COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1881CV01676

REAL ESTATE VISIONARIES, INC. d/b/a LEADING EDGE & others[1]

vs.

RE/MAX OF NEW ENGLAND, INC.

MEMORANDUM OF DECISION AND ORDER ON REAL ESTATE VISIONARIES, INC.'S MOTION FOR PRELIMINARTY INJUNCTION

In this contract action, the plaintiffs seek to adjudicate the defendant's ability to terminate the plaintiffs' rights to operate several real estate franchises pursuant to various agreements into which the parties entered. The plaintiffs currently seek a preliminary injunction barring the defendant from exercising its purported rights to terminate the franchises. Because the court concludes that the plaintiffs have not met their burden of showing they are entitled to such relief, the plaintiffs' motion for preliminary injunction is **DENIED**. The court will, however, expedite trial on the merits of this case so the issues raised can be considered on a comprehensive record.

FACTUAL BACKGROUND

The verified complaint, affidavit of Daniel Breault ("Breault"), and exhibits attached to each of those documents reflect the following relevant facts:

Defendant and franchisor RE/MAX of New England, Inc.[2] ("RE/MAX") permits the operation of franchised real estate offices via standard franchise agreements. Each individual office requires a separate franchise agreement. The individual plaintiffs formed Real Estate Visionaries, Inc. d/b/a Leading Edge ("Leading Edge") (collectively, "Plaintiffs") in 2012,

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[1] Stephen Chuha, Jr., Paul Mydelski, Eileen Hamblin, and Linda O'Koniewski.

[2] According to Breault's affidavit, RE/MAX of New England, Inc. is now known as RE/MAX INTEGRA, New England. The court refers to the entity as "RE/MAX" for ease of reference.

combining their various existing RE/MAX franchises (the earliest of which was started in 1990) into one entity. Since 1990, the individual plaintiffs or Leading Edge have entered into more than twenty initial and renewal franchise agreements with RE/MAX, each of which was in the standard form RE/MAX offered to all franchisees during the relevant period.

Leading Edge currently operates nine RE/MAX franchises, including franchises in Lexington, Cambridge, and Belmont, which are the subject of the present motion. Six of those franchises were or are subject to franchise agreements with different effective dates, meaning they expire(d) at different times. The most recent franchise agreement for Lexington expired in July 2017. Since then, Leading Edge has been operating the franchise on a month-to-month basis as a holdover franchisee as permitted in the now-expired franchise agreement. That expired agreement also provided in relevant part as follows: "[Y]our rights to operate the [Lexington] Office under these [holdover] circumstances may be terminated at any time and without cause by [RE/MAX], in our sole and absolute discretion, upon ten (10) days prior written notice to you."

In or around September 2016, Leading Edge opened the Cambridge and Belmont locations as satellite offices under its existing Melrose franchise. The parties did not enter into franchise agreements immediately upon Leading Edge opening these locations. Rather, they entered into a series of "satellite authorization agreements" ("Satellite Agreements"), in which Leading Edge agreed to purchase separate franchises for the two new locations and the parties committed to entering into a franchise agreement for each location within a certain number of days.[3] The Satellite Agreements also provided that the term of each franchise would be ten years.

[3] The Satellite Agreements are not attached to Breault's affidavit as indicated, but he cites various provisions from them in his affidavit.

Pursuant to the Satellite Agreements, RE/MAX presented for Leading Edge's execution regarding the two new offices the standard franchise agreement in effect at that time, but Leading Edge refused to execute the agreements based on the post-termination non-compete clause contained therein. The parties thereafter negotiated extensively in an effort to reach a resolution of their dispute. In March 2017, Leading Edge requested that RE/MAX extend the terms of the then-unexpired franchise agreements so that they would terminate at the same time as Leading Edge's other franchises. RE/MAX did not agree to this proposal, and negotiations continued. The parties were unable to reach a resolution, and in June 2018, RE/MAX sought to terminate Leading Edge's Lexington, Cambridge, and Belmont franchises. This lawsuit followed.

DISCUSSION

The Plaintiffs assert that they are entitled to a preliminary injunction maintaining the status quo and barring RE/MAX from terminating the Lexington, Cambridge, and Belmont franchises. To prevail on a motion for a preliminary injunction, a plaintiff must show "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction." Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001), citing Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980).

Because the court concludes that the Plaintiffs have not shown a likelihood of success on the merits, they are not entitled to a preliminary injunction.

I. Likelihood of Success on the Merits

The Plaintiffs have asserted claims of breach of the implied covenant of good faith and fair dealing, fraudulent inducement, and violation of Chapter 93A. The court will discuss the merits of each claim.

A. Breach of the Implied Covenant of Good Faith and Fair Dealing

The implied covenant of good faith and fair dealing "ensures that the parties act in good faith so that neither does anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 680 (2011) (internal quotations and citation omitted). The Plaintiffs claim that RE/MAX has refused to extend the franchise agreements' termination dates to make them coterminous, and has attempted to use the staggered expiration terms and the agreements' in-term non-compete provision "to extort unreasonable and unbargained-for concessions from Leading Edge." Verified Compl. ¶ 67.

However, based on the record before it, the court finds that the Plaintiffs are facing a self-made situation that is not the result of RE/MAX acting improperly or with a lack of good faith. The Plaintiffs—all sophisticated parties—freely entered into a series of separate franchise agreements over many years with RE/MAX, and the present situation of staggered termination dates and non-compete provisions, and the implications of same, have been apparent for a long time.[4] See Bruno Int'l Ltd. v. Vicor Corp., 2015 WL 5447652 at *10 (D. Mass. 2015), citing

[4] The Plaintiffs' assertion in their reply brief that all of Leading Edge's franchise and other agreements with RE/MAX should be construed together as a single transaction—which somehow changes the analysis—is incorrect. As an initial matter, the two cases the Plaintiffs cite involved circumstances that are factually distinguishable. See Chelsea Indus., Inc. v. Florence, 358 Mass. 50, 52, 55 (1970) (two contracts were entered into at same time and one contract stated that it and other written agreements entered into on same date "constitute the entire contract between the parties"); Dukes Bridge LLC v. Beinhocker, 856 F.3d 186, 187-188 (1st Cir. 2017) (two contracts entered into on same day as part of single transaction whereby defendant raised capital for his flailing business). Further, even if viewed as part of a "single transaction," it appears based on the present record that the implications of that transaction were obvious as Leading Edge entered into the separate agreements over the course of time.

Chokel v. Genzyme Corp., 449 Mass. 272, 276 (2007) ("The covenant of good faith and fair dealing cannot be used to save a party from a poorly negotiated contract."). Unlike in Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451 (1991), the Plaintiffs have not shown that RE/MAX is acting without good faith or unfairly in order to obtain benefits for which it did not bargain or contract. See id. at 471-473. Rather, the evidence indicates that RE/MAX is exercising its contractual rights to terminate the three Leading Edge franchises at issue. The Plaintiffs have not submitted any evidence that RE/MAX's "actions were motivated by a desire to deprive [them] of what [they] reasonably could have expected to receive under the [franchise agreements or Satellite Agreements]." Piantes v. Pepperidge Farm, Inc., 875 F. Supp. 929, 938 (D. Mass. 1995) (analyzing termination of franchise agreement).

The Plaintiffs' reliance on Zapatha v. Dairy Mart, Inc., 381 Mass. 284 (1980), is unavailing. As an initial matter, it seems the Zapatha court discussed the specific factors upon which the Plaintiffs rely, see id. at 298-299 (listing "varying factors" related to franchise agreements), in an analysis under Chapter 93A, not under the implied covenant, see id. at 298-300. See also C.R. Swaney Co. v. Atlas Copco N. Am., Inc., 1987 WL 33025 at *20 n.11 (D. Mass. 1987), citing Zapatha, 381 Mass. at 299 (plaintiff's claim regarding its development of goodwill and financial investment was "more properly considered under [Chapter 93A]"). Further, it does not appear that these factors have been cited or considered by any other court regarding the propriety of termination of a franchise agreement under the implied covenant.

The Plaintiffs therefore have not shown a likelihood of success on the merits of their breach of the implied covenant claim.

B. Fraudulent Inducement

Nor have the Plaintiffs met their burden of showing a likelihood of success on the merits of their fraudulent inducement claim, which is based on a statement in RE/MAX's Franchise Disclosure Document ("FDD") that RE/MAX "*may* provide for a longer franchise term" (emphasis added) than the standard five years. The Plaintiffs' fraudulent inducement claim necessarily requires that longer terms be mandatory, however, rather than discretionary as clearly stated in the FDD. As such, the Plaintiffs have not shown at this time that RE/MAX made a false statement of fact upon which they reasonably relied.[5] See Masingill v. EMC Corp., 449 Mass. 532, 540-541 (2007). See also Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 438 Mass. 459, 469 (2003) (statements that further inquiry would be made regarding potential resolution to business deal "may properly support hope, but they do not support reasonable reliance").

C. Violation of Chapter 93A

Finally, as to the Plaintiffs' Chapter 93A claim, the Plaintiffs have not shown a likelihood of success on the merits where that claim is based on RE/MAX's alleged breach of the implied covenant of good faith and fair dealing and misrepresentation claims, which the court has already concluded do not present a likelihood of success on the current record.

In sum, the Plaintiffs have not shown that it would be appropriate for the court to disrupt what at this stage appears to be the bargained-for rights of sophisticated parties. See, e.g., RAM Mgmt. Co. v. First Highland Mgmt. & Dev. Corp., 2013 WL 5442368 at *2 (D. Mass. 2013)

[5] Regarding the fraudulent inducement claim, in their reply brief, the Plaintiffs cite facts stated in the affidavit of Paul Mydelski regarding RE/MAX's assurances to Leading Edge that the parties could work out issues Leading Edge had regarding the staggered termination dates and post-termination non-compete provision when they entered into an agreement regarding the Cambridge and Belmont franchises. It is well-established, though, that a fraud claim generally cannot be based on the "give-and-take of negotiations" where the parties subsequently enter into a written contract that does not include the earlier-discussed term. See Masingill, 449 Mass. at 541-543.

("[T]he parties here are sophisticated business entities who, represented by attorneys, freely entered into a contract, and it is only appropriate to hold them to their bargained-for and agreed-upon terms" [internal quotations and citation omitted].). They have therefore not satisfied their burden of showing a likelihood of success on the merits and are not entitled to the requested preliminary injunction.[6]

II. Expedited Trial on the Merits

Notwithstanding this denial of the preliminary injunction, Plaintiffs' claims raise serious issues with respect to the impact of multiple franchise agreements with staggered terms upon a multi-franchise enterprise like Leading Edge. These issues deserve consideration on a full record, before the gradual termination of multiple franchise agreements causes the very result which Plaintiffs contend is anticompetitive, unfair or otherwise unlawful. Understanding that the next franchise termination date is in February 2019, the court intends to expedite trial in this case to a date in late 2018 to precede the next anticipated termination. The parties should be prepared to discuss expedited trial, discovery and other pretrial matters at a scheduling conference on June 28, at 2:00 p.m.

[6] Additionally, the Plaintiffs have failed to show that money damages are an inadequate remedy, such that they will suffer irreparable harm, particularly where they will continue to operate six of their nine franchises. See, e.g., Ramsten v. Alfieri, 2013 WL 2111668 at *2 (Mass. App. Ct. 2013) (Rule 1:28 decision) ("Irreparable harm is that harm that cannot be adequately addressed by money damages.").

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiffs' motion for preliminary injunction is **DENIED**. A scheduling conference will be held on Thursday, **June 28, 2018, at 2:00 p.m.** to discuss an expedited trial on the merits in late 2018 and related matters.

Christopher Barry-Smith
Justice of the Superior Court

DATED: June 21, 2018