

**AGT Crunch Acquisition LLC v Bally Total Fitness Corp.**

2008 NY Slip Op 30247(U)

January 16, 2008

Supreme Court, New York County

Docket Number: 0601684/2007

Judge: Richard B. Lowe

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

PRESENT: \_\_\_\_\_  
Justice

PART 56

AGT

INDEX NO. 601684107

MOTION DATE 11/13/07

- v -

MOTION SEQ. NO. 03

Bally Total

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

MOTION FILED IN A CONFORMANCE WITH THE DECISION

FILED  
JAN 29 2008  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: 1/16/08

RICHARD B. LOWERY J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate  DO NOT POST  REFERENCE

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

-----x  
AGT CRUNCH ACQUISITION LLC,

*Plaintiff*

Index No: 601684/07

*-against-*

**DECISION AND ORDER**

BALLY TOTAL FITNESS CORPORATION, BALLY  
TOTAL FITNESS HOLDING CORPORATION,  
CRUNCH FITNESS INTERNATIONAL, INC.,  
HEALTH & TENNIS CORPORATION OF NEW YORK,  
INC., JACK LA LANNE FITNESS CENTERS, INC.,  
SOHO HO, LLC, CRUNCH L.A., LLC, 708 GYM, LLC,  
WEST VILLAGE GYM AT THE ARCHIVES LLC,  
and CRUNCH WORLD, LLC,

*Defendants.*

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**RICHARD B. LOWE III, J:**

**FILED**  
JAN 29 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

This action arises out of the alleged misrepresentations concerning fitness clubs sold to the Plaintiff AGT Crunch Acquisition LLC (“Crunch”) by the Defendants pursuant to a purchase agreement dated as of September 6, 2005 (the “Purchase Agreement”). Defendants move pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the Complaint.

**BACKGROUND**

Crunch engages in the business of owning and managing fitness clubs. Crunch is defined as the “Purchaser” in the subject Purchase Agreement.

Defendants Bally Total Fitness, Bally Total Fitness Holding Corporation, Crunch Fitness International, Inc., Health & Tennis Corporation of New York, Inc., Jack La Lanne Fitness Centers, Inc., Soho Ho, LLC, Crunch L.A., LLC, 708 Gym, LLC, West Village Gym at the Archives LLC, 59th Street Gym, LLC, Flambe LLC, Ace, LLC, and Crunch World, LLC

(collectively “Defendants”) engage in the business of owning and managing fitness clubs.

Pursuant to the Purchase Agreement, Crunch agreed to purchase approximately 25 fitness clubs located in New York, Chicago, San Francisco, Atlanta, Miami, and Los Angeles from the Defendants.

Crunch alleges that Defendants made false representations and warranties contained in the Purchase Agreement and that Defendants breached provisions of the Purchase Agreement. Crunch commenced this action asserting causes of action sounding in breach of representation and warranty (first and second), breach of contract (third and fourth), trespass to chattel (fifth), and replevin (sixth). Defendants move pursuant to CPLR 3211(a)(7) to dismiss the first through sixth causes of action.

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## DISCUSSION

### *Motion to dismiss*

On a motion to dismiss made pursuant to CPLR 3211(a)(7), the court will “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

### *Breach of Representation and Warranties (first and second causes of action)*

Generally, Crunch alleges that Defendants breached certain representations and warranties in the Purchase Agreement by overstating the number of members and the quality of the membership contracts.

As to Crunch's first cause of action, Sections 3.16(d) and 3.17(e) of the Purchase Agreement concern representations and warranties of the sellers about the Disclosure Schedule, which lists certain membership contracts. Section 3.16(d) represents and warrants that the Disclosure Schedule "sets forth a list, that is complete and accurate in all material respects as of July 31, 2005, showing the approximate number of Members who are . . . subject to (i) Shared Membership Contracts and (ii) (A) Paid-In-Full Membership Contracts, (B) Financed Membership Contracts and (C) Pay-As-You-Go Membership Contracts" (Compl Ex 1, at 31). Crunch alleges that Defendants breached the representation and warranty by overstating the actual number of members disclosed in the Purchase Agreement. Further, Crunch alleges that the overstatement harmed Crunch by causing it to overvalue the fitness clubs.

Defendants' principal legal argument is that because Crunch had knowledge of the alleged breach from the facts disclosed by Defendants, Crunch may not recover under a breach of warranty claim. Indeed, the District Court in *Coastal Power Int'l v Transcon. Capital Corp.*, cited by Defendants, held that a plaintiff who closes with knowledge obtained from the defendant that the defendant was in breach of a warranty contained in the agreement may not recover for that breach (10 F Supp 2d 345, 361 [SDNY 1998]). However, *Coastal Power*, and the cases cited therein for the proposition above, are inapposite for several reasons. First, the rule cited by Defendants involves the issue of a plaintiff with "full knowledge and acceptance of facts disclosed by the seller," different from the issue encountered here (*Coastal Power*, 10 F Supp 2d at 361 [plaintiff was affirmatively informed by defendant of facts constituting breach]; see *Rogath v Siebenmann*, 129 F3d 261, 263 [2d Cir 1997] [discussed in *Coastal Power*]; *Galli v Metz*, 973 F2d 145 [2d Cir 1992] [same] [collectively, the "Federal Court Cases"]). Here,

Defendants do not submit evidence or even argue that Crunch proceeded with “full knowledge and acceptance of facts disclosed by [Defendants]” that the number of members were overstated (*Coastal Power*, 10 F Supp 2d at 361). Rather, Defendants argue that Crunch should have known. Second, the Federal Court Cases decided the issue of what the plaintiff knew at much later stages than the present stage in this litigation (*Coastal Power* [at trial]; *Galli* [same]; *Rogath* [summary judgment should not have been granted because material issues of fact existed as to what the plaintiff knew and when the plaintiff knew it]). Lastly, while the Federal Court Cases are instructive, the relevant and controlling case here is *CBS, Inc. v Ziff-Davis Pub. Co.* (75 NY2d 496; *see Coastal Power*, 10 F Supp 2d at 361).<sup>1</sup>

As to Crunch’s second cause of action, Section 3.17(a)-(c) represents and warrants that the Disclosure Schedule “sets forth a list, that is complete and accurate in all material respects as of July 31, 2005, showing each Member . . . , including such Member’s Facility location, member number, type of membership contract, renewal date, rights to renew, renewal price and terms of payment” (Compl Ex 1, at 31). Crunch alleges that Defendants affirmatively concealed and materially omitted to disclose, among other things, that over 80% of the membership contracts contained restrictions on Crunch’s ability to raise membership fees.

Defendants argue that Crunch cannot cite a Section in which Defendants represent or warrant that Crunch could raise the membership renew prices without limitation. The argument strikes the Court as curious because despite Crunch’s allegations that Defendants failed to

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<sup>1</sup>Additionally, Defendants argue that if Crunch can allege that Defendants overstated the number of members, Crunch should have also alleged why the overstated number should not have been included. While the general proposition is sound as a general matter, it is irrelevant for the purpose of deciding this motion to dismiss.

disclose information regarding renewal price limitations, Defendants argue that they never represented and warranted that Crunch “could charge unlimited renewal rates” (Mem of Law, at 7). Moreover, nothing in the Complaint or Crunch’s moving papers suggest that Crunch believed that it could raise membership renewal prices without limitation. Crunch appears to argue that a “complete and accurate” representation and warranty as to the “type of membership contract, renewal date, rights to renew, renewal price and terms of payment” includes disclosure of whether the contract contains a provision that restricts Crunch’s ability to raise membership renewal prices under any circumstance and in perpetuity. Defendants’ insistence that it made no representation that Crunch had an unlimited ability to raise renewal prices appears to prevent Defendants from recognizing what it did represent and warrant, and, more importantly, what Crunch interprets that representation and warranty to mean.

Additionally, Section 3.17(e) represents and warrants that “[e]ach Membership Contract entered into by [Defendants] after July 31, 2003 is substantially in the form of one of the Membership Contracts previously provided to [Crunch]” (Compl Ex 1, at 32). Crunch alleges that Defendants had previously never provided to Crunch membership contracts which contained riders or side-letters. However, Crunch alleges that some membership contracts entered into by the Defendants after July 31, 2003 contained riders or side-letters which restricted Crunch’s ability to raise membership fees. Here, Defendants advance nothing to contradict the allegation that Defendants breached an express representation and warranty by entering into membership contracts that were not substantially in the form of one of the membership contracts previously provided to Crunch. Accordingly, because Defendants insufficiently demonstrate that Crunch fails to state causes of action for breach of representation and warranty as to Sections 3.16 and

3.17, Defendants fail to demonstrate their entitlement to dismissal of Crunch's first and second causes of action.

***Breach of Contract (third and fourth causes of action)***

Section 5.01(a)(i)(A) of the Purchase Agreement states that Defendants shall not: "enter into any Membership Contract during the Pre-Closing Period that is a Paid-In-Full Membership with a term of greater than one (1) year." Crunch alleges that Defendants offered and entered into "Paid-In-Full Membership" renewals to members for periods of greater than one year during the Pre-Closing Period in direct violation of Section 5.01(a)(i)(A) of the Purchase Agreement

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(Compl ¶ 82). Crunch also alleges that Defendants offered and entered into Membership Contracts with membership fees, dues or initiation fees that are less than those set forth in Exhibit 5.01(a)(i)(B) of the Purchase Agreement (Compl ¶ 83).

Defendants argue that the section cited by Crunch only limits Defendants from entering into new contracts, not renewal contracts, thus, the conduct which Crunch complains of is not prohibited by the cited section of the Purchase Agreement. Indeed, Defendants argue that if Crunch wanted to prevent "renewals" for periods greater than one year, then Crunch should have negotiated for such a provision. However, Defendants reasoning belies its own argument. Nothing in Section 5.01(a)(i) limits the prohibition to "new" contracts. Instead, the plain language of Section 5.01(a)(i) states that no Defendant shall "enter into any Membership Contract." (Compl Ex 1, at 36.) Thus, if Defendants wanted the right to enter into "renewals" for periods greater than one year, then Defendants could have negotiated for such a provision. Accordingly, Defendants fail to demonstrate their entitlement to dismissal of Crunch's third

cause of action.<sup>2</sup>

As to its fourth cause of action, Crunch alleges that it is owed certain tax amounts from Defendants pursuant to Section 2.06(a)(i) of the Purchase Agreement (Compl ¶ 87). In response, Defendants argue that Crunch waived its claim for the tax amounts because Crunch failed to satisfy a condition precedent.

Here, Defendants argument of waiver by failure to comply with a condition precedent is misplaced because the condition precedent applies to Crunch's ability to bind Defendants to a specific amount, whereas the condition precedent Defendants seek would apply to entitlement to alleged tax credits - not argued by Defendants. Section 2.06(a) defines the terms under which Defendants and Crunch were entitled to tax credits. Subsections 2.06(b) to (d) define the protocol for delivering estimates of a "Preliminary Adjustment Payment," an "Initial Determination," and a "Final Adjustment Payment" to determine the binding amount owed. Subsection 2.06(c) is what Defendants rely on as the condition precedent with which Crunch failed to comply. Thus, if Crunch indeed waived a claim under Section 2.06, the waiver would be of the amount Crunch seeks to impose, and not Crunch's ability to seek a tax credit completely. Accordingly, because Defendants fail to demonstrate that Crunch is not entitled to tax credits under Section 2.06 as a matter of law, Defendants fail to demonstrate their entitlement to dismissal of Crunch's fourth cause of action.

***The Notice Requirement in Relation to the First Through Fourth Causes of Action***

Section 9.04 limits indemnification such that

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<sup>2</sup>The Court appreciates that on occasion vigorous and zealous advocacy may stand at the precipice of frivolity. Despite this appreciation, the Court notes its distaste for distortion of argument and fact under the guise of zealous advocacy.

[N]o claim may be asserted nor may any Action be commenced against either the Sellers or Purchaser for breach of any representation, warranty, covenant or agreement contained herein, unless written notice of such claim or action is received by such Party describing in reasonable detail the facts and circumstances with respect to the subject matter of such claim or Action on or prior to the date on which the representation, warranty, covenant of agreement on which such claim or Action is based ceases to survive . . . .

Section 9.01 provides that the representations and warranties cease to survive after April 30, 2007. This action was commenced on May 18, 2007.

Defendants argue that because Crunch did not commence its action and did not give notice of the action before April 30, 2007, Crunch's first through fourth causes of action are

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time-barred. However, the Complaint alleges that notice was provided by a letter dated April 11, 2007, which identified the breaches of representations and warranties sued upon (Compl ¶¶ 70, 78). Furthermore, Crunch argues that the time limitation found in Section 9.01 only applies to representations and warranties, therefore, the only time bar to its breach of contract claims is found in CPLR 213(a). Crunch asserts that because the action was commenced within two years after the execution of the Purchase Agreement, the action falls within the six-year statute of limitations under CPLR 213(a). Thus, Crunch argues that the causes of action for breach of representation and warranty and breach of contract were preserved under the relevant contractual and CPLR limitations. Assuming Crunch's allegations to be true for the purposes of this motion to dismiss, the Court finds that Defendants fail to demonstrate that the first through fourth causes of action were time barred.

***Trespass to Chattel (fifth cause of action)***

To establish a trespass to chattels, the plaintiff must plead an intentional and physical interference with the use and enjoyment of personal property in the plaintiff's possession,

without justification or consent (*Sch. of Visual Arts v Kuprewicz*, 3 Misc. 3d 278, 281 [Sup Ct NY County 2003]). An essential element in pleading trespass to chattel is “harm to the condition, quality or material value of the chattels at issue” (“*J. Doe No. 1,*” v *CBS Broadcasting Inc.*, 24 AD3d 215, 215 [1st Dept 2005]). As to the requisite degree of harm in the context of computer databases, “evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels” (*Register.com, Inc. v Verio, Inc.*, 126 F Supp 2d 238, 250 [SDNY 2000] [defendant held liable for harm to the chattel because unauthorized use of the database exceeded the scope of consent], citing *eBay, Inc. v*

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*Bidder's Edge, Inc.*, 100 F Supp 2d 1058, 1071 [ND Cal 2000]). The court in *eBay* explained that even if the alleged interference is negligible, the interference deprives the property owner to use its property for its own purposes (*eBay*, 100 F Supp 2d at 1071). “The law recognizes no such right to use another’s personal property.” (*Id.*)

Here, Crunch alleges that Defendants used and interfered with Crunch’s exclusive right of possession of its customer database by copying customer names and addresses (Compl ¶¶ 61-63, 93, 94). Crunch further alleges that Defendants did so intentionally and without consent (Compl ¶¶ 61-63, 93, 94).

Defendants’ arguments in support of its motion are without merit. Briefly stated, Defendants argue that Crunch cannot identify any provision in the Purchase Agreement which refers to the assignment of a customer database, that Crunch’s real claim is solicitation of members with “Shared Membership Contracts,” and that Crunch “has not and cannot allege” that Crunch was in possession of the database allegedly interfered with. Defendants misapprehend the law of trespass to chattel, a tort claim, which does not require that the personal property be

within the scope of a related assignment agreement. Rather, as Defendants aptly state in their moving brief, Crunch must allege interference with “use and enjoyment of personal property in plaintiff’s possession” (Defendants’ Mem in Support, at 16, citing *Sch. of Visual Arts v Kuprewicz*, 3 Misc. 3d 278). Second, and for the purposes of Defendants’ motion to dismiss Crunch’s cause of action for trespass to chattel, the Court is not concerned with the propriety of Defendants’ solicitation. To demonstrate entitlement to dismissal of the trespass to chattel claim, Defendants must address whether the conduct preceding the solicitations was proper, namely, whether Defendants interfered with Crunch’s customer database by copying names and

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addresses, which were in turn used to make solicitations. Lastly, and dovetailing with the first argument, Crunch alleges that Defendants’ use of the customer database “interfered with Crunch’s exclusive right of possession to its own database” (Compl ¶ 63). Thus, Crunch pleads possession as well as interference of personal property. Indeed, undercutting each of Defendants’ arguments is its own argument against the claim of replevin that Crunch “has a database with all of the contractual information” (Reply Mem of Law, at 14). Accordingly, Defendants fail to demonstrate their entitlement to dismissal of Crunch’s fifth cause of action.

***Replevin (sixth cause of action)***

Crunch alleges that it purchased “Business Assets” as defined in the Purchase Agreement (Compl ¶ 43). Citing Section 1.01 (the “Certain Defined Terms” section), “Business Assets” means “Assets,” which in turn means “all of such Person’s right, title and interest in and to all assets and properties . . ., including Contracts” (Compl Ex 1, at 2).<sup>3</sup> Thus, Crunch argues that when it purchased Defendants’ business assets, those assets included the original membership

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<sup>3</sup> “Contract” includes any “Membership Contract” (Compl Ex 1, at 3).

contracts.

Defendants argue that Crunch's claim for replevin fails to state a cause of action because no provision in the Purchase Agreement requires Defendants to turn over the originals of all membership contracts. Relying on their interpretation of Section 2.01, Defendants also argue that Crunch purchased "interests" in the membership contracts, which means that Crunch is not entitled to the originals. Lastly, Defendants argue that Crunch does not need the originals of the membership contracts because Crunch "has a database with all of the contractual information" (Reply Mem of Law, at 14). Thus, rather than demonstrating that the allegations do not fit within any cognizable legal theory, Defendants offer one interpretation of one section in the Purchase Agreement to dispute Crunch's interpretation of another section as the basis for its claim for replevin. Giving the pleadings liberal construction and accepting the facts alleged as true, the Court finds that Defendants fail to demonstrate that the allegations do not fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Accordingly, Defendants fail to demonstrate their entitlement to dismissal of Crunch's sixth cause of action.

CONCLUSION

Therefore, based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED that defendants shall serve and file its answer within twenty (20) days of service upon them of a copy of this order with notice of entry.

Dated: January 16, 2008

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ENTER:

  
JUSTICE RICHARD B. LOWE, III

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J.S.C.