

**Emfore Corp. v Blimpie Associates, Ltd.**

2006 NY Slip Op 30422(U)

September 14, 2006

Supreme Court, New York County

Docket Number: 601400/04

Judge: Richard B. Lowe

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UNFILED ON 9/18/2006  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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

PART 56

Emfore Corp.

INDEX NO. 601400/04

- v -

MOTION DATE 7/13/06

Blimpie Associates

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with the attached memorandum decision.

**FILED**  
SEP 18 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, JR.

Dated: 9/14/06

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

----- x  
EMFORE CORP.,

Plaintiff

Index. No. 601400/04

-against-

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

Defendants.  
----- x

**Hon. Richard B. Lowe, III:**

Defendant, Blimpie Associates, Ltd. (Blimpie), and plaintiff, Emfore Corp. (Emfore), the enterprise of Mona and Mark Morris, move and cross move, pursuant to CPLR 2221, respectively, for an order granting them leave to reargue their prior motion and cross motion for summary judgment, pursuant to CPLR 3212, and plaintiff's additional request to preclude certain evidence relating to a "merger/integration clause" in the parties' franchise agreement. In April 2006, this court issued a decision and order denying both motions for summary judgment based on material questions of fact. The parties now agree that there are no material questions of fact. The court grants the motion and cross motion to reargue on the basis that the court misapprehended certain salient uncontested facts, including which franchise documents Blimpie was relying upon to support its motion for summary judgment and the order in which the documents were first presented to plaintiff's president, Mona Morris (*Foley v Roche*, 68 AD2d

558 [1<sup>st</sup> Dept 1979]).

The instant motion and cross motion for summary judgment raise the question of whether the New York Franchise Sales Act (Franchise Act), article 33 of the General Business Law (GBL § 680, et seq) precludes a franchisor's reliance on disclaimers made by plaintiff's officers in an executed Questionnaire/Rider annexed to the parties' franchise agreement.

#### FACTUAL BACKGROUND

In 2002, Mona and Mark Morris decided that they would start a business to be managed day-to-day by Mona Morris in her capacity as president of plaintiff, Emfore. On October 24, 2002, after researching various franchise opportunities (Deposition of Mona Morris, Ex G, at 42-60), they met with defendant Louis Gioia, Blimpie Director of Sales at Blimpie headquarters to discuss their decision to pursue franchising opportunities with Blimpie (see, Exhibit H). On that day Mr. Gioia gave the Morrises a copy of the Blimpie Associates 2002 Uniform Franchise Offering Circular (Offering Circular) which included information about the franchise and, the franchisor and franchisee's respective rights and responsibilities.

It also included an "earnings claims" section explaining:

#### *EARNINGS CLAIMS*

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 subfranchisors 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, subfranchisors, 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. (Emphasis Added)

The Offering Circular also contained information on co-branding that 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..*

The Offering Circular also cautioned on the following page that:

Blimpie's approval of a co-brand partner is not the same as approval of your site for participation. If you wish to participate Blimpie must approve your location for co-branding. Factors will include whether you are in good standing .... Blimpie is not required to approve your site for co-branding... .

In addition, Blimpie gave the Morrises samples of agreements that a new franchisee would be asked to sign such as a copy of the proposed Franchise Agreement and Rider, together with other information and documentation as required under the Franchise Act. Also included

among the exhibits in the Offering Circular was a listing of the names and addresses of all of the current and recent past franchises of Blimpie Associates, along with their contact information (Ex C).

Mona Morris met with Mr. Gioia again on November 6, 2002 and November 22, 2002 to discuss further their interest in pursuing a Blimpie franchise opportunity. Allegedly, at one of these meetings the Morriscs were “offered the opportunity to co-brand with Chock Full O’ Nuts “immediately.” Mr. Gioia 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, Mr. Gioia allegedly stated to plaintiff “(1) “if you are still behind [the] counter in six months, you are doing something wrong; (2) that the average Blimpie store showed sales of \$33,000 per month with expenses of \$24,967 or \$28,000 per month in sales with expenses of \$22,467; (3) that an existing Blimpie store located at 55<sup>th</sup> Street and 8<sup>th</sup> avenue had revenues of \$20,000 per week; (4) that an existing store “someone just like you guys” had revenues of \$12,000 per week immediately, upon opening; (5) Mr. Gioia also allegedly represented that plaintiff would “attain their level of success or higher” (Amended Complaint, par 74).(earnings claims).

On November 22, 2002, after meeting with Mr. Gioia, the Morriscs met with an experienced franchise attorney who they retained to review and advise them on the Offering Circular and Franchise Agreement. On December 2, 2002 Blimpie sent a second copy of the Franchise Agreement with a Questionnaire/Rider annexed for the Morriscs to review with their attorney (Defendant’s Ex K). There were no material questions or changes made to the documents.

The parties executed the Franchise Agreement on December 30, 2002. Prior to the execution of the Franchise Agreement, Mona Morris was asked to sign a letter that asks perspective franchisees to identify the persons with whom it has negotiated for the Blimpie franchise, to identify any written materials received from those individuals and to confirm that there were no earnings claims, warranties or other representations made to them other than those in the Offering Circular or Franchise Agreement (Letter, Defendant's Ex N). The Letter states in pertinent part that:

We understand that if improper sales practices have occurred, the Blimpie's Associates, Ltd Legal Department, with appropriate notice prior to agreement execution, will be able to either rectify and cure the violation or in the alternative, reject the franchise sale ... .

We have signed this letter in order to assist your compliance program recognizing that Blimpie Associates, Ltd is relying on these statements to your detriment and based upon this letter Blimpie Associates, Ltd will consider that the compliance audit has confirmed with applicable laws, rules and regulations.

Mona Morris executed the Letter without comment. Mona Morris thereafter reviewed the Franchise Agreement and Rider/Questionnaire, a copy of which had been provided to her previously on October 24, 2002 and on December 2, 2002. Mona Morris was asked to read each of the seven representations in the two-page Rider/Questionnaire and to indicate her affirmation or disagreement with each representation by circling "yes" or "no," as well as by initialing their response. On the following page of the Rider/Questionnaire, spaces were provided for the franchisee to explain any of their "no" responses should an explanation be necessary (Blimpie Ex O).

The Questionnaire, located, in paragraphs 4.1 through 4.7 of the Rider, states

4.1 Operator has been represented by independent counsel who has reviewed the OFFERING CIRCULAR and this Blimpie Franchise

Agreement.

4.2 Operator is fully informed as to all of Operator's obligations, and of Franchisor's limited obligations as set forth in this Agreement and the OFFERING CIRCULAR.

4.3 Operator has only had contact, negotiations and/or discussions with the Salesperson(s) identified in Paragraph 1 of this Rider regarding this franchise sale or the offer and acceptance of this agreement.

4.4 Except for the salespersons(s), no other salesman, staff member, entity, or associate of franchisor nor any other salesman, staff member, associate or entity of the Subfranchisor met the Operator regarding this franchise sale or the offer and acceptance of this agreement.

4.5 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.

4.6 Operator acknowledges that neither the corporate Subfranchisor nor any officer, director or agent of Subfranchisor have made any offers to sell a Blimpie Restaurant franchise except for the Salesperson(s), who is (are) acting for Blimpies Associates, Ltd. as a commissioned salesman.

4.7 Operator understands that in entering into this Agreement, Franchisor is relying upon Operator's acknowledgments, representation and commitments as stated in this Section.

Mona Morris once again executed the Rider/Questionnaire, initialing each paragraph without comment. The Morrises did not confront Blimpie with the alleged co-branding and earnings claims at this time because they believed "at the time it wasn't a big deal to me so I let it

go” (Deposition of Mark Morris, Ex F at 46, Defendant’s Motion for Summary Judgment) and “I probably forgot about them” (Deposition of Mona Morris, Ex. G, at 69-101). The Franchise Agreement also contained the following integration clause

*Section 23.2* There is no other agreement, representation or warranty made by Franchisor or any other entity or person associated with Franchisor other than contained in this Agreement. This is not subject to or conditioned upon the obtaining of a Location for Operator’s System Restaurant.

At some point in January 2003, after the Franchise Agreement and documents, were executed, but before the Morrises invested in a space, Mr. Gioia allegedly represented to the Morrises that any Blimpie store “at the intersection of a major cross street and avenue in Manhattan” would be a “million dollar store” and that the Morrises could make “\$12,000 to \$14,000 per week in the next few months” (Amended Complaint pars. 105, 119).

On January 28, 2003 Blimpie entered into a co-branding agreement with Chock Full O’ Nuts which provided that Blimpie franchisees could co-brand with Chock Full O’ Nuts with Blimpie’s prior written consent and upon qualifying with Chock Full O’ Nuts. After the closing but before plaintiff found a location for its Blimpie’s, plaintiff requested Blimpie to approve them to co-brand with a Nestle Tollhouse Café (Deposition of Mona Morris, Ex G, at 175-178).

In March 2003, plaintiff entered into a sublease with Blimpie at a location at 179 Madison Avenue. From March 10 through March 14, 2003 the Morrises attended a one week Blimpie’s training course at Blimpie’s headquarters. Plaintiff did not send a credit application to pre-qualify for a Chock Full O’Nuts co-branding until June 3, 2003 (see, Blimpie’s Ex X). Although Chock Full O’ Nuts provided her with their licensing agreement for her review and signature on June 6, 2003, she was also advised that Chock Full O’ Nuts no longer had a co-

branding arrangement with Blimpie. Plaintiff was never approved by Chock Full O' Nuts for its license (Mona Morris Deposition Ex G, at 143-148).

Plaintiff opened its business on June 6, 2003. Blimpie's notified plaintiff by letter that they had been approved for a Nestle Tollhouse café co-branding venture (co-branding letter, Dcf Ex T). The Morrises' franchise failed to perform according to their expectations and closed less than six months later, in November 2003.

In May 2004, plaintiff commenced this action against defendants. The amended complaint includes causes of action against Blimpie, Mr. Gioia and Peter DeCarlo (DeCarlo) a senior Blimpie executive. The causes of action sound in common law fraud, violations of the General Business Law Sections 683 and 687 (The Franchise Act) and breach of contract. Plaintiff seeks both damages in excess of \$180,000 and rescission of the Agreement in the following sixteen causes of action: plaintiff's 1st and 2<sup>nd</sup> causes of action seek damages and rescission respectively under the Franchise Act based upon alleged "pre-sale" representations concerning the availability of a co-branding opportunity with Chock Full O' Nuts (co-branding claims); plaintiff's 3<sup>rd</sup> and 4<sup>th</sup> causes of action sound in common law fraud and seek damages and rescission, respectively, based upon the co-branding claims; plaintiff's 5<sup>th</sup> and 6<sup>th</sup> causes of action are for breach of contract and seek damages and rescission respectively, based upon the co-branding claims; plaintiff's 7<sup>th</sup> and 8<sup>th</sup> causes of action allege a violation of the General Business law Section 683 and in their 9<sup>th</sup> and 10<sup>th</sup> allege violation of General Business Law Section 687, and seek alternatively, damages and recession based upon allegations that defendants made "pre-sale" earnings claims or projections of the amount of income plaintiff would earn from the operation of their Blimpie restaurant causing plaintiff to enter into the Franchise Agreement and

the Lease (earnings claims); in the 11<sup>th</sup> and 12<sup>th</sup> causes of action plaintiff uses the earnings claims as the basis of causes of action sounding in common law fraud seeking alternatively, damages and rescission; in the 13<sup>th</sup> and 14<sup>th</sup> causes of action sounding in common law fraud, plaintiff alleges defendants made certain post-sale misrepresentations that caused them to enter a lease agreement and open a Blimpie's store; in the 15<sup>th</sup> and 16<sup>th</sup> causes of action sounding in breach of contract plaintiff seeks damages and rescission alternatively based on allegations that Blimpie failed to provide them with support services and training as required by the Franchise Agreement.

Shortly after issue was joined Blimpie made a motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) solely based upon the documentary evidence. In its decision and order dated March 23, 2005 the Court denied the motion finding that it was too early to tell whether plaintiff's reliance on defendants' purported misrepresentations was unreasonable until the factual record was more fully developed.

Defendants now moves for summary judgment to dismiss all 16 causes of action in the complaint alleging that defendants are liable to plaintiff for common law fraud, violation of the New York Franchise Sales Act and breach of contract by (1) orally representing to plaintiff that it will be able to co-brand with Chock Full O' Nuts (co-branding claims), and (2) orally representing that its Blimpie has the potential to be successful and that other existing Blimpies had high actual sales (earnings claims).

### **Discussion**

#### *Legal Standard Governing Summary Judgment*

Summary judgment should only be granted where there are no triable

issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). In order to prevail on a motion for summary judgment, the movant must present a prima facie case demonstrating entitlement to judgment as a matter of law (*Prince v. DiBenedetto*, 189 AD2d 757, 759 [2<sup>nd</sup> Dept 1993]; *Zarr v. Riccio*, 180 AD2d 734, 735 [2<sup>nd</sup> Dept 1992] ). Once the movant has established its prima facie case entitling it to summary judgment as a matter of law, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact ... mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The evidence presented on summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*Goldstein v. County of Monroe*, 77 A.D.2d 232, 236 [4<sup>th</sup> Dept 1980] ). Accordingly, summary judgment is only appropriate where the movant satisfies his or her initial burden of proof and the nonmovant's opposition to the motion is "entirely conjectural and there is no genuine issue [of fact] to be resolved" (*Cassidy v. Valenti*, 211 AD2d 876, 877 [3<sup>rd</sup> Dept 1995] ).

#### Common Law Fraud

Plaintiffs has asserted a claim for common law fraud against defendants Blimpie, DeCarlo and Gioia in its 3<sup>rd</sup>, 4<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> causes of action arising from the alleged misrepresentations regarding Blimpie's earnings claims. To prove fraud, a plaintiff must show (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 (*Lama Holding Co., v Smith Barney Inc.*, 88 NY2d 413, 421

[1996]). Defendants seek summary judgment based upon the argument that the representations that form the basis of plaintiff's fraud claims are non-actionable statements of opinion and that any reliance on oral representations by Blimpie's agents was unreasonable in light of the disclaimers in the Offering Circular, Franchise Agreement, Rider/Questionnaire, and Letter.

In order to properly evaluate this claim, it is necessary to outline the various representations plaintiff contends were made. Plaintiff claims that Blimpie sales person, Mr. Gioia fraudulently represented (1) that "if you are still behind [the] counter in six months, you are doing something wrong; (2) that the average Blimpie store showed sales of \$33,000 per month with expenses of \$24,967 or \$28,000 per month in sales with expenses of \$22,467; (3) that an existing Blimpie store located at 55<sup>th</sup> Street and 8<sup>th</sup> avenue had revenues of \$20,000 per week; (4) that an existing store "someone just like you guys" had revenues of \$12,000 per week immediately, upon opening and that (5) in January 2003, after the Franchise Agreement was executed but before the Morrises invested in a space, defendants generally represented to the Morrises that any Blimpie store at the intersection of a major cross street and avenue in Manhattan would be a "million dollar store" and that the Morrises could make "\$12, 000 to \$14, 000 per week in the next few months" (Amended Complaint paras. 105, 119).

A careful review of the statements allegedly made reveals that two general types of pre-contract and post-contract misrepresentations were made: statements regarding the potential profitability of plaintiff's prospective Blimpie store and those regarding the existing profitability of Blimpie franchises. The former statements constitute mere "puffing" or opinions as to future events and profitability of a Blimpie store and as such cannot form the predicate of a fraud claim (*Catlyn Thomas v Joseph McLaughlin* ., 276 AD2d 440 [1<sup>st</sup> Dept 2000]; *Crossland Savings, FSB*

*v SOI Development Corp.*, 166 AD2d 495 [2d Dept 1990]).

With regard to both potential and existing profitability claims of Blimpie stores, defendants assert that any reliance by the Morrisses on oral representations by Blimpie and its sales agents was unreasonable as a matter of law in light of the detailed information they read and received, acknowledgments they made and specific disclaimers they reviewed, all with the help of their experienced franchise attorney. The Court agrees. A party is foreclosed from establishing justifiable reliance to support fraud where that party has, by its own specific disclaimer of reliance upon oral representations himself has been guilty of deliberately misrepresenting his true intention (*City Bank NA v Plapinger*, 66 NY2d 90, 94 [1985]).

Here, the Morrisses agreed in the Offering Circular, which by signing the Franchise Agreement they acknowledged they received and read, that:

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 subfranchisors to furnish any oral or written information concerning the **actual, average projected, forecasted, or potential sales, costs, income or profits of a franchise** (Emphasis added).

Plaintiff also acknowledged in its responses to the seven detailed disclaimers in the two page Rider/Questionnaire in the Franchise Agreement that

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.**

(Emphasis added).

In addition, it acknowledged its understanding in the Letter that Blimpie “is relying on these statements” and that “based upon this letter Blimpie Associates, Ltd will consider that the compliance audit has confirmed with applicable laws, rules and regulations”

When confronted with the acknowledgments in the Questionnaire/Rider that no oral representations were made or were relied upon and that the detailed and clear language in these disclaimers regarding the understanding of the Morrises that any representations regarding the actual performance of existing franchises were not authorized, it would be “difficult to envisage language which could more completely eliminate the claimed representations as an inducing factor” (*Seaman -Andwal Corp v Wright Machine Corp.*, 31 AD2d 136, 138 [1<sup>st</sup> Dept 1968], *aff'd* 29 NY2d 617 [1971]).

Moreover, in the third and fourth causes of action plaintiff alleges that the Morrises detrimentally relied upon the pre-sale misrepresentation that Chock Full O' Nuts would be “immediately available for co-branding” and claim that they were caused to enter their sublease agreement with Blimpie and invest in the building. However, the parties do not deny that there was a signed co-branding agreement in place with Chock Full O' Nuts prior to plaintiff's locating and leasing space, thus plaintiff cannot show that it relied to its detriment on the alleged representation. Nor can plaintiff establish that the promise was made with the intention not to perform (*Handel v Bruder*, 209 Ad2d 282 [1<sup>st</sup> Dept 1994]). In addition, once plaintiff executed the Franchise Agreement on December 30, 2002, plaintiff was contractually bound to enter into a lease, open and operate a Blimpie. Finally, this reliance is contradicted by the detailed

disclaimers in the Questionnaire and Letter.

Thus, for all of the foregoing reasons, defendants are entitled to summary judgment on plaintiff's common law fraud claims as it is clear that it is unreasonable for plaintiffs to rely upon the purported representations as a matter of law.

*The Franchise Act Claims*

In addition to their common law fraud claims, the Morrises allege in their 1st, 2nd, 7th, 8th, 9th and 10th causes of action that defendants violated various provisions of the Franchise Act. Specifically, plaintiffs assert that the representations concerning potential and actual earnings claims made before the Franchise Agreement was executed violate the disclosure and anti-fraud requirements of sections 683 and 687 of the Franchise Act, since they were not included in the Offering Circular and were intentional misleading misrepresentations. Plaintiff states that in "reasonable reliance" on the aforementioned earnings claims concerning potential and actual income and sales of Blimpie stores, plaintiff entered into the Franchise Agreement (Amended Comp par 92).

Blimpie claims that the Morrises' Franchise Act claims fail because their claimed reliance on any of the alleged earnings representations is not reasonable in light of their acknowledgments in the aforementioned Offering Circular, Franchise Agreement Rider/Questionnaire and Letter. In the aforementioned clauses relied upon by Blimpie, plaintiff clearly acknowledges and agrees that it is not relying upon any oral representations as to existing or potential earnings of Blimpie franchises. However, plaintiff asserts that the aforementioned disclaimers constitute "illegal" waiver and merger clauses that are barred by the plain language of the Franchise Act, pursuant to its broad remedial purpose and the holding in *AJ Temple Marble & Tile v Union Carbide Marble*

*Care, Inc.*, 162 Misc 2d 941 [Sup Ct, NY Cty 1994] aff'd 214 AD2d 473 [1<sup>st</sup> Dept 1995], aff'd as mod 87 NY2d 574 [1996]). Defendant asserts that, even if the Court relies solely upon the detailed acknowledgments in the Rider/Questionnaire and Letter, it is clear that plaintiff disclaimed any reliance on oral representations not in the Franchise Agreement. Plaintiff also asserts that the court already decided this issue in its previous decision on Blimpie's motion to dismiss and finally, that reliance is not a necessary element to claims made under these portions of the Franchise Act.

As noted earlier, this case concerns the proper interpretation of sections 683 and 687 of the GBL which discuss disclosure and anti-fraud. A brief understanding of the purposes for the provisions of the Franchise Act is helpful to an understanding of its application to the particular facts of this case. The Franchise Sales Act (GBL §§ 680-695) was enacted in 1980 in response to widespread fraud in the franchise industry, specifically through the use of misleading information, misrepresentations and deceptive practices, to induce people to purchase franchises (New York State Legislative Annual 1980, ch 730 at 286-87); N.Y.Gen.Bus.Law §§ 680 et seq. (McKinney 1984); see *Mon-Shore Management, Inc. v. Family Media, Inc.*, 584 F.Supp. 186, 189 (S.D.N.Y. 1984); Kaufmann, Practice Commentary to Article 33, at 587-88 (McKinney 1984). The remedial purpose of this statute is accomplished by protecting prospective franchisees from unscrupulous franchisors who had all the information in their exclusive control by requiring franchisors to supply prospective franchisees full and accurate pre sale disclosure on the part of the franchisor through the registration of a prospectus (§ 683) and with all material information necessary to make an informed judgment concerning the offer (§ 687). The expansive anti-fraud provision is used to remedy abuse through post-sale monitoring,

investigation, civil and criminal prosecutions, and private civil actions (*State of New York v. Danny's Franchise Systems, Inc.*, 131 A.D.2d 746, 747 (2d Dep't 1987); Practice Commentary at 590- 93. See N.Y.Gen.Bus.Law § 680.2.(Sponsor's Mem, 1980 NY Legis Ann, at 286; Mem of Assembly Rules Comm, Bill Jacket, L 1980, ch 730; see, GBL § 680 [legislative findings and policy]).

General Business Law § 683 (2) requires that an offering prospectus, which must be registered with the Attorney General prior to the offer or sale of franchises in this state, shall contain “[a]ny 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.

General Business law § 687 (2) makes it unlawful for a person, in connection with the offer, sale or purchase of any franchise, to directly or indirectly:

....

(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....

(c)Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Section 687 (5) goes on to specifically provide that

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.

Section 687 (4) further provides that

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.**

(Emphasis added).

Section 691(1) provides that a franchisee may sue for “damages and, if such violation [is found to be] willful and material, for rescission, with interest at six percent per year from the date of purchase, and reasonable attorney fees and court cost.”

While plaintiff is correct in stating that the “clear and unambiguous” language of the Franchise Act bars release and waiver clauses, there is no language barring the type of Questionnaire disclaimers presented herein. Nor is the broad statutory anti-fraud purpose furthered by construing the disclaimers in the Questionnaire/Rider as “illegal”. Rather, it is consistent with the Franchise Act’s purpose enabling the prospective franchisee to assess the franchisee’s offer and to keep them fully informed as to its rights.

Also, unlike the traditional merger and waiver clauses examined by the court in *AJ Marble* (162 Misc 2d 941, *supra*), which were found to impermissibly permit defendants to get around the Franchise Act by contracting out of “the liability imposed on the franchisor” by the Franchise Act ( 947-948) in violation of the “purposes of the act”(948), the instant Questionnaire/Rider, is an interactive document that is a reflection of the “ongoing contractual relationship between the franchisor and franchisee”(see, *Matter of Southland corp., v Attorney General of the State of New York*, 148 Misc 2d 390 [NY Cty 1990]) and solicits factual information and representations from a prospective franchisee. Thus, unlike the boilerplate contract clauses in *AJ Marble* inserted to deceive an unsuspecting purchaser, this document reviewed in advance of the closing by a well respected franchise attorney and accepted for filing by the New York State Department of Law without comment in February 2002, required the Morrisises to pro-actively review their dealings with Blimpie sales people that led up to the sale of

the franchise with Blimpie and to affirmatively respond to the seven questions posed. Far from an attempt to contract out of liability this document is a responsible attempt by Blimpie to confront prospective purchasers about any misrepresentations or misconceptions. The Court finds the Letter to be in the same vein and thus, both documents are not “illegal” or void pursuant to the Franchise Act.

Finally, plaintiff’s reliance on this Court’s March 2005 decision denying dismissal of plaintiff’s claims pursuant to CPLR 3211(a)(1) is misplaced as the defendant’s basis for summary dismissal of the statutory fraud claims are not the waiver or integration clauses in the Franchise Agreement as discussed in this Court’s previous decision, but solely on the specific disclaimers in the Offering Circular, specific responses and denials in the Rider/Questionnaire and the acknowledgments in the Letter.

The court thus finds that, given their reading and execution of the Questionnaire/Rider and Letter prior to their execution of the Franchise Agreements, the Morrises could not justifiably rely on the alleged co-branding and earnings claims.

While plaintiff asserts that justifiable reliance is not an element under the Franchise Act, it provides this court with no authority for this. In the absence of authority, the court turns to the statutory language and statutory scheme. While plaintiff is correct that § 687 makes no reference to reliance as a prerequisite of recovery, GBL section 691 provides a private cause of action for damages under §§ 683, 684 and 687 of the Franchise Act, to “the person purchasing the franchise”. This section is contrasted with §692 which is concerned with prospective franchisees who were victims of franchisor fraud. Here, the Legislature provides for an investigation by the Attorney General which has broad investigatory and enforcement powers (General Business Law

§§ 688, 689, 692) and, enforcement by way of both criminal and civil action (*id.*, § 690).

Moreover, the Franchise Act incorporates reliance by the use of the word “fraud”, of which reliance is one of the essential elements. Absent some indication to the contrary, the term “fraud” must be given its common law meaning. The Court notes that even plaintiff, mentions the term “reliance” in its statutory claims (*Am Comp* pars 92, 100)

Also, at least one New York case has intimated that justifiable reliance is a necessary element. In *Oliveri v McDonald's Corp.*(678 F Supp 996 [ED NY 1988]), the court dismissed a claim brought by a prospective franchisee on the basis the he “did not rely upon it and does not have a civil remedy under the statute ( *id* at 1000-1001). Finally, the federal courts, in interpreting the securities laws, which the New York Franchise Act was based upon in large part, reads justifiable reliance into their statute (*Dua Pharmaceuticals v Broudo*, 544 US 336, 341-342 [2005]).

Thus, without a showing of justifiable reliance upon the alleged fraudulent oral co-branding and earnings representations, plaintiffs’ Franchise Act causes of action must fail.

#### Breach of Contract

Plaintiff’s 5th and 6th causes of action allege that Blimpie breached its Franchise Agreement with plaintiff by failing to consummate a master co-branding arrangement with Chock Full o’Nuts “immediately” as promised orally by Mr. Gioia and in the Offering Circular. The portion of the Offering Circular plaintiff relies upon simply states:

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).

However the Offering Circular clearly explains the necessity of preapproval stating that:

Blimpie's approval of a co-brand partner is not the same as approval of your site for participation. If you wish to participate Blimpie must approve your location for co-branding. Blimpie is not required to approve your site for co-branding..."

In addition, in the Franchise Agreement itself plaintiff acknowledged that:

Subject to franchisors prior written approval, operator may install approved co-branding marketing systems to be operated in conjunction with operators system restaurant.

(See Franchise Agreement as ex. D, par 23.8)

Finally, the acknowledgments plaintiffs made in Questionnaire/Rider and a Letter, forecloses plaintiff's reliance.

Plaintiff's fifteenth and sixteenth causes of action for breach of contract arise from Blimpie's alleged failure to provide "adequate training and support". In order to obtain rescission based on material breach of contract, the plaintiff must allege that the breach is material and willful or is so substantial that it defeats the purpose of the contract (Graham v James, 144 F 3d 229 [2d Cir 1998]). The parties' agreed in their Franchise Agreement that "[t]he training program and manner of conducting such program shall be at franchisor's sole discretion and control" (Blimpie Ex D). The Morrises do not deny that said training was provided, in fact Mona Morris testified at length about it in her deposition (Blimpie Ex G). Additionally, plaintiff was required to give Blimpie 60 days written notice concerning these alleged breaches and this term cannot be modified (section 18.2 of Franchise Agreement). Thus, plaintiff has not shown a

material breach of the contract and the claims for damages and rescission must fail as well.

For the foregoing reasons, defendant's motion for summary judgment dismissing the complaint in its entirety is granted and plaintiff's cross motion for summary judgment is denied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted in its entirety; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied in its entirety.

Dated: September 14, 2006

ENTER:



J.S.C. [illegible]

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