

Austin Blvd. Rest. Corp. v Iacono

2009 NY Slip Op 30155(U)

January 16, 2009

Supreme Court, Nassau County

Docket Number: 003657/2004

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

AUSTIN BOULEVARD RESTAURANT CORP.,
AUSTIN BOULEVARD PROPERTY CORP., and
650 ROUTE 112 RESTAURANT CORP.,

INDEX NO.: 003657/2004
MOTION DATE: 12/19/2008
MOTION SEQUENCE: 008

Plaintiffs,

Action No. 1

- against -

LEONARD IACONO, MICHAEL IACONO, ROBERT D.
MAYER, TSR ISLAND PARK CORP., TSR ISLAND PARK
REALTY CORP., TSR FRANCHISING CORP., and
MAYER & COMPANY,

Defendants.

TSR FRANCHISING CORP.,

INDEX NO.: 016692/2008
MOTION DATE: 12/19/2008
MOTION SEQUENCE: 001

Plaintiff,

- against -

BRIAN WARD and FRANK JACHETTA,

Action No. 4

Defendants.

The following papers read on these motions:

Notice of Motion, Affirmation & Exhibits Annexed	1
Exhibits "F" through "DD" to Affirmation in Support of Defendants' Motion for Partial Summary Judgment in Action No. 1	2

Defendants Memorandum of Law in Support of its Motion for Summary Judgment in Action No. 1 3

Notice of Motion, Affirmation & Exhibits Annexed 4

Affirmation of Marc J. Weingard in Opposition to both Motions & Exhibits Annexed .. 5

Exhibits 13 through 30 to Affirmation of Marc J. Weingard in Opposition to Motions for Summary Judgment by Defendants in Action 1 and Plaintiff in Action 4 6

Memorandum of Law in Opposition to the Motion for Summary Judgment of Leonard Iacono, Michael Iacono, TSR Island Park Corp., TSR Island Park Realty Corp. and TSR Franchising Corp. in Action 1 and the Motion for Summary Judgment of TSR Franchising Corp. in Action 4 7

Plaintiffs’ Memorandum of Law in Support of its Motion for Summary Judgment in Action No. 4 8

Defendants’ Rule 19-a Statement of Undisputed Facts in Support of Their Motion for Summary judgment in Action No. 1 9

Plaintiffs’ Rule 19-a Counter-statement of Undisputed Facts in Opposition to the Defendants’ Motion for Summary Judgment in Action No. 1 10

Plaintiffs’ Rule 19-a Statement of Undisputed Facts in Support of Their Motion for Summary Judgment in Action No. 4 11

Defendants’ Rule 19-a Counter-statement of Undisputed Facts in Opposition to the Plaintiff’s Motion for Summary Judgment in Action No. 4 12

Defendants’ Reply Memorandum of Law in Support of its Motion for Summary Judgment in Action No. 1 13

Plaintiffs’ Reply Memorandum of Law in Support of its Motion for Summary Judgment in Action No. 4 14

Motion Sequence # 1 is by the Plaintiff in Action # 4, TSR Franchising Corp. (TSR) for summary judgment pursuant to Civil Practice Law and Rules § 3212, and dismissing each affirmative defense and counterclaim in the Verified Answer to the Amended Complaint in Action # 4.

Motion Sequence # 8 is by the Defendants in Action # 1, in which they request (i) summary judgment pursuant to Civil Practice Law and Rules § 3212 on the Second Amended Complaint, and on the Eighth Affirmative Defense in their Answer to the Second Amended Complaint with Counterclaims; for dismissal of the Second and Ninth Causes of Action, and the Fourth and Fifth Causes of Action as they relate to the Spare Rib Restaurant located at 650 Rte. 112, Port Jefferson Station (PJ Spare Rib); (ii) summary judgment on the Ninth Affirmative Defense, dismissing the Third Cause of Action; (iii) summary judgment on the Fourth and Eighth

Affirmative Defenses in the Answer to the Second Amended Complaint, dismissing the First and Eighth Causes of Action, and dismissing the Fourth and Fifth Causes of Action as they relate to The Spare Rib Restaurant (IP Spare Rib), located at 4160 Austin Boulevard, Island Park, NY; (iv) summary judgment on the Complaint and the Tenth Affirmative Defense, dismissing the Plaintiffs' claim for punitive damages and attorneys fees; (v) summary judgment on their Ninth Counterclaim, for an award of attorneys fees under the franchise agreements; and, (vi) for such other and further relief as this Court deems just and proper.

Motion Sequence # 1 is decided as follows:

- (i) summary judgment is granted in favor of TSR Franchising Corp. but only with respect to the Port Jefferson location
- (ii) TSR is entitled to an assessment of damages, if any, with respect to the Port Jefferson location;
- (iii) the motion is in all other respects denied.

Motion Sequence # 8 is decided as follows:

- (i) the Second Cause of Action relating to the Port Jefferson location is dismissed;
- (ii) the Ninth Cause of Action relating to the Port Jefferson location is dismissed;
- (iii) the Fourth and Fifth Causes of Action, but only as they relate to the Port Jefferson location are dismissed;
- (iv) the Eighth Affirmative Defense is sustained, but only as it applies to the Port Jefferson location;
- (v) the Third Cause of Action is dismissed, but only as to the Port Jefferson location;
- (vi) the motion to dismiss the First Cause of Action is denied;
- (vii) the motion to dismiss the Eighth Cause of Action is denied;
- (vii) the motion to dismiss the Ninth Cause of Action is granted;
- (viii) the motion is in all other respects denied.

Background

The actions involve the purchase and sale of Spare Rib Franchises from TSR Franchising Corp. by Brian Ward and Frank Jachetta. The first transaction involved the restaurant at the Port Jefferson site. In October, 2002 Ward and Jachetta learned that the restaurant on Rte. 112 was

for sale. They signed a letter of intent to purchase PJ Spare Rib from G & W Restaurant Corp. for \$1,035,000, with a cash payment of \$400,000 and the balance of \$635,000 payable over 9 years with 8% interest.

Contemporaneously with the closing on February 13, 2003, Ward and Jachetta signed a Franchise Agreement with TSR Franchising Corp. The Franchisees were 650 Rte. 112 Restaurant Corp., Brian Ward, and Frank Jachetta. By December, 2003 the Franchisees stopped paying the advertising fees to TSR as required in the agreement. In January 2004 they discontinued the purchase of products from TSR, but continued to remain open for business, and advertises as "The Spare Rib".

In July 2004 they ceased making payments to the Seller, G & W, under the purchase agreement, and in September 2004 they turned the restaurant back to G & W in return for the cancellation of the balance due on the \$635,000 Note.

In March 2003 Ward and Jachetta sought to purchase a second Spare Rib franchise. Located on Austin Boulevard in Island Park, TSR had purchased the property in June 2002 for \$775,000, and expended some \$800,000 in renovations. TSR began operating as IP Spare Rib in October 2002.

In March 2003 Ward and Jachetta signed a letter of intent to purchase the real estate for \$1,350,000, and the business assets for \$1,250,000, for a total of \$2,600,000. The agreement was subject to the Purchasers' obtaining financing, and provided for due diligence on their part. A formal Restaurant Purchase Agreement dated September 30, 2003 called for payment of \$575,000 for the assets of IP, as opposed to the \$1,250,000 in the letter of intent, and \$1,521,000 for the realty, an increase over the \$1,350,000 in the letter. The new combined purchase price was therefore \$2,096,000.

The transaction closed on November 14, 2003, with the payment of \$75,000 cash and a note secured by a mortgage for \$500,000. The realty was sold for \$377,250 cash and a mortgage from Commerce Bank in the amount of \$1,143,750. The parties contemporaneously executed Franchise Agreement.

Almost immediately after the closing, the Purchasers claimed to have been defrauded. By letter dated January 16, 2004 TSR's attorneys agreed to rescind the agreement, and re-purchase

the Island Park realty and business. The Purchasers were amenable to the proposition, but only on the condition that TSR also purchase the Port Jefferson Spare Rib, which TSR had not sold them. Action # 1 was commenced on March 17, 2004, when TSR did not comply with the condition..

Austin Boulevard Restaurant Group and 650 Rte. 112 Restaurant Corp. have filed for Chapter 11 Bankruptcy protection in the Eastern District of New York.

The Pleadings - Action No. 1

The Second Amended Complaint identifies the Plaintiffs, Austin Boulevard Restaurant Corp. and Austin Boulevard Property Corp. as a New York corporations with its principal places of business at 4160 Austin Boulevard, Island Park, New York. Brian Ward and Frank Jachetta are their principals. TSR Franchising is the franchisor of The Spare Rib restaurants; TSR Island Park Corp. And TSR Island Park Realty Corp. are New York corporations with their principal places of business at 66 Harned Road, Commack, New York. Defendants Michael and Leonard Iacono are the principals of the TSR corporations. Robert D. Mayer was Chief Financial Officer of TSR Franchising and TSR Island Park, and Mayer & Company was an accounting firm employed by TSR Franchising and TSR Island Park, with its principal place of business at 100 East Jefryn Boulevard, Deer Park, New York.

The Complaint relates the transactions leading to the acquisition of the Port Jefferson site by the Plaintiffs, and their subsequent purchase of the land and business at the Island Park location. In connection with the latter, the Plaintiffs allege that the Iacono Defendants misrepresented to the Plaintiffs the performance of the Island Park Spare Rib, and provided them with written reports, including computer-generated information known as Micros reports, which reflected sales at the location in the range of \$45,965 per week, which the Defendants intentionally falsified. Based upon reliance on the foregoing, the Plaintiffs consummated the purchase of the realty and the assets of the Island Park Prime Rib.

From the inception of the operation of the restaurant by Ward and Jachetta, there was a noticeable decrease in the receipts, more so in cash than in credit purchases. While they were only able to retrieve data from the computer system for a single day immediately preceding the closing, that day reported order tickets for over \$1,000 from 30 customers for sales at off hours,

and without inclusion of beverages, deserts or appetizers. The contention is that during the period of due diligence, the Iocono Defendants regularly transferred cash deposits from their Commack location to that in Island Park, thereby inflating the reported sales at that location.

The First Cause of Action alleges false representations by the Defendants, upon which the Plaintiffs justifiably relied, thereby inducing them to enter into the Franchise Agreement and purchase the realty, for which they have been damaged in the amount of \$5,000,000. The Second Cause of Action alleges fraudulent misrepresentations by the Defendants leading the Plaintiffs to acquire the Franchise at the Port Jefferson location.

The Third Cause of Action alleges a failure of the Defendants to issue an Offering Prospectus in violation of §§ 683 and 691 of the General Business Law, for which they claim damages in the sum of \$2,000,000. The Fourth Cause of Action alleges a violation of § 687 of the General Business Law in that the Defendants engaged in untrue, or fraudulent, or unlawful practices in connection with the offer and sale of the franchises.

The Pleadings - Action No. 4

The Amended Complaint in Action No. 1 is dated March 28, 2005. It identifies the Plaintiff TSR as the franchisor of "The Spare Rib" restaurants. The Defendants Ward and Jachetta are principals of Austin Boulevard Restaurant Corp. and of 650 Route 112 Restaurant Corp. It alleges that the parties executed Franchise Agreements on February 13, 2003 for the Port Jefferson franchise, and on November 14, 2003 for the Island Park Franchise. In addition, the parties personally and unconditionally guaranteed the performance of both Agreements.

Both Agreements called for the payment of a weekly "Continuing Fee", contributions to a local advertising fund, and required franchisees to make available all their financial records upon 3 days notice from TSR. Because of the failure of Austin Boulevard, and Ward and Jachetta as guarantors, to comply with the obligations under the Island Park Franchise Agreement, TSR terminated the franchise as of April 23, 2004. Similarly, as a result of 650 Rte. 112, or Ward and Jachetta as guarantors, to comply with the obligations under the Franchise Agreement, TSR terminated the Port Jefferson Franchise Agreement as of April 23, 2004.

In addition, the Amended Complaint alleges failure on the part of each of the foregoing corporations and guarantors to comply with post-termination obligations contained in the

Franchise Agreements. These obligations included payment of all outstanding marketing and other fees, as well as other outstanding obligations; the return to TSR all Manuals, Menus, advertising materials and other printed material; compliance with all other obligations of the Franchise Agreement; and immediate cessation of the name “The Spare Rib”, and other Marks and Business Systems defined in the Agreements. It is further alleged that, in violation of non-competition provisions, the corporations and individuals continued to operate as restaurants at their respective locations.

The First Cause of Action seeks judgment against Ward and Jachetta on their individual guarantees for the Island Park location. The Second Cause of Action requests the same relief against the Defendants based upon their Port Jefferson individual guarantees.

The Verified Answer to the Amended Complaint denies the essential allegations of the complaint, but admits the failure of the Defendants to comply with certain obligations under each of the Franchise Agreements, but only because they were fraudulently induced into entering into both the Island Park and Port Jefferson Franchise Agreements.

The Answer raises four affirmative defenses: failure to state a cause of action upon which relief can be granted; the First Cause of Action is barred by fraudulent inducement of Austin to enter into the Franchise Agreement; the First Cause of Action is barred by the doctrines of estoppel, waiver, laches, and unclean hands; a prior action between the parties, Nassau County Index No. 04-003657 was removed to the United States Bankruptcy Court under Adv. Pro. No. 04-8601. The Answer also adopts the Amended Complaint in the prior action and incorporates it as a counterclaim.

Legal Principles

Summary Judgment

When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of

fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must “ ‘ 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’ ”. (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Fraud in the Inducement

In order for a party to successfully establish that they were fraudulently induced to execute an instrument, they must allege and prove a false misrepresentation of a material fact, which is known by the other party to be false and intended to be relied on when made, and upon which the plaintiff placed justifiable reliance which resulted in injury. (*Gaidon v. Guardian Life Ins. Co. Of Am.*, 94 N.Y.2d 330, 348 [1999]).

Discussion - Motion Sequence # 1 in Action # 4.

By this motion the Plaintiff, TSR seeks summary judgment against Ward and Jachetta on their personal guarantees of the performance of the Franchise Agreement and the dismissal of the affirmative defenses and counterclaims in the Defendants' answer. The Plaintiff alleges, and the Defendants do not dispute, that Ward and Jachetta executed agreements on behalf of 650 Rte. 112 Restaurant Corp. and Austin Boulevard Restaurant Corp. for the Port Jefferson and Island Park locations respectively, and further that they personally guaranteed the performance of the

corporations. But the Defendants respond that they were the subject of knowingly fraudulent misrepresentations by the Plaintiff as to the reported income at the Island Park premises, that they justifiably relied upon such misrepresentations, and that they suffered injury as a result.

The reply of the Plaintiff is essentially that the Defendants were obligated to exercise due diligence, that oral representations as to the productivity of the restaurant are merged in the written documents, and that those documents specifically provide in part in ¶ 27.2 as follows:

The Franchisee acknowledges that it has not received any estimates, projections, representations, warrants or guarantees, expressed or implied, regarding potential sales, Gross Revenues, income, profits, earnings, expenses, financial or business success, value of the Restaurant, or other economic matters pertaining to the Franchisee's Restaurant from Franchisor or any of its agents that were not expressly set forth in Franchisor's Uniform Franchise Offering Circular received by the Franchisee Ihereinafter referred to in this provision as "Representatitons").

TSR has made a prima facie showing of entitlement to summary judgment, including the existence of a Franchise Agreements and personal guarantees by the individual Defendants. In order to defeat the motion, the Defendants are required to bare their proof, in admissible form, sufficient to raise questions of material fact. They have done so with respect to the Island Park franchise. There exists a material issue of fact as to whether or not the Plaintiff manipulated the financial records of the Island Park Prime Rib during the period when the Defendants-Purchasers were performing their "due diligence" inquiry. A further factual issue is whether or not the Purchasers exercised adequate diligence, and if they did not, whether more rigorous inquiry would have revealed the bookkeeping irregularities which they allege. (*Westbury Small Bus. Corp. v. Ballarine*, 128 Misc.2d 469, 476 [Sup. Ct. Nassau Co. 1985]), *aff'd*. 125 A.D.2d 462 [2d Dept. 1986]).

The merger clause in the Franchise Agreements does not preclude the claim for damages as a result of fraudulent misrepresentations which induced a party to justifiably rely to their detriment. (*Braddock v. Braddock*, 2009 WL 22307 [N.Y.A.D. 1st Dept. 2009]). Were the clause to absolve a franchisor from such claims, it would unjustifiably reward successful misrepresentations. The motion for summary judgment in favor of the Plaintiff in Action No. 1,

and for dismissal of the affirmative defenses and cross-claims with respect to the Island Park properties is denied.

The issue with respect to the Port Jefferson location is somewhat more complicated. While the alleged conduct of TSR consisted of falsifying sales numbers at the Island Park location, similar to the conduct of the Plaintiff in *Westbury Small Bus. Corp.*, who provided the Purchaser with falsified gasoline gallonage sales reports, there is no such "smoking gun" allegation with respect to the Port Jefferson restaurant. What the Defendants in Action No. 1 contend is that TSR orally assured them that with certain small modifications, they would be able to increase the sales volume at that location. The question, then, is whether such representations are fraudulent misrepresentations of an existing fact, or merely puffery upon which the Purchasers were not entitled to rely.

The circumstances surrounding both the Island Park and Port Jefferson purchases are stated in the affidavit of Brian Ward. (Exh. "2" to the Affirmation in opposition). The Port Jefferson transaction predated the Island Park purchase by nine months. The claims are that he and Jachetta had no concerns about the productivity of Port Jefferson. They claim that TSR, both before and after the closing, represented that if they made renovations to the real estate, installed a steam table, and improved the meal presentation, they would have no difficulty increasing the weekly sales to \$50,000. Despite undertaking the renovations, and making the suggested improvements, the sales at the location never reached the \$50,000 level.

In his December 1, 2008 affidavit, annexed to the Affirmation in Opposition, Ward alleges at ¶ 23 that "(b)y fraudulently inducing Frank and I to purchase the IP Spare Rib, the TSR Parties destroyed not only the business that Frank and I had purchased at Island Park, but also the Spare Rib franchise that we had been successfully operating in Port Jefferson since 2003". While the experience at Island Park may have soured the relationship between the parties, there are insufficient factual allegations so as to defeat a motion for summary judgment on the personal guarantees for the Port Jefferson Franchise.

The motion for summary judgment on the issue of liability is therefore granted and the affirmative defenses and counterclaims respecting the Port Jefferson enterprise is therefore granted. The Plaintiff in Action No. 4 is entitled to an assessment of damages, if any, that they

have sustained as a consequence of the Defendants' return of the operation of that facility to the preceding franchisee.

Motion Sequence # 8 in Action No. 1

By this motion the Defendants Leonard Iacono, Michael Iacono, TSR Island Park Corp., TSR Island Park Realty Corp. and TSR Franchising Corp. seek summary judgment dismissing the Second Amended Complaint as it applies to both the Port Jefferson and the Island Park locations. For the previously stated reasons those causes of action relating to the Port Jefferson location are dismissed, and the motion to dismiss those causes of action which relate to the Island Park location is denied. The Eighth Affirmative Defense is stricken as it applies to Island Park, but is substantiated as to Port Jefferson.

The parties are directed to appear in this Part on February 10, 2009, at 9:30 A.M., for a pre-trial conference on the remaining issues.

This constitutes the Decision and Order of the Court.

Dated: January 16, 2009


J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**