

**Burgers Bar Five Towns LLC v Burger Holdings Corp.**

2009 NY Slip Op 31633(U)

July 6, 2009

Supreme Court, Nassau County

Docket Number: 600057/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_

TRIAL/IAS, PART 3  
NASSAU COUNTY

BURGERS BAR FIVE TOWNS LLC,

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Plaintiff,

MOTION DATE: May 1, 2009  
Motion Sequence # 006, 007

-against-

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

Defendants.

\_\_\_\_\_

The following papers read on this motion:

- Order to Show Cause..... X
- Cross-Motion..... X

This motion, by defendant Burger Holding Corp. a/k/a Burgers Holding Inc., brought on by order to show cause, for an order 1) to order plaintiff to cease and desist from using the Burgers Bar logo and trademark in any manner; 2) to order plaintiff to make payments of all unpaid royalties and other fees due and owing to defendants to date pursuant to the Licensing Agreement entered into between the parties on or about November, 2006; 3) to declare the Licensing Agreement entered into by the parties on or about November, 2006 terminated for breach of such Agreement by plaintiff due to plaintiff's refusal to abide by the terms of the Agreement including but not limited to not paying royalties, goods delivered and the service fees as outlined in the Agreement; 4) to restrain plaintiff and/or his agents from selling, transferring, disposing or encumbering

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any and all assets of Burgers Bar Five Towns LLC other than in the ordinary course of business, or adding additional Burgers Bar restaurants in any location pending a hearing and a ruling by this court; 5) to order plaintiff to pay for the counsel fees, costs and expenses incurred in bringing this Order to Show Cause brought on solely as a result of the inappropriate conduct of plaintiff; and 6) for such other and further relief as this Court may deem just and proper; and the cross-motion, by plaintiff, for an order pursuant to CPLR §3611(b) dismissing defendant's counter-claims and defenses and/or granting plaintiff a 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, are **both** determined as hereinafter set forth.

**FACTS**

In November 2006 plaintiff entered into a license agreement ("Agreement") with the defendant Eldad Ella, President of Burger Holdings Corp. The plaintiff paid the defendant an initial fee of \$50,000 and additional fees for the right to use the Burgers 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 the event of such breach the liquidated damages would be equal to the greater of (a) employee's prior annual salary or (b) salary and benefits paid by the breaching party during the first year of employment.

Plaintiff brought this action against the defendants 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.

**PROCEDURAL HISTORY**

In June of 2008 the plaintiff moved for summary judgment pursuant to CPLR §3212 against the defendants and for leave to amend the complaint. In an order of this Court, the motion for leave to amend the complaint to include a cause of action against Erez Ella, CEO of Burgers Holding Corp. was denied. The plaintiff's motion for summary judgment was granted as to that part of the plaintiff's motion which sought the reimbursement of the \$50,000 franchise fee plus interest and attorney fees, on the basis

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that the license agreement was in violation of the New York Franchise Act. (“Order”)

### **DEFENDANT’S CONTENTIONS**

The defendant contends that the plaintiff is trying to steal the Burgers Bar name and logo by opening other Burgers Bar locations without making payment for the use of the name and logo. Accordingly, a restraining order is necessary to prevent irreparable harm to the Burgers Bar name and logo. The defendant claims that this matter is urgent because the plaintiff has not been abiding by the requirement to use only meats and burgers supplied by BHC, thereby compromising the logo and trademark by not adhering to certain quality standards.

The defendant seeks a declaration that the Agreement is terminated and without any force or effect going forward because the plaintiff breached the Agreement in refusing to pay the monies owed under the Agreement; and that the plaintiff should not continue to have rights with respect to opening other Burgers Bar locations provided in the Agreement in light of the fact that they have failed to pay the money owed.

The defendant seeks to restrain plaintiff from selling, transferring, disposing or encumbering any and all assets of the plaintiff other than in the ordinary courts of business, or adding any new locations pending a hearing and a ruling by this Court; that in the event plaintiff sells or transfers the business, defendants will not have to ability to be made whole on the monies due and owing to them.

The defendant argues that the plaintiff was given the opportunity to comply with the Order of the Court and had refused. As a result, the defendant was forced to incur legal fees to enforce the terms of the Order. In light of the plaintiff’s unreasonable and frivolous behavior, the plaintiff should be ordered to pay defendant’s legal fees.

### **PLAINTIFF’S CONTENTIONS**

The plaintiff argues that the defendants’ defenses, which revolve around the issue of defendant being innocent of failing to file the Agreement with the Secretary of the state, are meritless according to a prior decision by this Court. The Court has ruled that the defendant does not have a right to collect franchise fees because the defendant failed to register the franchise with the Secretary of State and ordered the return of the initial \$50,000 fee. Counsel asserts that since the defendant had to return the \$50,000 paid, it

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cannot have a right to collect 5% for the use of the operation and the Burgers Bar logo and operating system. Therefore, the defendants defenses, and second, third and fourth counter-claims should also be dismissed.

The plaintiff contends that the defendant's first counter-claim should also be dismissed because the defendant should not be permitted to collect for goods that were never sold at wholesale. The plaintiff notes that the goods were not sold at wholesale due to a 7% markup. Alternatively, the defendant does not have a USDA license to sell meat to the plaintiff which violates the US department of Agriculture law and thus the contract illegal and unenforceable in New York.

The plaintiff seeks to amend its complaint to include a cause of action for breach of contract and indemnity for plaintiff's defense of a federal law suit brought by a third party—the Israeli Burgers Bar— claiming that the defendant Burger Holding had no right to permit plaintiff to use its exclusive logo.

**DECISION**

The court **denies** the defendants' application because the remedies sought therein are based upon issues which have already been decided by this Court in the order of September 17, 2008. This Court rescinded the licensing agreement for violations of the New York Franchise Act, and granted the plaintiff partial summary judgment, and ordered that the defendant return the initial franchise fee plus interest and attorney's costs. The agreement has already been rescinded; therefore, the Court cannot order the plaintiff to pay monies due under the agreement, nor terminate it for breach on the part of the plaintiff.

With respect to the defendant's request for a restraining order, in order to be entitled to a preliminary injunction the moving party must establish: "(1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor." (**Ruiz v. Meloney**, 26 A.D.3d 418, 810 N.Y.S.2d 216, 2<sup>nd</sup> Dept., 2006). A preliminary injunction "will not be granted unless a clear right thereto is established under the law and the undisputed facts." (**Blake Agency, Inc. v Leon**, 283 A.D.2d 423, 723 N.Y.S.2d 871, 2<sup>nd</sup> Dept., 2001). With respect to the injunctive relief sought to prevent plaintiff from using the Burgers Bar name and logo, this Court's ruling in the order of September 17, 2008 actually supports a contrary conclusion to that propounded by the defendants.

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The defendant seeks reimbursement of his legal fees on the basis that the plaintiff's behavior has been "unreasonable and frivolous." The Court has already determined that the plaintiff's behavior is neither unreasonable nor frivolous in the Order when the Court granted summary judgment in favor of the plaintiff.

With respect to the plaintiffs' cross motion, the motion to dismiss defendants' counterclaims and defenses and/or grant plaintiff summary judgment is **denied** for failure to comply with CPLR 3212(b).

That portion of the plaintiff's cross motion for leave to amend the complaint is **granted**. "Leave to amend a pleading should be freely granted unless the amendment sought is palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party." (Surgical Design Copr. v. Carrea, 31 A.D.3d 744, 81 N.Y.S.2d 542, 2<sup>nd</sup> Dept., 2006; CPLR § 2035(b)). The breach of contract and indemnity claims are not meritless. A provision in the Agreement provides: "BB owns, and has all necessary rights to license others to use, the various trademarks and service marks employed in Burgers Bar Restaurants...." The Court determined in the Order that defendants did not have a right to franchise due to a violation of the New York Franchise Act which may constitute a breach of the stated provision. Further, the federal action is based upon this violation, and the indemnity claim is also not without merit.

The defendants cannot claim prejudice or surprise since the "proposed amendments arise out of the same facts as those underlying the action brought by the [plaintiff]." (Maloney Caprentry, Inc., v. Budnik, 37 A.D.3d 558, 830 N.Y.S.2d 262, 2<sup>nd</sup> Dept., 2007). The Court also considers that the "reasonable excuse for the delay" in seeking the amendment has been demonstrated. The defendant is amending the complaint to include indemnity and breach of contract after commencement of legal action in federal court.

In sum, the defendants' motion is **denied**; the plaintiff's cross-motion is **granted**.

The certification conference shall be held in Chambers of the undersigned on July 28, 2009 at 9:30 a.m.

Dated JUL 06 2009

*Stephen A. Buccarone*  
J.S.C.

**ENTERED**

JUL 02 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE