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

PRESENT: Hon. Herman Cahn PART 49

Justice

TOP DOG VENTURES LLC

INDEX NO. 104741/07

MOTION DATE

- v -

MOTION SEQ. NO. 1

PK OPERATIONS INC

MOTION CAL. NO.

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . . .

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: April 17 2008

Herman Cahn

J.S.C.

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

TOP DOG VENTURES, LLC,

Plaintiff,

-against-

PK OPERATIONS, INC., DANIEL HORAN and CLAY WALKER,

Defendants.

Index No. 104741/07

Herman Cahn, J.

Defendants PK Operations, Inc., Daniel Horan and Clay Walker move to dismiss the action based on documentary evidence and on statute of limitations grounds, CPLR 3211(a)(1), (5).

BACKGROUND

In 2005, PK Operations offered to sell a franchise, to operate a "Papaya King" restaurant at the Roosevelt Field Mall in Garden City, New York.

"Papaya King" restaurants, operated by PK Operations, are fast-service restaurants that feature proprietary hot dogs and tropical drinks, as well as other menu items. Defendants Horan and Walker are officers and employees of PK Operations.

Plaintiff Top Dog Ventures, LLC and defendants entered into discussions during the summer of 2005 for plaintiff to purchase a franchise. Plaintiff alleges that based on various representations, the parties entered into a franchise agreement, dated August 25, 2005, wherein it would operate, as a franchisee, a "Papaya King" restaurant (the "Franchise Agreement").

Plaintiff alleges that defendants had made various representations in the latter part of August 2005 regarding the franchise business to induce plaintiff to purchase the franchise, such as: (i) the rent on the franchise location; (ii) the cost of construction and equipment; (iii) that the architect prepared final plans and specifications and that he was partially paid; (iv) that the building permits were obtained; (v) that the construction bids were being submitted; and (vi) the annual sales volume.

However, plaintiff alleges that defendants failed to provide an assignment of the lease between PK Operations and the mall's landlord, an assignment of the contract between PK Operations and the architect and the names and addresses of the expeditor and contractors who were submitting bids.

Plaintiff also alleges that defendants made false representations, upon which it relied, in deciding to purchase the franchise. Construction of the restaurant was substantially delayed because a building permit was never issued and the specifications provided by the contractor did not meet the town's codes as well as the landlord's requirements. Also, plaintiff alleges that the monthly sales were significantly lower than projected and could not generate sufficient cash flow to pay the cost of goods, rent and other expenses.

Plaintiff commenced this action on April 6, 2007 based on the various claimed misrepresentations and violations of the Franchise Sales Act in connection with a prospectus and the Franchise Agreement for the "Papaya King" franchise. Gen Bus Law §§ 683, 687. Section 683 sets forth extensive disclosure requirements for an "offering prospectus" concerning the offer or sale of a franchise in New York. Section 687 proscribes the making of untrue statements or omissions in a franchise prospectus and other filed documents and other fraudulent practices in

connection with franchises.

DISCUSSION

On a CPLR 3211 motion to dismiss, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87–88.

Defendants argue that the Complaint should be dismissed because the Franchise Agreement provided for a one-year statute of limitations period and all of the material misrepresentations are alleged to have been made more than 19 months prior to this action being commenced. Defendants contend that provision 22.5 in the Franchise Agreement shortens the limitations period to one year from the occurrences giving rise to an action relating to the agreement or relationship between the franchisor and franchisee.

Section 22.5 of the Franchise Agreement provides:

> Any and all claims and actions arising out of or relating to this Agreement, the relationship of the Franchisee and Franchisor, or Franchisee's operation of the Franchised Business, brought by any party hereto against the other, shall be commenced within one (1) year from the occurrence of the facts giving rise to such claim or action, or such claim or action shall be barred.

Written agreements to shorten a statute of limitations are enforceable. *John J. Kassner & Co. v New York*, 46 NY2d 544, 550–51 (1979). In *Protter v Nathan's Famous Systems, Inc.*, 246 AD2d 585, 586 (2d Dep't 1998), a similarly drafted, shorter limitations period was held enforceable in a franchise agreement.

Defendants contend that the various misrepresentations are alleged to have been made

during a meeting and telephone conferences that took place in the latter part of August 2005 to induce plaintiff to enter into the Franchise Agreement, dated August 25, 2005. However, this action was commenced on April 6, 2007, after the statute of limitations had run.

Defendants also maintain that Horan and Walker, as officers and employees of the franchisor, are intended beneficiaries of the Franchise Agreement and, therefore, the restricted limitations period equally applies to dismissal of the case as to them. Section 21.2 of the Franchise Agreement states that "nothing in this Agreement is intended . . . to confer upon any person or legal entity other than Franchisee, Franchisor, Franchisor's officers, directors, and employees . . . any rights or remedies under or by reason of this Agreement."

Plaintiff argues that the one-year limitations period provided in the Franchise Agreement is unreasonable. Plaintiff contends that since the statute of limitations provision in the Franchise Agreement is devoid of any discovery method of accrual for a fraud claim, it is against public policy. It argues that generally there are two different alternatives to determining when a fraud cause of action accrues – when the act complained of occurs or when the fraud is discovered. *Rostuca Holdings, Ltd. v Polo*, 231 AD2d 402, 403 (1st Dep't 1996). Thus, plaintiff contends that, since the limitations period in the Franchise Agreement unfairly restricts this second alternative, the limitations period should not be enforced.

With regard to the added cause of action for breach of the Franchise Agreement, plaintiff maintains that the performance obligations were continuing and, therefore, each breach for the failure to perform began the limitations period anew. For example, plaintiff argues that the defendants' continued failure to pay the rent under the lease resulted in its inability to effectuate the assignment thereby breaching their obligation anew for each day that the assignment was not

completed.

After reviewing the facts in the light most favorable to plaintiff, the motion is granted and the action is dismissed. The Franchise Agreement unambiguously stated that the parties could bring an action relating to it or the relationship between the parties, for one year after the act complained of occurred. (*See* Franchise Agreement ¶ 22.5.) Similar language – restricting the limitations period to one year – has been held unambiguous, appropriate and enforceable. *Protter*, 246 AD2d at 586. The argument that the one-year statute of limitations period violates public policy, is unavailing. Courts have routinely allowed statute of limitations to be shortened, as it was in *Protter*. Also, while the CPLR does provide for a different statute of limitations period for the *discovery* of fraud, this requirement cannot be imposed when a contract specifies what the shortened statute of limitations period will be.

With regard to the breach of the Franchise Agreement, that cause of action accrued at the time the agreement was entered into, as is typical with breach of contract claims. Plaintiff's argument that there are continuing obligations is unpersuasive. While PK Operations stated that it would provide periodic and continuing advisory assistance, which at first appears to be a continuing obligation, the provision clearly states that the franchisor would do so as it deemed advisable. Therefore, it was completely defendant's determination whether to give such advisory assistance. Also, while PK Operations failed to pay the rent and the assignment could not be completed, this cause of action accrued when the Franchise Agreement was first entered into and the assignment was not completed. Again, plaintiff was required to assert these causes of action within one year of the time of accrual, pursuant to the agreed-upon limitations period in the Franchise Agreement.

Accordingly, it is

ORDERED that the motion is granted and the action is dismissed as to all defendants; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

Dated: April 17, 2008

ENTER:

J.S.C.