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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III *Justice*

PART 56

0601400/2004

EMFORE CORP.
vs
BLIMPIE ASSOCIATES, LTD.

INDEX NO. _____

MOTION DATE 11/16/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

DISMISS ACTION

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 29 2005
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/23/05

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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EMFORE CORP., Plaintiff,

Index No. 601400/04

-against-

BLIMPIE ASSOCIATES, LTD., PETER DECARLO and LOUIS GIOIA,

Defendants.

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RICHARD B. LOWE, III:

Defendant, Blimpie Associates, Ltd. (Blimpie), moves pursuant to CPLR 3211 (a) (1), for an order dismissing plaintiff's first through twelfth causes of action, based solely upon the documentary evidence. Defendants, Louis Gioia (Gioia) and Peter DeCarlo (DeCarlo) cross-move also pursuant to CPLR 3211 (a) (1) to dismiss plaintiff's first through tenth causes of action (collectively "Defendants").

In this action, plaintiff Empore Corp. (Empore), a former franchisee of Blimpie, Associates, Ltd., (Blimpie) seeks damages and rescission of a franchise agreement (Agreement) against defendants Blimpie, DeCarlo, and Gioia for violations under the New York Franchise Sales Act (Franchise Act), common- law fraud, fraudulent inducement to contract, and breach of contract.

BACKGROUND

The complaint alleges that after reading a Blimpie Unit Franchise Offering Circular

(Offering Circular) a few weeks earlier, plaintiff's principals, Mona and Mark Morris (the Morrises), met with DeCarlo, a Blimpie senior executive and Gioia, director of Franchise Sales on November 6, 2002, to discuss the possibility of opening up a Blimpie franchise. An Offering Circular is a regulated document required to be presented to potential franchisees under the Franchise Act which describes the franchise being offered by Blimpie. At the meeting, "plaintiff repeatedly and unequivocally stated its desire to have the Store generate revenue throughout the day, not just at Blimpie's peak hours (i.e., lunch)" (Complaint, par 25, annexed to the affidavit of Nicholas Lagano, Jr., in Notice of Motion, Ex G). Thus, plaintiff "expressed its desire to co-brand with a franchise that would allow plaintiff to offer coffee and/or desserts to customers during off-peak hours in the Store" (id.). The Offering Circular provided to plaintiff allegedly stated that:

> Blimpie believes that its franchisees may have additional opportunity for business growth by offering for sale within Blimpie franchised restaurants additional recognized branded products which compliment the product line currently offered by Blimpie, which have gained public recognition and have satisfied Blimpie standards of quality.
>
> Blimpie is not required to approve any co-branding marketing system unless Blimpie has recognized that co-branding system as an approved co-brand for operation within its system restaurants, either nationally or regionally.
>
> Blimpie has entered into master agreements with TCBY, Mrs. Field's, Nathan's Famous, Twin Donut, and Taco Maker. *Blimpie has also approved co-branding with Dunkin Donuts* and Wok & Roll. *Other co-branding opportunities are being evaluated by Blimpie.*

(Emphasis supplied Complaint, par 27).

During the November 2002 meeting, plaintiff alleges that, after reviewing the Offering

Circular, it "was offered the opportunity to co-brand with Dunkin' Donuts, but [it was] stated that a deal with Dunkin' Donuts was not completed, but one was in place with Chock Full 'O Nuts and agreed that plaintiff co-brand with Chock Full 'O Nuts 'immediately'. Blimpie added that once a deal was done with Dunkin' Donuts, co-branding would be permitted with Dunkin' Donuts in the Store" (Complaint, par 28) (co-branding claims).

Later in the month during negotiations, Gioia allegedly stated to plaintiff, "if you are still behind [the] counter in six months, you are doing something wrong. You should be working on your second store." Also, it is alleged that both Gioia and DeCarlo "repeatedly spoke about other stores' success," and that plaintiff would "attain their level of success or higher" (Complaint, pars 73-75) (earnings claims).

In December 30, 2002, plaintiff, in reliance upon defendants' allegedly material misrepresentations, executed the Agreement.

Thereafter, on March 12, 2003, plaintiff, with the help of DeCarlo signed a lease for the Blimpie store (the Store) located at 179 Madison Avenue, New York, New York for approximately 2400 square feet (the Lease) - the amount of space allegedly needed to operate a Blimpie and a co-brand. The complaint alleges that plaintiff made this purchase based upon defendants' representations that their new location could make "$12,000 to $14,000 per week within the first few months" (Complaint, par 94)(post-Agreement earnings claims). Blimpie allegedly stated that other stores' numbers ranged from $15,000 per week to $22,000 - $25,000 per week, and that a franchise at 179 Madison Avenue (the Leased Premises) had the potential to be a "million dollar store" (Complaint, par 96). Plaintiff was also allegedly advised that "heavy hitters" wanted to take the Madison location, so plaintiff had to make a quick decision

(Complaint, par 97).

After execution of the Agreement and the Lease, plaintiff allegedly made repeated phone calls to Gioia concerning the status of the Chock Full O'Nuts co-branding, and in May 2003 finally contacted Chock Full O'Nuts directly, which advised it that there was no agreement with Blimpie, although one was being negotiated. Finally, in June 2003, Chock Full O'Nuts advised plaintiff that it would not be co-branding with Blimpie. During this period plaintiff also allegedly called Blimpie to complain about inadequate training. The plaintiff's store opened in June 2003, and closed less than six months later, in November 2003.

In May 2004, plaintiff commenced this action against defendants. Plaintiff's claims fall into four categories: (1) allegations that Blimpie made affirmative misstatements to plaintiff regarding co-branding opportunities with Chock Full O'Nuts ; (2) allegations that Blimpie made earnings claims or projections of the amount of income plaintiff would earn from the operation of its Blimpie restaurant causing plaintiff to enter into the Agreement and the Lease ; (3) earnings claims after the Agreement was signed and (4) claims regarding failure to provide adequate training.

Read liberally, the complaint appears to allege as to all defendants: violations of Article 33 of the General Business Law, known as the Franchise Sales Act, which regulates franchises in New York State (General Business Law §§ 680 - 696), specifically sections 687 and 683, based upon the co-branding and earnings claims respectively (the statutory claims) (1st , 2nd, 7th, and 8th causes of action). The complaint also alleges the following against defendant Blimpie only: fraudulent misrepresentation with respect to co-branding claims (3rd and 4th causes of action) and earnings claims made after the Agreement was executed (9th and 10th causes of

action); fraudulent inducement to contract with regard to the co-branding claims (5th and 6th causes of action); and breach of contract regarding adequate training (11th and 12th causes of action). Plaintiff seeks both damages in excess of $180,000 and rescission of the Agreement in each of the various causes of action. Defendants move and cross move pursuant to CPLR 3211 (a) (1), to dismiss all 12 causes of action, based solely upon the Offering Circular and the Agreement's merger and disclaimer clauses.

DISCUSSION

On a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Shannon v MTA Metro North RR., 269 AD2d 218 [1st Dept 2000]).

> However, "in those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference and the criterion becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one.'" On a motion to dismiss pursuant to CPLR 3211 (a) (1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (internal citations omitted)

(Morgenthow & Latham v The Bank of New York Company, Inc., 305 AD2d 74 [1st Dept 2003]).

The Statutory Claims

The Morrises allege that defendants took advantage of their inexperience in franchise dealings, in violation of two sections of the Franchise Act. First, plaintiff claims that it decided to enter into the Agreement with Blimpie in reliance upon defendants' "untrue statements of

material fact" about co-branding opportunities with Chock Full 'O Nuts being "in place," and that it was "agreed" that plaintiff could co-brand "immediately," in violation of the anti-fraud provisions of section 687 (2) of the Franchise Act. Plaintiff also maintains that it relied on the representation that "once a deal was done with Dunkin Donuts, co-branding would also be permitted with Dunkin' Donuts in the Store."

General Business Law § 687 (2) evidences the broad scope of the Franchise Act's anti-fraud provisions:

> Fraudulent and unlawful practices:
>
> 2. It is unlawful for a person, in connection with the offer, sale or purchase of any franchise, to directly or indirectly:
> (a) Employ any device, scheme, or artifice to defraud.
> (b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. It is an affirmative defense to one accused of omitting to state such a material fact that said omission was not an intentional act.
> (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Secondly, plaintiff maintains that defendants made "estimates or projections of earnings" in violation of section 683 of the Franchise Act by stating, "if you are still behind [the] counter in six months, you are doing something wrong. You should be working on your second store." Also, it is alleged that both Gioia and DeCarlo "repeatedly spoke about other stores' success, and that plaintiff would "attain their level of success or higher."

General Business Law § 683 "Disclosure requirements" provide:

***

2. The offering prospectus sought to be registered with the department of law shall be filed with the department, accompanied by an application for registration on forms prescribed by the department, and shall contain the following:

***

(o) Any representation of estimated or projected franchisee earnings or income, together with a statement setting forth the data, methods and computations upon which such estimate or projection is based.

***

5. Every application by a franchiser for registration of an offering prospectus shall be accompanied by such materials, data, records, or other information as the department may by rule require in connection with its consideration of the application .

With regard to both claims, defendants deny that they made co-branding or earnings oral claims prior to execution of the Agreement. Defendants further argue that the co-branding claim is not viable because specific language in the Offering Circular, read in conjunction with section 23.8 of the Agreement, specifically reveals that neither Dunkin Donuts nor Chock Full O' Nuts was an approved co-brand at the time that the Agreement was signed. Defendants deny that the Offering Circular presented to plaintiff contained the statement that co-branding was available with Dunkin' Donuts, and that it merely stated that other co-branding opportunities were reviewed on an ongoing basis. Thus, according to defendants, it would be inconsistent to assume that those brands would be immediately available to plaintiff. Defendants offer that Chock Full O' Nuts was not an approved brand until one month after the Agreement was signed, in January 2003. Thus, it is argued that plaintiff cannot claim reasonable reliance on defendants oral statements to plaintiff which were specifically contradicted by the Offering Circular.

In addition, defendants rely upon Rosenberg v Pillsbury Co. 718 F Supp 1146 ([SD NY 1989]), for the proposition that both claims of misrepresentation are barred by the merger/integration and disclaimer clauses which "go to the very core of their Complaint and

conclusively prove that the claims are false" (Notice of Motion, Affirmation of Nicholas Lagano, Jr., President of Blimpie at 10). In Rosenberg, a plaintiff-franchisee sued its Franchisor (Haagen-Daz) inter alia, for fraud and violation of the implied covenant of good faith and fair dealing, and the United States District Court for the Southern District of New York summarily dismissed all of plaintiff's claims. In the Rosenberg case, importantly, the Court construed and applied Massachusetts law. It held that defendants' alleged misrepresentations were unreasonable as a matter of law, because the alleged misrepresentations were not contained in the franchise agreement. The Court in that case also noted that the plaintiffs did not reasonably rely because they had already operated another Haagen-Daz shop for at least three months, and they were attorneys.

Defendants argue that reliance on oral misrepresentations regarding co-branding and earnings are thus, canceled by the integration/merger clauses and disclaimers in the Agreement (see Exs A-F annexed to the Lagano Aff in Support of Motion to Dismiss). Defendants rely upon the following merger clauses in the Agreement, which provide that:

> *Section 23.2* There is no other agreement, representation or warranty made by Franchiser or any other entity or person associated with Franchiser other than contained in this Agreement. This is not subject to or conditioned upon the obtaining of a Location for Operator's System Restaurant.
>
> *Section 23.8* Subject to Franchisor's prior written approval, Operator may install approved co-branding marketing systems to be operated in conjunction with Operator's System Restaurant. Franchisor shall not be required to approve any co-branding marketing system unless Franchisor has recognized that co-branding system as an approved co-brand for operation within its system restaurants, either nationally or regionally.
>
> *Section 4.5 of the Rider* Operator acknowledges that Franchisor, salesman, subfranchisor or any of their agents, salesmen, directors, officers, employees or any other salesman, person or entity have not made, and Operator has not relied

on any representations, warranties, inducements, pro formas, forecasts, estimates or any other inducement or statement regarding financing, net profits, gross profits, net sales, gross sales, costs or expenses of Blimpie restaurants generally or of any specific Blimpie restaurant or any other matter not stated here.

EARNINGS CLAIMS in Offering Circular

No representations or statements of actual projected or forecasted sales, profits, or earnings are made to franchisees with respect franchises. Blimpie does not furnish or authorize its salespersons or Subfranchisor to furnish any oral or written information concerning the actual, average projected, forecasted, or potential sales, costs, income or profits of a franchise.

Blimpie specifically instructs its sales personnel, Subfranchisor, agents, employees, and officers that they are not permitted to make such claims or statements as to the earnings, sales or profits or prospects or chances of success, nor are they authorized to represent or estimate dollar figures as to franchisee's operation.

Actual results vary from franchise to franchise, and Blimpie cannot estimate the results of a particular franchise. Blimpie recommends that prospective franchisees make their own independent investigation to determine whether or not the franchise may be profitable, and consult with an attorney and other advisors prior to executing the Franchise Agreement.

Defendants note that section 4.5 was almost identical to a merger clause relied upon by the Rosenberg Court.

Plaintiff opposes the motion and argues that its ability to show reliance on the co-branding representations and pre-Agreement earnings claims are not contradicted by the Offering Circular nor are they precluded by the aforementioned contract terms.

The court agrees. Preliminarily, neither the terms of the Offering Circular nor the terms of the Agreement contradict oral statements allegedly made by defendants. The allegation that Chock Full 'O Nuts would be " immediately available" for co-branding is not specifically contradicted by the Offering Circular since the Offering Circular presented by plaintiff which the court must believe to be true for the purposes of this motion, provides that in addition to the listed

brands available, other co-branding opportunities are "evaluated on an ongoing basis." In addition, defendants concede that Chock Full O' Nuts was eventually approved by Blimpie as a co-brand one month after the Agreement was executed in January 2003 and that Blimpie permitted plaintiff to negotiate with Chock Full O'Nuts directly.

Moreover, the aforementioned contract terms cited by defendant do not per se bar plaintiff's claims of reliance on the co-branding representations and earnings claims. The Franchise Act, General Business Law §§ 680-696, is a broad remedial statute that was enacted in 1980 to combat abuses by franchiser and to "protect the would-be franchisee from fraudulent and unethical practices (A.J. Temple Marble & Tile, Inc., v Union Carbide Marble Care, Inc., 162 Misc 2d 941, 948 [Sup Ct NY County 1994], aff'd 214 AD2d 473 [1st Dept 1995], affd as modified, 87 NY2d 574 [1996]). Our courts have acted to promote the strong public policy underlying the Franchise Act by protecting franchisees' enforcement of these rights against non-complying franchisors (id. supra, at 941; Reed v Oakley, 172 Misc 2d 655 [Sup Ct Saratoga County 1996], aff'd 240 AD2d 991 [3d Dept 1997]; TKO Fleet Enterprises, Inc., v Elite Limousine Plus, Inc., 184 Misc 2d 460 [2000], affd 286 AD2d 436 [2d Dept 2001]). It was "drafted to incorporate stringent disclosure and broad anti-fraud provisions" (Temple Marble, 162 Misc 2d at 941. The Legislature's intent was to "prevent a franchisor from contracting out of the liability imposed on the franchisor under the Act by the inclusion of merger and waiver clauses" (id.). Sections 687 (5) and 687 (4) of the Franchise Act expressly prohibit merger/waiver clauses. Section 687(5) provides a specific prohibition against release and waiver of the duties imposed by the Franchise Act:

> 5. It is unlawful to require a franchisee to assent to a

> release, assignment, novation, waiver or estoppel which would relieve a person from any duty or liability imposed by this article.
>
> Subsection 4 states:
>
> 4. Any condition, stipulation, or provision purporting to bind any person acquiring a franchise to waive compliance with any provision of this law ... shall be void.

Hence, the aforementioned merger/integration clauses are expressly prohibited by the Franchise Act (Franchise Act §687 [5]).

Thus, the court is unable to conclude as a matter of law that based upon the aforementioned provisions, plaintiff's reliance on all of defendants' purported misrepresentations was unreasonable. However, portions of this issue may be capable of resolution on a motion for summary judgment, after a factual record has been more fully developed. This court's decision in sustaining the adequacy of the pleadings thus far is not intended to indicate that these claims will be ultimately sustainable under New York law - especially the pre-Agreement earnings claims which do not appear to rely upon statements of existing fact. The court notes that this motion did not challenge the sufficiency of the pleadings, but that dismissal is sought solely based upon the documents. At this juncture, it is not clear that the particular language of the Franchise Agreement or the Offering Circular would, as a matter of law, render any reliance on the purported misrepresentations unreasonable.

Common Law Fraud/Fraud in the Inducement

Pre-Agreement Statements

Plaintiff's third, fourth, fifth, and sixth causes of action arise from the alleged

misrepresentations relating to co-branding made before the Agreement was executed. A complaint must plead the following elements for a claim of fraud : (1) that defendant made a misrepresentation; (2) with knowledge that the representation was false; (3) with the intent to induce reliance on the misrepresentation by the plaintiff; (4) that the plaintiff reasonably or justifiably relied on the misrepresentation; and (5) that the plaintiff's reliance resulted in damages to him (Lama Holding Co., v Smith Barney Inc., 88 NY2d 413, 421 [1996]).

Defendants once again argue that the portion of the fraud and fraud in the inducement claims which allege that plaintiff reasonably relied on the alleged oral representations of defendant regarding co-branding cannot be sustained as a matter of law because of the aforementioned clauses. This portion of the motion is also denied for the same reasons discussed above.

Post-Agreement Statements

Plaintiff's ninth and tenth causes of action arise from alleged misrepresentations relating to co-branding and earnings potential made by defendants after the Agreement, and before the Lease was executed. Defendants assert in their motion and cross motion to dismiss, that these claims must be dismissed because of the merger and disclaimer clauses. However, these clauses provide that no agreement was made with or to plaintiff that was not included in the Agreement. Thus, by their terms these provisions cannot prohibit claims that rely upon representations made after the Agreement was executed (see, Getty Refining and Marketing v Linden Maintenance Corp, 168 AD2d 480 [2nd Dept 1990]).

Breach of Contract

Plaintiff's eleventh and twelfth causes of action, for breach of contract, arise from

Blimpie's alleged failure to provide adequate training and support. Plaintiff specifically alleges that pursuant to Article 3 of the Agreement, and the Offering Circular, Blimpie was required to provide certain enumerated support services including, but not limited to, classroom training for: Blimpie standards, assembly line operations, food preparation techniques, restaurant operations, personnel management, customer service techniques, safety and security, setting up the restaurant, equipment maintenance, Blimpie paperwork, legal, financial control, training for POS and cash register (technical training tools), food ordering, how to obtain or need for obtaining food handling.

To establish a claim for breach of contract a plaintiff must prove : 1) That an agreement existed between it and the defendant; 2) What the respective obligations of the parties were; 3) That the plaintiff performed its obligation under the agreement; 4) That the defendant breached the agreement by failing to perform its obligation; 5) That the plaintiff suffered damages as a result of the breach (Cleveland Wrecking Co., v Hercules Construction Corp., 23 F Supp 2d 287 [ED NY 1998, affd 198 F3d 233 [2d Cir 1999]).

The thrust of Blimpie's objection to this cause of action is that plaintiff is barred from seeking damages for breach because plaintiff failed to give Blimpie 60 days written notice concerning these alleged breaches and that this term cannot be modified (section 18.2 of Agreement, annexed to Notice of Motion, Ex D). Plaintiff asserts that adequate notice was given in that it repeatedly made verbal complaints which were ignored, and thus, written notice would have been a futile. In addition, it maintains that it's attorney did eventually send a pre-lawsuit written demand in April 2004 asserting the claim of breach which was not responded to by defendant (Affidavit of Mona Morris, dated October 14, 2004, annexed to the Opposition to

Motion to Dismiss, Exs. 2, 3). Finally, its argued that even if the notice was not given in full compliance with the Agreement, there was no prejudice suffered by any deviation from the Agreement and thus, that there should be no dismissal based upon defective notice (see, Suarez v Ingalls, 282 AD2d 599 [2nd Dept 2001]).

The court agrees with plaintiff. Thus, this portion of Blimpie's motion that seeks dismissal of the eleventh and twelfth causes of action, solely based upon the assertion of inadequate notice of breach is denied at this juncture, as defendants do not deny that they received actual notice, and they have failed to show prejudice.

CONCLUSION

Accordingly, it is the decision and order of this court that the motion and cross-motion to dismiss are denied in their entirety.

Dated: March 23, 2005

ENTER:

HON. RICHARD B. LOWE, III

J.S.C.