both parties, (ii) PFF imposed a condition that the termination clause must be modified, and (iii) Hood's conditional acceptance of PFF's proposed new terms had the legal effect of rejecting PFF's offer. Without an enforceable lease, PGA cannot be liable under its guaranty, neither defendant can be liable under an implied covenant of good faith and fair dealing, the declaratory judgment claim is subject to dismissal, and the claims of fraud and violation of c. 93A fail as well.

Dec & Order emailed to Parties on 5/2/23

1. **Contract Claims**.

1.1. **Breach of Lease by PFF**. The facts that Hood alleges in its complaint do not plausibly suggest that it entered into an enforceable lease with PFF.[1] To the

[1] To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint must allege facts that, if true, would "plausibly suggest[] … an entitlement to relief." *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007).

contrary, the facts alleged by Hood make clear that the lease was not enforceable, because PFF imposed a condition that Hood never satisfied.[2]

1.1.1. **The Facts Alleged**. Hood alleges the following facts in its complaint, or attaches as exhibits to its complaint documents that establish the following facts:

- After Hood and PFF had essentially agreed upon the final terms of a seven-year lease of certain property in Charlestown, PFF told Hood that it needed to have the right to terminate after four years, subject to the condition that it would make Hood whole by making a lump-sum payment of the remaining three-years' rent. PFF's agent proposed that the termination clause be rewritten to provide, in substance, that "We give you 4 full years and if terminated we pay the remaining 3 years immediately upon notice."
- Hood was open to the idea, but asked that the parties sign the Lease, and then revise the termination clause in a lease amendment. During oral argument, Hood clarified that it had sent a text to PFF stating that it agreed with the proposed change to the termination clause, subject to the condition that the parties sign the lease as written first and then amend the termination clause later.
- PFF's Chief Operations Officer responded in an email on June 30, 2022, that "I think sign and amend will work."
- The next day, PFF informed Hood that signing of the lease would be delayed because its CEO had broken his femur. PFF's COO added, "I know that this is not ideal for all involved but be assured that the project is a 'GO' all the way to the CEO of the PG group."
- On July 5, 2022, PFF's Chief Executive Officer signed the lease. When the COO forwarded that signature to PFF's real estate agent, he wrote that this was "contingent on agreement on termination clause." The agent forwarded the signature and this email to Hood's real estate agent, thereby putting Hood on notice that PFF's

[2] Where a complaint sets out "detailed factual allegations which the plaintiff contends entitle him to relief," a claim must be dismissed if those allegations "clearly demonstrate that plaintiff does not have a claim." *Fabrizio* v. *City of Quincy*, 9 Mass. App. Ct. 733, 734 (1980); accord *Harvard Crimson, Inc.* v. *President and Fellows of Harvard Coll.*, 445 Mass. 745, 748 (2006).

agreement to the lease terms was conditioned on resolution of the termination clause issue previously raised by PFF.

- As negotiated, the lease provides in Art. X, ¶ (M), that "this Lease becomes effective as a lease only upon execution and unconditional delivery thereof by both Landlord and Tenant."
- PGA executed its guaranty of the lease. PFF's agent forwarded that signature to Hood's agent as well.
- On July 13, 2022, Hood's counsel sent an email to PFF's real estate agent stating in part as follows: "Subject to review and approval by Hood's lender, Hood is willing to allow Tenant to terminate the lease after 4 years of paying rent so long as Hood is made whole for the entire term of the Lease," with PFF obligated to pay the remaining three-years' of rent "upfront (within a reasonable time of Tenant's notice of termination)," and without any offset if Hood is able to re-let the premises or any obligation by Hood to make efforts to do so.
- The July 13 email asked the agent to forward this proposal to PFF "with the caveat that it will require the approval of Hood's lender." And Hood stated that it did not plan to seek approval from its lender until it "make[s] sure Piaggio is on the same page with respect to the termination option."
- On July 27, 2022, PFF made a counterproposal that if PFF terminated the lease after four years then it would be obligated to continue making monthly lease payments for the remaining three years of the lease.
- Hood rejected PFF's counterproposal.
- On August 18, 2022, PFF informed Hood that it was "withdrawing from negotiations with respect to the Lease." PFF said that it was doing so in part because the cost to build-out the leased space was more than twice what PFF had expected, and in part because the parties had not agreed upon the terms of an amendment covering early termination by PFF.
- Hood responded by letter on August 23, 2022. Hood took the position that the lease was enforceable, and rejected what it characterized as PFF's attempt to terminate the lease. Hood added

that was willing to continue with good faith negotiations regarding the termination clause.

- On September 2, 2022, Hood reiterated its July 18 proposal to amend the termination clause in the manner first suggested by PFF.

1.1.2. **No Execution with Unconditional Delivery**. The Court agrees with PFF that these facts show that the parties never entered into an enforceable lease, because they demonstrate that there was never the requisite offer and acceptance.

To form a binding contract "[t]he parties must give their mutual assent by having 'a meeting of the minds' on the same proposition on the same terms at the same time." *I&R Mechanical, Inc.* v. *Hazelton Mfg. Co.*, 62 Mass. App. Ct. 452, 455 (2004), *rev. denied*, 444 Mass. 1102 (2005). "The manifestation of mutual assent between contracting parties generally consists of an offer by one," covering all the material terms of an agreement between the parties, "and the acceptance of [that offer] by the other." *Id.*

The lease document provides that it would take effect "only upon execution and unconditional delivery" by both sides. This provision allowed either party unilaterally to impose a condition that would have to be met before the lease became effective and enforceable.

The parties' discussions about revising the termination clause before PFF executed the lease on July 5, 2022, could not form a contract, because the parties agreed that the lease would not take effect until execution and unconditional deliver of the written lease. Since Hood and PFF agreed to "an exclusive method of acceptance," no other method of acceptance could bind either party. See *Polaroid Corp.* v. *Rollins Envt'l Services, Inc.*, 416 Mass. 684, 690 (1993) (citing Restatement (Second) of Contracts, § 30 (1981)).

And PFF's execution of the written lease document did not constitute acceptance either, because PFF informed Hood that PFF's execution of the lease and its acceptance of the lease terms was "contingent on agreement on termination clause." This was not an unconditional delivery of PFF's signature on the lease, as required. To the contrary, this meant that the lease would take effect if, but only if, the parties reached an agreement on how to revise the termination clause.

1.1.3. **No Acceptance of PFF's Offer**. Though Hood agreed on July 13 to the substance of PFF's proposed new termination clause, Hood expressly stated

that its agreement was "[s]ubject to review and approval" of the revised contract language "by Hood's lender." Hood explained that it was accepting the proposed revision, but only "with the caveat that it will require the approval of Hood's lender."

By imposing this condition on its acceptance of PFF's prior offer, Hood's response operated as a **rejection** of that offer, not as an acceptance. A contract is formed by offer and acceptance "where the offeree assents to the offer 'in the terms in which it is made.' " *Sea Breeze Estates, LLC* v. *Jarema*, 94 Mass. App. Ct. 210, 215 (2018), quoting *Moss* v. *Old Colony Trust Co.*, 246 Mass. 139, 148 (1923). "[A] conditional acceptance or one that varies from the offer in any substantial respect is in effect a rejection and is the equivalent of a new proposition." *Sea Breeze Estates, supra*, quoting *Moss, supra*. Indeed, "[a] notice of acceptance that is in any respect conditional ... is not an operative notice of acceptance." *Christian* v. *Edelin*, 65 Mass. App. Ct. 776, 779 (2006), quoting 3 Corbin on Contracts § 11.8, at 529–530 (rev. ed. 1996)).

Hood's September 2 attempt to accept PFF's prior offer regarding a modified termination clause was also ineffective. Having previously rejected the offer, by conveying a conditional acceptance that operated as a rejection, Hood was no longer free to accept PFF's offer without conditions. "[A]n offer once rejected cannot thereafter be revived by an attempted acceptance thereof." *Peretz* v. *Watson*, 3 Mass. App. Ct. 727, 727 (1975) (rescript).

1.1.4. **No Acceptance of Lease by Performance**. Hood's argument that PFF nonetheless accepted the lease by partial performance also fails.

As noted above, the lease specified that it would become effective "only upon execution and unconditional delivery" by both parties. As a result, acceptance by performance would not be binding. Cf. *Polaroid Corp.*, 416 Mass. at 690.

In any case, Hood has not alleged facts plausibly suggesting that PFF accepted the contract as written by partially performing its obligations under the lease. Hood says that PFF visited the premises to prepare to undertake design of the tenant improvements that it would have to complete within 90 days after executing the lease, and that PFF negotiated the terms of a letter of credit for the security deposit that would be required under the lease. But Hood does not allege that PFF started to make any tenant improvements, and Hood concedes that PFF never paid the security deposit. Making "preparations for performance" under a lease or other contact does not constitute acceptance of

the contract terms. See Restatement (Second) of Contracts § 62, comment d (1981).

1.2. **Breach of Guaranty by PGA**. Since Hood never entered into an enforceable lease with PFF, Hood's claim against PGA under the Guaranty of Lease fails as well. PGA agreed in the guaranty "to pay and perform as a primary obligor all liabilities, obligations and duties (including, but not limited to, payment of rent) imposed upon Tenant under the terms of the Lease[.]" Since PFF has no liability, obligations, or duties under the lease, PGA cannot be held liable under the guaranty.

1.3. **Breach of Implied Covenant**. Similarly, since Hood alleges no facts plausibly suggesting that it entered into an enforceable lease with PFF, it cannot assert a claim for breach of the implied covenant of good faith and fair dealing contained in that alleged contract. *Curtis* v. *Herb Chambers I-95, Inc.*, 75 Mass. App. Ct. 662, 670 (2009), aff'd in relevant part and rev'd in part, 458 Mass. 674, 680 n.10 (2011); *Miller* v. *Milton Hosp. & Med. Ctr.*, 54 Mass. App. Ct. 495, 498 n.6 (2002). Where there is no contract, there is no implied covenant could be breached. See, e.g., *Guldseth* v. *Family Medicine Assocs. LLC*, 45 F.4th 526, 538 (1st Cir. 2022) ("the covenant governs only conduct of parties that have actually entered into a contract – without a contract, there is no covenant to be breached") (applying Massachusetts law).

Hood's argument that PFF had a duty under the implied covenant to negotiate a revised termination provision in good faith is without merit. See *Levenson* v. *L.M.I. Realty Corp.*, 31 Mass. App. Ct. 127, 131 (1991) (where owner of real estate negotiated but never accepted purchase and sale agreement, they had no duty to negotiate terms of agreement in good faith). Alleged bad faith in the course of negotiating a contract or a contract amendment does not implicate this implied covenant, because "this covenant pertains to bad faith in the performance of a contract, not in its execution." *Sheehy* v. *Lipton Indus., Inc.*, 24 Mass. App. Ct. 188, 194 n.6 (1987). "Where, as here, the parties have not yet reached a binding agreement, there is no duty to negotiate in good faith." *Massachusetts Eye and Ear Infirmary* v. *QLT Phototherapeutics, Inc.*, 412 F.3d 215, 230 (1st Cir. 2005) (applying Massachusetts law and citing *Levenson, supra*).

Though this claim is asserted against both defendants, Hood has alleged no facts plausibly suggesting that PGA violated its implied covenant. The implied covenant of good faith and fair dealing "does not create rights or duties beyond those the parties agreed to when they entered into the contract." *Boston Med.*

Ctr. Corp. v. *Secretary of Executive Office of Health & Human Servs.*, 463 Mass. 447, 460 (2012) (affirming dismissal of claim), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 680 (2011). It only governs "the manner in which existing contractual duties are performed." *Eigerman* v. *Putnam Investments, Inc.*, 450 Mass. 281, 289 (2007). Since PGA had no enforceable obligations under its guaranty in the absence of an enforceable lease, PGA could not have violated the implied covenant by refusing to pay anything to Hood.

1.4. **Declaratory Judgment**. Given the Court's determination that the facts alleged in the complaint do not plausibly suggest that Hood is entitled to declaratory relief in its favor as to the validity of the lease, the Court will also dismiss the claim for declaratory judgment. See *Buffalo-Water 1, LLC* v. *Fidelity Real Estate Co., LLC*, 481 Mass. 13, 18–22 (2018).

2. **Fraud Claim**. Hood has clarified in its written opposition that its claim for fraud is intended to state a claim that "Defendants misrepresented their intention to perform their obligations under the Lease and Guaranty[.]" But since PFF never had any obligations under the Lease and therefore PGA never had any enforceable obligations under the Guaranty, this claim for fraud necessarily fails to state a claim upon which relief may be granted.

To state a claim of misrepresentation upon a false promise, a plaintiff must allege facts plausibly suggesting that the defendant promised to perform an act, and that "the promisor had no intention to perform the promise at the time it was made." See *Cumis Ins. Society* v. *BJ's Wholesale Club, Inc.*, 455 Mass. 458, 474 (2009).

This claim fails as against PFF because, as discussed above, PFF never promised to perform under the lease. There can be no false promise in the absence of a promise.

This claim fails as against PGA as well because the facts alleged do not plausibly suggest PGA entered into the guaranty without ever intending to honor its obligations. That PGA correctly took the position that it had no obligation under the guaranty, because PFF never entered into an enforceable lease, does not provide any ground for this fraud claim against PGA.

3. **Chapter 93A Claim**. Hood's claim under G.L. c. 93A fails for much the same reasons.

To state a claim against the corporate defendants under G.L. c. 93A, § 11, Hood must allege facts plausibly suggesting that (i) each defendant did something

while acting in trade or commerce that was "unfair or deceptive," and (ii) as a result Hood suffered some "loss of money or property." See *Lumbermens Mut. Cas. Co.* v. *Offices Unlimited, Inc.*, 419 Mass. 462, 468 (1995); *Frullo* v. *Landenberger*, 61 Mass. 814, 822–823 (2004); G.L. c. 93A, § 11; see also *Smith* v. *Caggiano*, 12 Mass. App. Ct. 41, 43 (1981) (when loss of money or property was element of claim under G.L. c. 93A, § 9, "it was necessary to plead loss or money or property").

Hood has failed to allege facts plausibly suggesting that either defendant engaged in unfair or deceptive conduct in violation of c. 93A. There was nothing unfair or deceptive about PFF declining to be bound by an unenforceable commercial lease, or in PGA taking the position that without an enforceable lease there was nothing for it to guaranty. PFF was free to back out of the deal after Hood effectively rejected PFF's condition that the termination clause must be changed; doing so is not unfair or deceptive conduct and does not violate c. 93A. See *Lambert* v. *Fleet Nat. Bank*, 449 Mass. 119, 127 (2007); *Pappas Indus. Parks, Inc.* v. *Parros*, 24 Mass. App. Ct. 596, 600 (1987).

ORDER

Defendants' motion to dismiss plaintiff's complaint is **allowed**. Final judgment shall enter dismissing this action with prejudice.

Kenneth W. Salinger
Justice of the Superior Court

2 May 2023