SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

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

Plaintiffs,

INDEX NO.: 003657/2004
MOTION DATE: 09/01/2010
MOTION SEQUENCE: 014, 015 and 016

-against-

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

(Action No. 1)

Defendants.

TSR FRANCHISING CORP.,

Plaintiff,

INDEX NO.: 016692/2008

-against-

(Action No. 4)

BRIAN WARD and FRANK JACHETTA,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Order to Show Cause, Affirmation & Exhibits Annexed	2
Notice of Cross-Motion, Affirmation & Exhibits Annexed	3
Affirmation of Marc J. Weingard in Opposition to Cross-Motion & Exhibits Annexed	4
Affirmation of Marc J. Weingard in Opposition & Exhibit Annexed	5

PRELIMINARY STATEMENT

Motion Sequence 14

TSR Franchising Corp. ("TFC") moved for leave to reargue this Court's Decision and Order dated April 26, 2010:

1) to the extent it denied TFC's prior motion to reargue this Court's Decision and Order dated December 15, 2009; and

2) to the extent it limited the damages awarded to TFC to less than the full amount requested for its claims for unpaid marketing fees and weekly continuing fees, for which this Court granted Summary Judgment to TFC in its January 16, 2009 Decision and Order.

Motion Sequence 15

Austin Boulevard Restaurant Corp.("ABRC") and Austin Boulevard Property Corp.("ABPC") moved, by Order to Show Cause, for an Order pursuant to:

1) CPLR 2221(d) that clarifies that under this Court's Memorandum Decision After Trial("Trial Decision") dated June 10, 2010, ABRC & ABPC may recover reasonable attorney fees and court costs under GBL 691;

2) CPLR 5229, that directs Leonard Iacono("L. Iacono") and TFC to immediately submit to a deposition concerning the nature, extent and location of their assets;

3) CPLR 5229, that restrains and enjoins L. Iacono and TFC, pending the entry of the impending judgment against L. Iacono and TFC, from dissipating, disposing, transferring, conveying or otherwise encumbering any assets except to the extent that said assets are exempt from application to the satisfaction of a money judgment under CPLR 5205 and 5206.

Motion Sequence 16

L. Iacono and TFC moved, pursuant to CPLR 2221(d), for:

1) leave to reargue Court's finding that "Austin" is entitled to rescission of the Island Park Franchise Agreement, and entry of an Order amending the Trial Decision accordingly;

2) Leave to reargue Court's omission of an award of damages to TFC and against 650, Ward and Jachetta, jointly and severally, for its Port Jefferson attorneys' fees and related expenses, in the Court's Trial Decision, and entry of an Order awarding said damages to TFC;

3) leave to reargue the Trial Decision to extent it omits an award of damages to TFC and

against "Austin", Ward, and Jachetta, jointly and severally, for unpaid advertising and continuing fees under the affirmed Island Park Franchise Agreement, and entry of an Order awarding said damages to TFC;

4) leave to reargue the Trial Decision to extent it omits to award damages to TFC and against "Austin," Ward, and Jachetta, jointly and severally, for attorneys' fees and related expenses for at least "Austin's" claims that were dismissed, and entry of an Order awarding said fees and related expenses to TFC;

5) clarification of Trial Decision, directing the Court Attorney/Referee that "Austin's" damages, if any, are to be limited to out of pocket damages(calculated as consideration paid less actual value as affected by consequences of the fraud) and consequential damages proximately caused by reliance on the purported fraud excluding post-discovery damages or ordinary business expenses;

6) clarification of Trial Decision directing Court Attorney/Referee that "Austin" may not seek damages related to the Island Park real property; and

7) clarification that Trial Decision directing Court Attorney/Referee to limit the scope of the parties' arguments and evidence before said Court Attorney/Referee to the evidence presented at trial.

BACKGROUND

Brian Ward and Frank Jachetta purchased a "The Spare Rib"("TSR") franchise restaurant in Port Jefferson and then another in Island Park. Ultimately both franchises dissolved into bankruptcy.

Leonard and Michael Iacono, two brothers, became the owners of the original Commack TSR restaurant in the early 1990s and later opened a second TSR restaurant in Hicksville. By 2000, Leonard and Michael Iacono decided to begin franchising the TSR restaurants.

Ward and Jachetta purchased the Port Jefferson Restaurant when plaintiff 650 Route 112 Restaurant Corp. ("650") closed on the purchase on February 13, 2003. This restaurant was purchased from a pre-existing franchisee, G & W Restaurant Corp., that was independent from the Iacono's and TFC.

In 2002, the Iacono brothers purchased the TSR Island Park property, renovated it, and

began operating a TSR restaurant at the location. This Island Park restaurant was doing poorly and losing money. (See Trial Decision, pg. 41, lines 5-10). When Ward and Jachetta raised the idea with Leonard Iacono about purchasing the Hicksville TSR restaurant L. Iacono rejected it, but suggested the Island Park TSR restaurant was "built to sell." Ward and Jachetta signed a letter of intent to purchase the IP TSR restaurant on March 24, 2003, and closed on the purchase on November 14, 2004, using the time in the interim to conduct due diligence on the restaurant.

Based on the evidence and testimony presented at trial, there was substantial evidence that the sales at the TSR Island Park restaurant were inflated to defraud the plaintiffs. After trial, this Court found by clear and convincing evidence, that TFC, the franchisor, fraudulently misrepresented facts about the Island Park TSR restaurant to the prospective franchisee, in violation of the Franchise Act.

Motion Sequence 14

In this Court's decision dated December 15, 2009, this Court determined that Action No. 4 plaintiff TFC was entitled to judgment, joint and severally, against Action No. 4 defendants Ward and Jachetta, jointly and severally, in the amount of $74,319.96. In this Court's Decision dated April 26, 2010 this Court determined, after reargument of the December 15, 2009 Decision, that

1) 650 Route 112 Restaurant Corp., Ward, and Jachetta were jointly and severally liable for $74,319.96 with interest; and

2) denied defendants motion to reargue the Court's determination that TFC was not entitled to marketing fees for 15 years pursuant to the Port Jefferson Franchise Agreement.

TFC argues that the Court, in its reliance on the First Department's decision in Reiss, overlooked the Court of Appeals rejection of relevant aspects of the First Department's decision.(See Reiss v. Financial Performance Corp., 97 N.Y. 2d 195 [2001]; Reiss v. Financial Performance Corp., 279 A.D. 2d 13 [1st Dept 2000]).

In opposition, 650, Ward and Jachetta argue, impliedly, that the CPLR does not permit a party to file a motion to reargue a prior order that denied a prior motion to reargue.(Weingard Affirmation in Opposition, para 3). They further point out that TFC did not cite *Reiss* in support

of its initial motion for partial summary judgment or the prior motion to reargue, and therefore these legal authorities were not presented to the court. Finally, they argue the contract was drafted solely by TFC's counsel and the Court of Appeals decision in Reiss still supports the courts ultimate conclusion that TFC is not entitled to marketing fees for the full 15 year period.

Motion Sequence 15

In this Court's June 10, 2010 Decision After Trial("Trial Decision"), this Court made, inter alia, the following determinations:

> "The Court finds that Plaintiffs have proven by clear and convincing evidence that the franchisor, [TFC], fraudulently misrepresented material facts to the prospective franchisee, in violation of the Franchise act." (Trial Decision, pg. 44, lines 15-17).
> "Leonard Iacono is liable as a "controlling person" under the Franchise Act. He was the motivating force, and it appears the primary actor behind [TFC's] fraudulent scheme. He is jointly and severally liable for the damages caused to Austin for the damages it suffered in connection with the purchase of the TSR Island Park and the property related thereto."(Id. at pg 45, lines 24-27)
> "The Court further determines that the conduct by the defendants found liable was willful and material as defined in GBL § 691." (*Id.* at pg. 46, lines 10,11).

TFC argues that Austin affirmed the Island Park franchise agreement through its actions after discovering the fraud and therefore should not be entitled to a claim for interest and attorney fees. TFC further argues that if Austin is entitled to any such fees, the fees should be limited only to fees related to the GBL claims, as opposed to other claims which were dismissed.

Austin argues in response that TFC raises its affirmation argument for the first time on this motion to reargue and therefore should not be considered.

Motion Sequence 16

Port Jefferson

In this Court's December 15, 2009 Decision and Order, it severed TFC's claims "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" (December 15, 2009 Order, pg 5, lines 10-12). These severed claims were to be determined in conjunction with

other outstanding claims.*Id.*

The Port Jefferson Franchise Agreement provided that:

> "Franchisee will pay attorneys' fees, costs and expenses incurred by Franchiser in enforcing any term, condition or provision of this Agreement .... In any action brought pursuant to this Agreement where Franchiser prevails against the Franchisee, the Franchisee will indemnify Franchiser for all costs that it incurs in any lawsuit or proceeding under this Agreement including without limitation, attorneys' fees, expert witness fees, costs of investigation, court costs, litigation expenses, travel and living expenses, and all other costs incurred by Franchiser." (Notice of Cross-Motion, Stein Affirmation, pg 14, para 37).

Island Park

During the first day of trial this Court dismissed any claims by ABPC under GBL. "Only [ABRC] was the purchaser of the franchise, so only that plaintiff has standing to pursue relief under GBL."(Notice of Cross-Motion, Exhibit B, TT lines 12-17).

In the Trial Decision, this Court determined, inter alia, that

> "The conduct of defendants found liable[L. Iacona and TFC] was willful and material as defined in GBL § 691. Plaintiffs are entitled to rescission of the Franchise Agreement and refund of amounts paid therefore, together with interest at the rate of 6% per year from the date of purchase, November 14, 2003, and including the advance of $50,000 paid on contract on March 24, 2003." (Id. at Exhibit A, Trial Decision, pg. 46).

TFC argues that Austin should not have been awarded recission because they waived their claim for rescission, and even if they didn't waive this claim, their conduct affirmed the franchise contract and therefore they are not entitled to rescission. In Austin's response, Austin argues, in part, that "Austin's position that rescission was no longer an option focused squarely on the fact that Austin no longer operated the Island Park Spare Rib and did not own the related property. Thus, Austin was not in a position to return the restaurant and real property to [TFC]."(Affirmation in Opposition to Cross-Motion, para 11). Austin also points out that it stated, in an affirmation in opposition to a prior motion to strike jury demand, that

> "rescission of the Island Park purchase is not possible given that TSR no longer operates a Spare Rib restaurant in Island Park, and has not done so for several years."(Id. at Exhibit A, para. 16).

DISCUSSION

Motion Sequence 14

CPLR 2221 governs motions to reargue. A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion"(CPLR 2221(d)(2.). A motion to reargue is "addressed to the sound discretion of the court which decided the prior motion." (*Marini v. Lombardo*, 17 A.D.3d 545, [2d Dept 2005]). To the extent 650, Ward and Jachetta argue that the CPLR does not permit a party to move for leave to reargue a prior Order that denied a motion for leave to reargue, this Court disagrees. Importantly, the Court, in its April 26, 2010 Order, did grant reargument of the Court's earlier Decision and Order dated December 15, 2009. This is distinguishable from the instance where a Court does not reconsider its prior Order and summarily denies leave to reargue. The Court now grants leave to reargue the Court's April 26, 2010 Order.

TFC moved to reargue the Court's determination that TFC is not entitled to marketing fees for the full 15 years term of the Port Jefferson franchise agreement. The Court determined, that this franchise agreement was terminated by letter on April 23, 2004.(April 26 Order) The Court further determined that TFC was not entitled to marketing fees, pursuant to Article 7 of the franchise agreement, after April 23, 2004. *Id.*

In this Court's December 15, 2009 Decision and Order, the decision TFC's prior motion to reargue, the Court stated the following:

> "[TFC] 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. [TFC] 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 this is a difference without distinction. There is no controversy but that [TFC] served a Notice of Termination dated April 23, 2004, pursuant to ¶ 18.6 of the Agreement. ...
> 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) during 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." (December 15, 2009 Decision and Order pg. 3, lines 26-30, pg. 4, lines 1-7)

It is clear from the Court's December 15 Decision and Order that this Court determined the franchise agreement was unambiguous that the franchisee's obligation to pay marketing fees terminated upon termination of the franchise agreement.

"[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous on its face"(*Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195 [2001]). "An omission or mistake in a contract does not constitute an ambiguity [and] ... the question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence." (*Id.*)

Article 7 of the franchise agreement does not state that the franchisee is obligated to pay marketing fees after termination of the franchise agreement. After the franchise agreement was terminated, such fees could hardly be considered marketing or advertising fees because the franchisee no longer had a franchise to market. Article 7 advertising fees are based, in part, on a percentage of the gross revenues of the franchise. But after termination of the franchise agreement, there could be no "gross revenues" of a franchise and therefore this aspect of Article 7 would be rendered meaningless. The mere fact that Article 6 included the words "or until the Agreement has been terminated", but Article 7 did not, does not, by itself, create an ambiguity. Examination of the entire contract reveals that despite this difference, Article 6 and 7 are, in actuality, consistent. (See Contract, Notice of Motion(Seq. 11), Exhibit B). The obligations of both Articles terminated upon the termination of the overall franchise agreement.

Even if the Court found Article 7 to be ambiguous as to the obligation to pay marketing fees upon termination of the contract, and the Court examined extrinsic evidence, the weight of the evidence would still favor an interpretation that the obligation ceased upon contract termination. The Court's examination of the overall contract, as discussed above, weighs in favor of terminating the obligation. The court also considers TFC's claims under the Lanham Act for trademark infringement at the Island Park restaurant to be inconsistent with an interpretation of the franchise contract which requires Austin to pay fees to market a franchise

that Austin no longer has the right to market. Additionally, neither party directed the court to extrinsic evidence bearing on whether either party considered this contingency prior to entering the contract. Finally, "[i]n cases of ... ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language." (*Jacobson v. Sassower*, 66 N.Y.2d 991, [1985]). An exception to this rule applies where the contract results from the "negotiations between commercially sophisticated entities."(*Shadlich v. Rongrant Associates, LLC*, 66 A.D.3d 759, [2d Dept 2009]). Here, it is clear that TFC, the franchisor, drafted the franchise agreement, and there is a lack of evidence that Ward, Jachetta, or their attorney participated in any manner in drafting or negotiating the terms of the contract.

The Court adheres to the Court's December 15, 2009 determination that Article 7 was not ambiguous, and accordingly, that TFC was not entitled to marketing fees beyond the April 23, 2004 termination date. Accordingly, the Court also adheres to the ultimate determination in the April 26, 2010 Order that Judgment in the amount $74,319.96 with interest from April 18, 2004 is rendered against 650 Route 112 Restaurant Corp., Brian Ward and Frank Jachetta jointly and severally.

Motion Sequence 15

GBL 691(1) provides that

> "A person who offers or sells a franchise in violation of section ... 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 recission ..., and reasonable attorney fees and court costs."

GBL 681(13) explains that the meaning of "Person" for purposes of the Franchise Act includes individuals as well as corporations.

TFC raised the argument of Austin's affirmation for the first time on this motion to reargue(Motion No. 15) and therefore the Court will not consider this argument. In the Trial Decision, this court determined, that the violation of GBL 687 was "willful and material." It follows that Austin is entitled, under GBL 691(1), to interest and "reasonable attorney fees and court costs." These "reasonable attorney fees and court costs" extend to Austin's fees and costs

attributable to the Island Park litigation. Said fees and costs are not limited to Austin's successful GBL fraud claim.

CPLR 5229 provides that:

> "In any court, before a judgment is entered, upon motion of the party in whose favor a ... decision has been rendered, the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment."

Here, despite the fact that TSR and L. Iacono have been found liable for fraud in the Trial Decision, damages have yet to be determined by a referee. Additionally, a judgement has already been entered against Austin in an amount exceeding $100,000.00 in the Port Jefferson matter. Given the uncertain nature of Austin's damages at this time, an examination or restraining notice is unwarranted. Austin's motion under CPLR 5229 is dismissed without prejudice, and Austin is granted leave to file a new CPLR 5229 motion after the referee makes its damages findings.

Motion Sequence 16

Port Jefferson

In the Trial Decision, this Court omitted to make a determination regarding TFC's claims for attorneys' fees and related costs pursuant to the Port Jefferson franchise agreement. Since TFC was successful in its claims pursuant to the Port Jefferson franchise agreement, this Court now determines that TFC is entitled to attorneys' fees, costs and expenses related to TFC's action to enforce the terms of the Port Jefferson franchise agreement. 650, Ward and Jachetta are jointly and severally liable for said attorneys' fees, costs and expenses and the Referee is directed to determine the amount due.

Island Park

Recission "is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored." (*Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, [1972]). "Rescission is not appropriate where ... the status quo cannot be 'substantially restored.'" (Singh v. Carrington, 18 A.D.3d 855, [2d Dept 2005]).

There is no question that GBL 691, expressly provides for rescission, where, as here, the Court has determined the fraudulent conduct of defendants(TFC and L. Iacono) was willful and

material. However, as Austin pointed out at the time of trial, "recission of the Island park purchase is not possible given that [TFC] no longer operates a Spare Rib restaurant in Island Park, and has not done so for several years." This Court should not have awarded Austin rescission because based on these circumstances, the status quo could not be "substantially restored."(see *Singh v. Carrington*, 18 A.D.3d 855, [2d Dept 2005]).

Even if a plaintiff is found to have affirmed the contract, this "does not of itself, ... either waive recovery of fraud damages or deprive the victimized party of the ability to achieve compensation for the aftermath of the fraud." (*Clearview Concrete Products Corp. v. S. Charles Gherardi, Inc.*, 88 A.D.2d 461 [2d Dept 1982]). Accordingly, whether or not the conduct of Austin rose to the level of affirming the contract, Austin could still recover for damages that resulted from the fraud.

"The prime standard for measuring the actual pecuniary loss sustained as a direct result of fraud is the "out of pocket" rule." *Id.* Under the "out of pocket" rule, "the loss is computed by ascertaining the difference between the consideration paid for the property and its actual value as affected by the consequences of the fraud."*Id.* Such a "loss must be measured by the difference between the actual value ... and the price plaintiffs paid ... by reason of the lessor's deceit."(*Dress Shirt Sales, Inc. v. Hotel Martinique Associates*, 12 N.Y.2d 339, 343 [1963]). "Recovery of profits which would have been realized in the absence of fraud is not possible under the "out of pocket" theory because the defrauded party is entitled solely to recovery of the sum necessary for restoration to the position occupied before the commission of the fraud."(*Clearview Concrete Products Corp. v. S. Charles Gherardi, Inc.*, 88 A.D.2d 461 [2d Dept 1982]). "Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained." (*Maisano v. Beckoff*, 2 A.D.3d 412, [2d Dept 2003]).

"'Out of pocket' considerations do not, however, prevent recovery of other consequential damages proximately caused by reliance upon the misrepresentation."(*Clearview Concrete Products Corp. v. S. Charles Gherardi, Inc.*, 88 A.D.2d 461 [2d Dept 1982]). Where "reliance on the false representation resulted in expenditures which would not otherwise have been incurred" a plaintiff is not barred from recovery of such expenditures.*Id.* Accordingly, "reliance is the key element" to determine whether consequential damages can be recovered. *Id.*

Likewise, expenditures incurred prior to discovery of the fraud can be recovered, but expenditures incurred after discovery cannot be recovered. *Id.* It also follows that expenditures incurred prior to discovery of the fraud, which are contractually due after discovery, may still be recovered as consequential damages, depending on the circumstances.

The plaintiff must prove its "out of pocket" damages and consequential damages by clear and convincing evidence. (*Nicholson v. Aesthetique, Ltd.*, 72 A.D.3d 774, 775 [2d Dept 2010]).

The court now determines that ABRC is entitled to "out of pocket" damages and consequential damages. These damages are to be determined by a referee in accordance with the principles set forth above. These damages are limited to "out of pocket" and consequential damages arising from the Island Park franchise purchase. The referee is authorized to determine the date Austin discovered the fraud, if necessary to calculate consequential damages. To the extent Austin used proceeds from the Island Park property transactions as consideration for the IP franchise, such consideration can be considered in the calculation of damages.

TFC also sought leave to reargue the Court's Trial Decision to the extent it omitted an award of "advertising fees and continuing fees" and "attorneys' fees and related expenses" to TFC pursuant to the Island Park franchise agreement.

This Court stated, in the Trial Decision:

> "In that the Court has found that ... [TFC] fraudulently misrepresented the franchise in violation of the Franchise Act, all alleged violations based upon breach of said agreement are hereby dismissed in that the fraud in the inducement of the agreement makes it unenforceable in all respects." (Trial Decision, pg. 47, lines 15-18)

Accordingly, the Court did not omit an award of "advertising fees and continuing fees" or "attorneys' fees and related expenses" to TFC pursuant to the Island Park franchise agreement.

TFC seeks clarification of the Trial Decision such that the Court Attorney/Referee is directed to limit the scope of the parties' arguments and evidence to the evidence presented at trial. The Court now makes the following clarification. Any evidence presented to the Court Attorney/Referee is limited to the evidence presented at trial.

Island Park Property

Austin seeks to recover damages related to the Island Park property. "Austin ... sold the

IP Spare Rib real property for $1,875,000.00." (Weingard Affirmation in Opposition to Cross Motion, para 39.) "Austin expended $1,531,509.50 to purchase the [IP] real property." (*Id.* at para 31). Austin argues that it had to pay $1,222,271.99 and $95,619.22 to satisfy the mortgage and related title charges and taxes. (*Id.* at 39). Austin also states that it paid TFC "nearly $90,000 more than the original loan amount", and Austin also paid TFC "$319,993.00 in costs and attorney's fees." (*Id.* at 40).

The real property transaction was largely separate and distinct from the franchise purchase, and the real property was sold for more than $350,000,00 more than its purchase price. However, but for the fraud, Austin never would have purchased the property. To the extent Austin incurred a loss, after considering all of Austin's expenditures related to the property purchase and sale, such loss could be deemed consequential damages arising out of the fraud. Accordingly, the Court Attorney/Referee, in determining Austin's consequential damages, should examine the Island Park real property purchase, sale and related transactions.

This matter is referred to Court Attorney/Referee Frank Schellace (Room 060, Special 2 Courtroom, Lower Level) on November 9, 2010, at 9:30 A.M., to determine damages to which plaintiffs and defendants are entitled pursuant to the Court's ruling.

This constitutes the Decision and Order of the Court.

Dated: October 18, 2010

J.S.C.