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BLOGS

Good Faith and Fair Dealing

Claim for Misuse of Advertising Fees Survives Motion, But Good Faith and Fair Dealing Claim Over New Rival Location Fails

In *Sunshine Restaurant Partners, L.P. v. Shivshakti One, Inc.*, 2008 WL 2809096 (S.D. Fla. Nov. 5, 2008), the United States District Court for the Southern District of Florida granted an International House of Pancakes subfranchisor's motion to dismiss a franchisee's claim for breach of the covenant of good faith and fair dealing regarding the construction of a new location in a site the franchisee wanted, finding the construction fell in line with the contract between the parties. However, the court denied the subfranchisor's motion to dismiss the contract claim, finding that the franchisee had adequately alleged that the advertising fees were being misused.

The franchisee's claim for breach of the licensing agreement was based on its allegation that the subfranchisor was using mandatory advertising fees to promote its own stores, but not the franchisee's store. This survived the motion to dismiss because the court found that the claim rose "above the level of the speculative." Although the subfranchisor argued that the licensing agreement gave it broad discretionary rights to spend the money in the manner it saw fit, the court found that a "cognizable argument" could be made that such an interpretation was so broad that it was inconsistent with the intent of the parties in entering the agreement.

The franchisee also brought a claim for breach of the covenant of good faith and fair dealing based on its allegation that the subfranchisor opened a location on a site the franchisee had wanted. The court found that the opening of the store did not breach an express term of the licensing agreement but rather specifically complied with the agreement's only provision governing the opening of new locations – that they be at least two miles away from the franchisee's existing site. Absent a breach of an express term of the underlying contract or a derogation of the express terms of the same, the court found that a breach of covenant claim could not survive.