

Burgers Bar Five Towns LLC v Burger Holdings Corp.

2008 NY Slip Op 33335(U)

November 20, 2008

Supreme Court, Nassau County

Docket Number: 600057/08

Judge: Stephen A. Bucaria

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AMENDED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

BURGERS BAR FIVE TOWNS LLC,

Plaintiff,

INDEX No. 600057/08

MOTION DATE: June 27, 2008
Motion Sequence # 003

-against-

BURGER HOLDINGS CORP. a/k/a
BURGERS HOLDING INC. and
ELDAD ELLA,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Memorandum of Law in Opposition..... X
- Reply Affidavit.... X

This motion, by plaintiff, for an order granting plaintiff summary judgment pursuant to CPLR §3212 against defendants and for leave to amend the complaint, and for such other and further relief that the Court may deem just, appropriate and proper, is determined as hereinafter set forth.

FACTS

In November 2006 plaintiff entered into a license agreement with the defendant Eldad Ella, President of Burger Holdings Corp., (hereinafter "BH"). The plaintiff paid the defendant an initial fee of \$50,000 and additional fees for the right to use the Burger

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Bar name and logo. Also plaintiff was to pay a royalty fee of 5% of gross sales, and another 7% mark up on all food it must buy only from defendant. Another term of the agreement was that the parties will not knowingly recruit or hire any person employed by the other party without first obtaining such other party's written consent. The parties agreed that in event of such a breach the liquidated damages would be equal to the greater of (a) employee's prior annual salary or (b) salary and benefits paid by breaching party during the first year of employment.

Plaintiff brought this action against the defendants BH and Eldad Ella for damages resulting from allegedly inaccurate representations made by defendants, about which defendants allegedly knew or should have known were false. Plaintiff is also seeking liquidated damages resulting from alleged violation of license agreement.

PLAINTIFF'S CONTENTIONS

Plaintiff argues that the license agreement with the defendants is a franchise contract, and as such it was sold in violation of the New York Franchise Act because the defendants failed to register the Burger Bar name and logo. With respect to Eldad Ella, he is jointly and severally liable for damages because as acting president of BH he materially aided in the transaction constituting the violation. Plaintiff is seeking summary judgment against the defendants for reimbursement of \$50,000 franchise fee plus interest and attorney fees.

With respect to the issue of liquidated damages, the plaintiff contends that it is entitled to summary judgment in the amount of \$35,000 because defendants willfully violated the terms of the agreement by hiring one of plaintiff's employees.

Plaintiff seeks to amend its complaint to include a cause of action against Erez Ella as CEO of BH on grounds that joint and several liability is imposed on executive officers whose actions materially aid statutory violations.

DEFENDANTS' CONTENTIONS

The defendants argue that the licensing agreement falls under the "isolated sales transaction" exemption of the New York Franchise Act. Defendants further argue that summary judgment in favor of plaintiff for franchise fees should be denied because of genuine issues of fact regarding the actual amount paid by the plaintiff.

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With respect to the issue of liquidated damages, the defendants argue that summary judgment should be denied because the employee referred to in the plaintiffs complaint was an employee of BH who was only "loaned" to the plaintiff during the crucial start up time.

Defendants further assert that Plaintiff should not be allowed to amend the complaint to add Erez Ella because the claim has no merit. Defendants base their argument on the fact that plaintiff has not set forth any specific acts that Erez Ella is alleged to have done to materially aid the alleged statutory violation.

PLAINTIFF'S REPLY

The plaintiff argues that the defendant fails to qualify for the exemption under the New York Franchise act because it was not an isolated sales transaction. The plaintiff has supplied the court with the affidavit of two individuals who were also offered a franchise agreement by the defendant.

DECISION

With respect to amending the complaint to include a cause of action against Erez Ella as CEO of BH, the motion is **denied**. The moving party has not demonstrated that there is a viable action against Erez Ella. (See, **Aponte v. Brentwood Union Free School District**, 270 AD 2d 295, 704 NYS 2d 285)

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

"It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d

607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; Zuckerman v City of New York, *supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

Applying those principles to the facts in the case at bar has warranted an intensive examination of the record as presented to this court, which includes the pertinent pleadings, affidavits and other relevant data.

With respect to the license agreement, plaintiff has established its **prima facie** entitlement to summary judgment for violation of the New York Franchise Act. Plaintiff is entitled to reimbursement of \$50,000 franchise fee plus interest and attorney fees. More specifically, GBL Section 691 (1) provides as follows:

"A person who offers or sells a franchise in violation of section six hundred eighty-three, six hundred eighty-four or six hundred eighty-seven of this article is liable to the person purchasing the franchise for damages and, if such violation as willful and material, for rescission, with interest at six percent per year from the date of purchase, and reasonable attorney fees and court costs".

Defendants sold the Burger Bar name and Logo to the plaintiff without first registering it with the Department of Law in violation of the New York Franchise Act. More specifically, GBL Section 683 (1) provides as follows:

"It shall be unlawful and prohibited for any person to offer to sell or sell in this state any franchise unless and

until there shall have been registered with the department of law, prior to such offer or sale, a written statement to be known as an "offering prospectus" concerning the contemplated offer or sale, which shall contain the information and representations set forth in and required by this section. Any uniform disclosure document approved for use by any agency of the federal government or sister state may be utilized and sought to be registered, provided that said uniform disclosure documents comply with the provisions of this article".

Defendants argue they are exempt from having to comply with GBL section 683 because the offer to sell a franchise was made only to the plaintiff. More specifically, GBL Section 684 3(c) provides as follows:

"The transaction is pursuant to an offer directed by the franchise to not more than two persons, other than persons specified in this subdivision, if the franchisor does not grant the franchisee the right to offer franchises to others, a commission or other remuneration is not paid directly or indirectly for soliciting a prospective franchisee in this state, and the franchisor is domiciled in this state or has filed with the department of law its consent to service of process on the form prescribed by the department".

The defendants' argument for exemption fails because the plaintiff has demonstrated, by the affidavits of two other individuals who were offered the Burger Bar logo before the licensing agreement took place, that the instant transaction was not the sole offer.

Therefore, for all the above reasons, the plaintiff's motion for summary judgment is **granted** as to that part of the plaintiff's motion which seeks the reimbursement of the \$50,000 franchise fee plus interest and attorney fees.

A hearing is required on the issue of attorneys fees.

Subject to the approval of the Justice there presiding and provided a note of issue has been filed at least 10 days prior thereto, this matter shall appear on the calendar of TAP II for the 29th day of October 2008 at 9:30 a.m.

A copy of this order shall be served on the Calendar Clerk and accompany the note of issue when filed. The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in TAP II to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

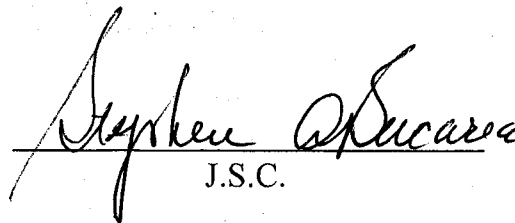
With respect to the issue of liquidated damages in the amount of \$35,000, the plaintiff's motion for summary judgment is **denied** on the grounds that the defendants have shown the existence of a genuine issue of fact regarding the status of the employee.

Defendants' claim that the employee was only loaned to the plaintiff during the start up period of the franchise, is supported by an employee registry that shows the employee was originally on the defendant BH's payroll.

A Preliminary Conference has been scheduled for October 20, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Plaintiff's attorney may obtain a Clerk's Judgment for the amount in the first cause of action.

Dated NOV 20 2008


J.S.C.