

**Austin Blvd. Rest. Corp. v Iacono**

2009 NY Slip Op 33131(U)

December 15, 2009

Supreme Court, Nassau County

Docket Number: 003657/2004

Judge: Ira B. Warshawsky

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

E

**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.,

Plaintiffs,

**Action No. 1**

INDEX NO.: 003657/2004  
MOTION DATE: 10/02/2009  
MOTION SEQUENCE: 011

-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.,

Plaintiff,

**Action No. 4**

-against-

INDEX NO.: 016692/2008

BRIAN WARD and FRANK JACHETTA,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed .....	1
Affirmation in Opposition of Marc J. Weingard & Exhibit Annexed .....	2
Reply Affirmation of Marc A. Stein .....	3

## PRELIMINARY STATEMENT

TSR Franchising Corp. (“TSR”), Defendant – counterclaimant in action No. 1, and Plaintiff in action No. 4, moves for an order directing the Clerk of Nassau County to enter judgment in favor of TSR and against Plaintiff – Counterclaimant Defendant 650 Route 112 Restaurant Corp. for \$37,790.77, plus pre-judgment interest from April 24, 2004 at the statutory rate of 9%, representing unpaid Continuing Fees up until the date of the termination of the agreement between the parties. Plaintiffs also seek judgment in the amount of \$969,704.33 for unpaid weekly Marketing (Advertising) fees for the entire duration of the franchise agreement, terminating on February 21, 2018. Plaintiff in Action No. 1 and Defendants in Action No. 2 do not challenge the calculation of \$37,790.77 for unpaid Continuing Fees, but to dispute the claim for marketing fees for a period long beyond the termination of the agreement.

## DISCUSSION

The resolution of this motion depends upon the interpretation of the Franchise Agreement and the effect of its termination by the parties. Among the more salient aspects of the Franchise Agreement are the following:

### ARTICLE 6 CONTINUING FEE

#### 6.1 Amount of Continuing Fee.

In addition to the Initial Fee payable by the Franchisee, the Franchisee will, each week during the entire Term of this Agreement, pay Franchisor a Continuing Fee according to Schedule B.

#### 6.2 Franchisee’s Obligation to Pay.

The Continuing Fee payable to Franchisor under this Article will be paid to Franchisor by the Franchisee every period during the entire Term of this Agreement, and the Franchisee’s Agreement. The Franchisee’s obligation to pay Franchisor the Continuing Fee pursuant to the terms of this Agreement has expired *or until this Agreement has been terminated in accordance with the terms and conditions set forth in this Agreement and applicable law (emphasis supplied)*. The Franchisee will not have the “right of offset” and, as a consequence, the Franchisee will timely pay all Continuing Fees

due to Franchisor under this Agreement regardless of any claims or allegations the Franchisee may allege against Franchisor.

#### 6.4 Interest on Unpaid Continuing Fees.

If the Franchisee fails to remit the Continuing Fee due to Franchisor as provided for in in Section 6.3, then the amount of the unpaid and past due Continuing Fee will bear *simple interest (emphasis supplied)* at the lesser of: (A) the maximum legal rate allowable by applicable law; or (B) eighteen (18%) simple interest per annum.

### ARTICLE 7 MARKETING FEES

#### 7.1 Local Advertising Fee; Use of Funds

Franchisee shall spend not less than one (1%) of its Gross Revenues per week for local advertising.

...

#### 7.2 Local DMA or Other Designated Area Advertising Fund.

The Franchisee will, at the sole discretion of Franchisor, be required to immediately execute such documentation as required by the Franchisor and contribute to a Local SMA or Other Designated Area Advertising Fund (the "Local Fund") and be subject to all terms and conditions of this Section 7.2. If a Local Fund is established by Franchisor for a designated market area or other designated area (the "Designated Area"), Franchisee agrees to contribute pursuant to Schedule C for each Restaurant operating with the Designated Area to the Local Fund.

Plaintiffs seek, and Defendants acquiesce in, a claim for \$37,790.97 for unpaid Continuing Fees under Article 6. To the contrary, however, Plaintiff (TSR) claims that the obligation to pay Marketing Fees under Article 7, continue to the end of the original term of the Agreement, 18 years, and amount to \$960,704.33. Plaintiff distinguishes between Article 6 and Article 7, essentially relying on the inclusion of the words "or until the Agreement has been terminated" in Article 6, but not in Article 7.

The Court concludes that this is a difference without distinction. There is no controversy

but that Franchisor served a Notice of Termination dated April 23, 2004, pursuant to ¶ 18.6 of the Agreement. Exh. "1" to Affirmation in Opposition. Aside from the fact that this document makes no reference to a continuing obligation to pay, the payment schedule, Schedule "C", has as its introductory sentence "(d)uring each year of the term of this Agreement, Franchisee will be required to remit to the Franchisor a weekly advertising fee in accordance with Section 7.2 of this Agreement. . . ." Upon termination by letter dated April 23, 2004, the term of the Agreement concluded.

Based upon the schedule provided by Plaintiff, Exh. ""E" to motion, it appears that commencing November 23, 2003, Defendants have failed to make 22 payments, each in the amount of \$1,200 up to the date of termination. Unlike the simple interest provision for Continuing Fees at the rate of 18% or the highest legal rate of interest prevailing, there is no specific provision for interest on unpaid Marketing Fees. Civil Practice Law and Rules § 5001, however, provides as follows:

**5001. Interest to verdict, report or decision**

**(a) Actions in which recoverable.** Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

**(b) Date from which computed.** Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

**(c) Specifying date; computing interest.** The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

The sum awarded to Plaintiff in Action No. 4 is based upon a breach of contract, for which interest is compensable from the date upon which it is due. Exh. "E" to the motion is a schedule of payment dates, together with interest from the date payment is due. The total of the \$1,200 payments with interest at 9% per annum from November 23, 2003 up to and including April 18, 2004, the last payment prior to termination, is \$36,528.99.

Plaintiff in Action No. 4 is entitled to judgment in the combined amount of \$74,319.96, and the Nassau County Clerk is directed to enter judgment in favor of TSR Franchising Corp. against Brian Ward and Frank Jachetta, jointly and severally in the sum of \$74,319.96.

The claims of Plaintiff in Action No. 4 for reasonable counsel fees, costs, expenses, expert witness fees, investigation, court costs, litigation fees and expenses in connection with Actions No. 1 and 4 are hereby severed, to be later determined by this Court in conjunction with (a) the claims of TSR in Action No. 1 under the remaining counterclaims; (b) TSR's claims in the First Cause of Action in the Amended Complaint referable to the Spare Rib Restaurant in Island Park, and that portion of the Second Cause of Action under the Guaranty of fees, including sums due under the Management Agreement between 650 and TSR Management, Inc.; and, (c) reasonable attorneys' fees, disbursements, and other expenses, including accounting fees and disbursements, incurred in Actions Nos. 1 and 4, all of which remain sub judice before this Court.

Submit Judgment.

This constitutes the Decision and Order of the Court.

Dated: December 15, 2009

  
J.S.C.

**ENTERED**  
DEC 18 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE