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Order on Plaintiffs' and Third-Party Defendants' Motion for Summary Judgment on Defendant PRG's Counterclaims and Third-Party Claims (PAYLESS CAR RENTAL SYSTEMS, INC.)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

PAYLESS CAR RENTAL SYSTEMS, INC. and L & S VEHICLE LEASING, INC.,	)(	
Plaintiffs,	)(	
v.	)(	Civil Action File No. 2007CV129218
PRG GROUP, LLC and ANTHONY ELKIK,	)(	
Defendants.	)(	
PRG GROUP, LLC,	)(	
Third-Party Plaintiff,	)(	
v.	)(	
ORLIN, INC. and ATLIN, INC.,	)(	
Third-Party Defendants.	)(	

ORDER ON PLAINTIFFS' AND THIRD-PARTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON DEFENDANT PRG'S COUNTERCLAIMS AND THIRD-PARTY CLAIMS

On November 18, 2009, counsel appeared before the Court to present argument on the motion for summary judgment of Plaintiffs' and Third-Party Defendants. After hearing the arguments made by counsel, reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows.

Defendant PRG Group, LLC ("PRG") and Plaintiff Payless Car Rental Systems, Inc. ("Payless") entered into a Franchise Agreement ("FA") in August 2006. PRG has asserted a counterclaim against Payless for breach of the FA and for breach of the implied duty of good faith and fair dealing. PRG alleges that Payless breached the FA

by occasionally failing to list the Atlanta airport store on the Payless reservation system and by failing to provide PRG "with any meaningful consultation or assistance in operating its Payless franchise," as required by the FA.

PRG has also asserted counterclaims against Payless and third-party claims against two of Payless's affiliates, Orlin, Inc. ("Orlin") and Atlin, Inc. ("Atlin"), for breach of an asset purchase agreement ("APA") claiming that they failed to provide 300 vehicles to PRG as required by the APA. PRG also alleges breach of the implied duty of good faith and fair dealing as to the APA, and negligent misrepresentation by Payless and Third-Party Defendants ("Movants").

The Parties agree that Florida substantive law governs PRG's counterclaims and third-party claims because of the choice of law provisions in both the FA and the APA. Movants argue that they are entitled to summary judgment on PRG's claims based on breach of the APA. In support of that argument, Movants maintain that a term in the APA requiring them to lease "up to 300 vehicles" merely caps the number of cars Orlin or its assignee would be required to lease to PRG. In other words, Movants argue that the phrase, "up to 300 vehicles," is a limitation on how many vehicles Orlin or its assignee was obligated to lease; it was not a minimum number. The Court disagrees and finds that Orlin or its assignee was required to provide at least, but not more than, 300 vehicles if, in fact, PRG so requested that many vehicles and other conditions of the APA were met. In further support of their argument, Movants maintain that there is no genuine issue of material fact that Movants fully complied with their contractual duties under Section 5.2 of the APA. The Court again disagrees and finds that questions of fact regarding Movants breach of the APA exist in this case.

Extending their argument above, Movants argue that they are entitled to summary judgment on PRG's claims for breach of the duty of good faith and fair dealing implied in the APA because Florida law does not recognize a breach of those implied covenants when there is no link to a breach of an express term of a contract. Snow v. Ruden, 896 So. 2d 787, 792 (Fla. 2d DA 2005) ("Because the implied covenant is not stated contractual term, to operate it attaches to the performance of a specific or express contractual provisions. There can be no cause of action for a breach of the implied covenant absent an allegation that an express term of the contract has been breached.") Because PRG's claims for breach of an express term of the APA remain, so too does its claim for breach of the implied duty of good faith and fair dealing related to that breach. As to Movants' alternative argument that they complied with the implied covenants, the Court finds that questions of fact remain as to whether the implied covenants were breached.

Next Movants argue that they should be granted summary judgment on PRG's negligent misrepresentation claim because that claim is barred by Florida's economic loss rule. The Court disagrees because Florida's economic loss rule does not bar "tort actions based on fraudulent inducement" D & M Jupiter, Inc. v. Friedopfer, 853 So.2d 485, 487 (4thDCA, 2003). The test used by Florida courts to determine whether the economic loss rule applies is "to ask if the fraud alleged is in an act of performance or in a term of the bargain." Id. (citing Allen v. Stephan Co., 784 So.2d 456, 457 (4th DCA, 2000). Therefore, when fraud "occurs in the connection with misrepresentations, statements or omissions which cause the complaining party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort." Id. at

487-88. The Court finds that PRG has alleged facts that would support a claim for fraud in the inducement and such tort is not barred by Florida's economic loss rule.

Next, Payless argues that it is entitled to summary judgment on PRG's counterclaims for breach of the FA and covenants of good faith and fair dealing implied in the FA. First, Payless argues that section 5.6 of the FA bars PRG's claims for breach of contract based on reservation systems. Section 5.6 of the FA provides that

> Franchisor shall bear no liability or responsibility for: (i) errors or omissions of information contained in the reservations systems, the Website, or any other e-networks or (ii) computer hardware, software, or system, failures in connection with any such reservation system, the Payless® Wesite, or other website, or any other e-networks..."

Based on that express contract term, the Court finds that Payless's claims for breach of the FA based on allegations that Payless breached the FA by occasionally failing to list the Atlanta airport store on the Payless reservation system are barred. However, PRG's claim based on allegations that Payless breached the FA by failing to provide PRG "with any meaningful consultation or assistance in operating its Payless franchise" remains because issues of fact, including whether PRG has been damaged, remain.

Finally, Movants argue that they are entitled to summary judgment on PRG's claim for an equitable accounting. The Court agrees. Georgia law applies to this issue under the rule of lex fori. The Court finds that none of the bases for an equitable accounting provided in O.C.G.A. § 23-2-70 exist in this case, and notes that "an equitable accounting is granted only in carefully prescribed and determined circumstances, such as when an accounting at law is inadequate." Herring v. Standard Guaranty Ins. Co., 238 Ga. 261, 262 (1977). The Court further finds that all of the

parties' claims are for damages that may be calculated based on information obtained through discovery. For these reasons, the Court finds that there is no basis for a claim for an equitable accounting.

Accordingly, summary judgment on PRG's counterclaims and third-party claims for an equitable accounting and for breach of the FA based on allegations of problems with the reservation system(s) provided by Payless is **GRANTED**. Summary judgment on all remaining counts in the counterclaim and third party complaint is **DENIED**.

SO ORDERED this 7 day of January, 2010.

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Attorneys for Plaintiffs and Third-Party Defendants
Stephen E. Hudson, Esq.
Rachael Lee Zichella, Esq.
Kilpatrick Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Attorneys for Defendants/Third-Party Plaintiffs
David W. Davenport, Esq.
Keith A. Pittman, Esq.
Lamar Archer & Cofrin LLP
50 Hurt Plaza, Suite 900
Atlanta, GA 30303