UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IROQUOIS MANOR, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:99CV-27-S

WALGREEN CO. DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on motion of the defendant, Walgreen Co. ("Walgreen"), to dismiss. For the reasons set forth below, the defendant's motion will be granted.

FACTS

On November 12, 1999, this Court entered a Memorandum Opinion and Order in this case denying the plaintiffs' Motion for Judgment on the Pleadings. The dispute in this case revolves around an alleged breach by Walgreen of its lease with the plaintiffs, Iroquois Manor, et al. ("Iroquois Manor"), when it vacated the premises and discontinued payment of cash sales percentage rent, but continued to pay the fixed monthly rent due under the lease. The underlying facts of this breach of contract case were set out fully in the Memorandum Opinion in which this Court declined to imply a covenant of continuous operation in the lease. Walgreen now moves this Court to dismiss the claims filed by Iroquois Manor based on that ruling.

STANDARD OF REVIEW

In deciding on a motion to dismiss, we are required to accept the plaintiffs' allegations as true. See Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). If it appears beyond doubt that the plaintiffs can prove no set of facts in support of its claims that would entitle them to relief, then dismissal is proper. See Weiner v. Klais & Co., 108 F.3d 86, 88 (6th Cir. 1997). We are permitted to consider those facts contained in documents referred to in the plaintiffs' complaint and central

to the plaintiffs' claim in ruling on a motion to dismiss. See Helwig v. Vencor, Inc., No. 99-5153, 2000 WL 432432, at *13 (6th Cir. Apr. 24, 2000) (citing Greenberg v. The Life Ins. Co. of Va., 177 F.3d 507, 514 (6th Cir. 1999)).

DISCUSSION

It is undisputed that the lease in question does not contain an express covenant of continuous operation. As mentioned above, this Court also declined to imply such a covenant. Because no covenant of continuous operation, express or implied, exists in this lease, it is impossible for Iroquois Manor to prove any set of facts which would entitle it to relief on its claim for breach of such a covenant and judgment in Walgreen's favor is appropriate.

Iroquois Manor also claims damages for an alleged breach of an implied covenant of good faith and fair dealing because Walgreen did not continue operations until the lease expired. As noted by Iroquois Manor, under Kentucky law, all contracts contain an implied duty of good faith and fair dealing. See Ranier v. Mount Sterling Nat'l Bank, 812 S.W.2d 154, 156 (Ky. 1991). This claim is derivative, however, of Iroquois Manor's unsuccessful primary claim. Iroquois Manor points to the fact that the Court in Lagrew v. Hooks SupeRX, Inc., 950 F. Supp. 401 (E.D. Ky. 1995), allowed recovery for the defendant's breach of the covenant of good faith and fair dealing. In our prior opinion, however, this Court found that Lagrew was factually distinguishable from this case. The Lagrew Court first decided to imply a covenant of continuous operation into the parties' lease; then ruled that the defendant breached that covenant of continuous operation; and then found that it also breached its covenant of good faith. Thus, unlike Iroquois Manor in this case, the plaintiff in Lagrew first succeeded on its primary claim, and then succeeded on its derivative bad faith claim. Moreover, because this Court declined to imply a covenant of continuous operation, Walgreen's actions were permissible under its lease with Iroquois Manor. Taking actions permissible under the lease by Walgreen cannot constitute bad faith or unfair dealing. Thus, Iroquois Manor's claim for breach of the covenant of good faith and fair dealing should be dismissed as well.

Iroquois Manor also claims it is entitled to damages arising from Walgreen's failure to share in the cost of maintaining, repairing, lighting, and cleaning the parking areas. Iroquois Manor correctly points out that this Court's Memorandum Opinion and Order of November 12, 1999, is silent as to this claim. Although this issue has not been fully briefed by the parties, Walgreen does not dispute that it has breached this obligation by failing to share this cost after it vacated the premises. Therefore, Walgreen's motion to dismiss this claim will be denied.

Accepting all Iroquois Manor's well-pled facts as true, this Court finds that it would be impossible for Iroquois Manor to prove any set of facts which would entitle it to relief for its claims of breach of the implied covenant of continuous operation and for breach of the duty of good faith and fair dealing. Iroquois Manor's claim for Walgreen's breach of its obligation under the lease to pay its share of the cost of maintaining, repairing, lighting, and cleaning the parking areas of the shopping center remains. A separate order will be entered herein this date in accordance with this opinion.

This _____ day of _____, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

Motion having been made by the defendant, Walgreen Co., to dismiss and to extend its deadline to identify experts, and for the reasons set forth in the memorandum opinion entered herein this date, and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that:

1. The motion to dismiss the plaintiffs' claims for breach of the implied covenant of continuous operation and for breach of the duty of good faith and fair dealing is **GRANTED** and those claims are **DISMISSED WITH PREJUDICE**.

2. The motion to dismiss the plaintiff's claim for breach of the obligation to pay for Walgreen's share of the cost of maintaining, repairing, lighting, and cleaning the parking area is **DENIED**.

3. The defendant's motion to extend its deadline to identify experts in this matter is **GRANTED**. To the extent that any experts are still necessary, the defendant shall have **sixty (60) days** from the date of this Order to identify any experts it may engage in this matter.

IT IS SO ORDERED this _____ day of _____, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record