

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

2 South 7th Street Corporation, BKY No. 97-32582
d/b/a Nankin Cafe,

Debtor.

2 South 7th Street Corporation, ADV No. 97-3144
d/b/a Nankin Cafe,

Plaintiff, ORDER FOR JUDGMENT

v.

City Center Associates Limited Partnership,
and G/C Restaurant Company of Minneapolis(1),
Inc., a Minnesota corporation,

Defendants.

This matter came before the Court on
Defendant's Motion for Partial Summary Judgment.
Appearances are as noted in the record. This
ORDER is based on the Federal and Local Rules of
Bankruptcy Procedure.

I.
FACTS

The Debtor filed a Petition for Relief under
Chapter 11 on April 15, 1997. On June 16, 1997,
this adversary proceeding was commenced by the
Debtor against its landlord seeking relief on the
following counts: lien avoidance; conversion;
breach of covenant of quiet enjoyment; and, fraud.
On February 13, 1998, the case was converted to
Chapter 7, and Michael Iannacone was appointed
trustee.

The Plaintiff/Debtor owns and operates Nankin
Cafe. It leases its business premises from the
Defendant. The lease in place at the filing of
this adversary proceeding was the "Third Amendment
of Lease" dated November 1, 1994.

The Plaintiff participated in a program called
"Do the Town" at the request of the Defendant.
The program was designed to attract business
downtown and offered parking validation if
customers purchased \$20 worth of merchandise.
Under the program, the Plaintiff was required to
pay the Defendant the value of all parking fees
which it validated for customers.

The Defendant moves for partial summary judgment based on the Plaintiff's claims for fraudulent misrepresentation and breach of the covenant of quiet enjoyment. The Plaintiff's claim of fraudulent misrepresentation is based on alleged representations made by the Defendant to induce the Plaintiff to participate in the "Do the Town" program. The Defendant asserts that even if those representations were made, the Plaintiff is not entitled to relief. The Plaintiff's claim for breach of the covenant of quiet enjoyment is based on the Defendant's security guards taking food from the Plaintiff's buffet. Again, the Defendant asserts that even if the security guards engaged in the alleged conduct, the Plaintiff is not entitled to relief.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c), as applied to adversary proceedings through Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment shall be entered if:

the pleadings, depositions, answers to interrogatories, and admissions of 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.

The moving party has the burden of demonstrating that there is an absence of a genuine issue of material fact. In re Calstar, 159 B.R. 247, 251 (Bankr.D.Minn. 1993). All inferences must be resolved against the moving party. McDonough v. City of Rosemount, 503 N.W.2d 493, 496 (Minn.App. 1993). However, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co., Inc. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 Sup. Ct. 1348, 1355, 89 L.Ed.2d 538, 552 (1986). If reasonable persons might reach different conclusions when viewing the facts, summary judgment is not proper. Northland Ins. Co. v. Bennett, 533 N.W.2d 867, 871 (Minn.App. 1995).

B. FRAUDULENT MISREPRESENTATION

The Plaintiff asserts that the Defendant fraudulently misrepresented that all the City Center tenants were participating in the "Do the Town" program and specifically stated that T.G.I.Friday's was participating.(2) The Plaintiff argues that summary judgment should be denied because there are genuine issues of material fact

surrounding the alleged misrepresentations. The Defendant asserts that even if representations were made regarding T.G.I.Friday's, no damages could have been incurred because the Plaintiff was participating in the program before T.G.I.Friday's even became a tenant in City Center.

Whether the Defendant made representations regarding T.G.I.Friday's participation is a question of material fact. Even though the Plaintiff was participating in the program at the time of the alleged representation, knowledge that a direct competitor was not participating might have induced the Plaintiff to cancel its participation. Therefore, summary judgment is not appropriate.

The Defendant bases this entire portion of the summary judgment motion on the representation regarding T.G.I.Friday's and never addresses the Plaintiff's claim that the representation was made that "all" tenants were participating. Therefore, summary judgment is also not proper on the representation that "all" tenants were participating.

C. COVENANT OF QUIET ENJOYMENT

The Plaintiff claims that the covenant of quiet enjoyment was breached when the Defendant's security guards took food from its buffet without paying. The Defendant asserts that even if this conduct occurred, the covenant of quiet enjoyment was not breached because the Plaintiff was not prevented from using the premises or operating the restaurant.

The covenant of quiet enjoyment is breached "[w]hen an outstanding superior title is asserted in hostility to the title of the covenantee, and the convenatee, in good faith, yields to such paramount title". *Efta v. Swanson*, 115 Minn. 373, 376, 132 N.W. 335, 336 (Minn. 1911), citing, *Ogden v. Ball*, 40 Minn. 94, 41 N.W. 453 (Minn. 1889). The covenant of quiet enjoyment applies when possession is actually interfered with by one asserting superior title. *Miles v. City of Oakdale*, 323 N.W.2d 51, 57 (Minn. 1982); *Efta v. Swanson*, 115 Minn. 373, 376, 132 N.W. 335, 336 (Minn. 1911); *Collins v. Lewis*, 53 Minn. 78, 83, 54 N.W. 1056, 1057 (Minn. 1893); *Ogden v. Ball*, 40 Minn. 94, 96, 41 N.W. 453, 454 (Minn. 1889); *Fritz v. Pusey*, 31 Minn. 368, 370, 18 N.W. 94, 95 (Minn. 1884). The covenant does not apply to trespass or wrongdoing of third parties.(3) *Miles v. City of Oakdale*, 323 N.W.2d at 57. Even if security guards were taking food from the Plaintiff, no breach of the covenant of quiet enjoyment occurred because there was no interference with possession by the landlord. Therefore, summary judgment is appropriate and will be granted on this claim.(4)

DISPOSITION

Based on the foregoing analysis,
IT IS HEREBY ORDERED THAT:

- 1) Summary Judgment is DENIED on the fraudulent misrepresentation claim; and,
- 2) Summary Judgment is GRANTED on the claim for breach of the covenant of quiet enjoyment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated:

By the Court

Dennis D. O'Brien
Chief United States
Bankruptcy Judge

(1). G/C Restaurant Company of Minneapolis was dismissed from the adversary proceeding by Court order dated January 9, 1998. The dismissal was based on a stipulation between the Plaintiff and G/C Restaurant.

(2). In order for the Debtor to prevail on a claim of fraudulent misrepresentation the following elements must be shown:

1. There must be a representation;
2. That representation must be false;
3. It must have to do with a past or present fact;
4. That fact must be material;
5. It must be susceptible of knowledge;
6. The representer must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false;
7. The representer must intend to have the other person induced to act, or justified in acting upon it;
8. That person must be so induced to act or so justified in acting;
9. That person's action must be in reliance upon the representation;
10. That person must suffer damage;
11. That damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury.

Hanson v. Ford Motor Co., 278 F.2d 586, 591 (8th Cir. 1960).

(3). But see, Soltis v. Hovey, 1994 WL 71368, at *1 (Minn.App. 1994) implying otherwise. However, the two-page opinion is unpublished and provides no acknowledgment or analysis of the long history of Minnesota Supreme Court case law holding contrary.

(4). The Plaintiff also asserted a claim for conversion based on the actions of the security guards. Summary judgment was not sought on that portion of the claim.