Juice Land, Inc. v TBAAR Franchising Corp.
2020 NY Slip Op 33634(U)
September 17, 2020
Supreme Court, Queens County
Docket Number: 705713/2017
Judge: Cheree A. Buggs

Short Form Order

SUPREME COURT - COUNTY OF QUEENS

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

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JUICE LAND, INC. and ZHONGFANG DAI,

Index No.: 705713/2017

Plaintiffs,

-against-

Motion Date: September 2, 2020

TBAAR FRANCHISING CORPORATION and GUOYAO LIN, a/k/a GARY LIN,

Motion Seq.: 3

Motion Cal.: 18

Defendants.
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The following efile papers numbered EF 55-61 and 63-67, submitted and/or considered on this motion by Defendants TBAAR FRANCHISING CORPORATION and GUOYAO LIN a/k/a GARY LIN (collectively referred to as "Defendants") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 2221 (a) and (d) granting Defendants leave to reargue the part of their prior motion to dismiss and/or summary judgment seeking dismissal of plaintiffs JUICE LAND, INC. and ZHONGFANG DAI. (collectively referred to as "Plaintiffs") Second Cause of Action for plaintiffs' failure to show damages proximately caused by Defendants' failure to file a franchise prospectus with the New York Attorney General together with such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 55-61
Aff. In Opposition.....	EF 63-65
Reply.....	EF 67

This is action that arises out of a Franchising Contract entered into between the parties. Plaintiffs allege the following: Defendants made a presentation to Plaintiff in July or August of 2013 to promote the sale of the franchise, where Defendants promised Plaintiffs would make a net profit from the first year of the opening. The parties entered an oral agreement and in accordance with the agreement Plaintiffs rented a premises in Jackson Heights, Queens in 2014 as the location for the franchise (hereinafter referred to as "Oral Agreement"). Plaintiffs had a grand opening for the bubble tea restaurant (hereinafter referred to as "Juice Land") in November 2014. The parties entered into the written franchise agreement on December 12, 2014 (hereinafter referred to as "Written

Agreement"). Pursuant to the Written Agreement Plaintiffs paid a franchise fee of $40,000 and paid a monthly fee which was the equivalent of three percent (3%) of gross sales. Plaintiffs state that Juice Land operated at a deficit at all times and as a result, it was forced to close in October of 2016.

The Defendants moved to dismiss and for summary judgment pursuant to CPLR 3211 and 3212. By Short Form Order dated April 29, 2020 the undersigned dismissed Plaintiffs' First and Third Causes of Action. However, the Second Cause of Action was not dismissed, this Court stated in part:

> Plaintiffs' allege had Defendants provided financial statements as required by GBL § 683 (2)(e)(4)(g) they would have known that Defendants' net income in December 2013 was $-2,454.76. Plaintiffs claim had they known this they would not have become a franchisee. Plaintiffs further allege compliance with GBL § 683 (2)(o) would have gave them a more realistic understanding of the income associated with a storefront as opposed to the knowledge they had of plaintiff Zhongfang Dai's wife's store, which was located inside a discount store that she owned. Therefore, Plaintiffs' allege had Defendants complied with GBL § 683 Plaintiffs' would have chose not to invest in the franchise. Plaintiffs have raised a triable issue of fact.
> (*Juice Land, Inc. et al. v TBAAR Franchising Corp.,* Sup Ct, Queens County, April 29,2020, Buggs, J., index No. 705713/17)

Now, Defendants seek clarification on the types of damages Plaintiffs may recover at a trial on damages.

John Kilgour Lentell v Merrill Lynch & Company Inc., 396 F.3d 161, 164 (2005) is a securities fraud case against Merrill Lynch. Plaintiffs alleged that Merrill Lynch published bogus analysis' in order to generate investment banking business. The allegations involve investment recommendations to two internet companies 24/7 Media and Interliant (*id* at 166). The plaintiffs allege Merrill Lynch committed fraud and developed a scheme that consisted of the following five elements: "(i) the public issuance and maintenance of knowingly or recklessly false, bullish research reports"; (ii) the publication of false "BUY or ACCUMULATE recommendations on 24/7 Media and Interliant; (iii) the setting of profoundly unrealistic price targets for those stocks; (iv) the existence of undisclosed agreements between Merrill Lynch and 24/7 Media and Interliant to trade favorable, bullish Analyst Reports for investment banking business directed to Merrill Lynch; and (v) the undisclosed sharing of investment banking fees among Merrill Lynch and its internet analysts" (*id* at 166).

The District Court dismissed the complaint for failure to state a claim and the Court of Appeals reviewed the dismissal de novo. The court reversed the District Court's determination that the cause of action was time barred (*id* at 168). Then, the court addressed the allegations that Merrill Lynch committed securities fraud which requires a showing that Merrill Lynch "(1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied and (5) that plaintiffs' reliance was the

proximate cause of their injury" (*id* at 172 citing *In re IBM Securities Litigation*, 163 F3d 102, 106 [2d Cir 1998]). The court stated plaintiff must prove transaction and loss causation in order to establish securities fraud. Transaction causation is reliance, it only requires an allegation that "but for the claimed misrepresentation or omission, the plaintiff would not have entered into the detrimental securities transaction" (*id* citing *Emergent Capital Inc. Mgmt, LLC v Stonepath Group, Inc.,* 343 F3d 189, 197 [2d Cir. 2003]). The court found and Merrill Lynch does not dispute that plaintiffs established transactional causation, at issue was whether the plaintiffs plead loss causation. Loss causation " is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff" (*id* citing *Emergent* at 197). To establish loss causation plaintiffs have to prove the subject of Merrill Lynch's alleged fraudulent statements or omissions were the cause of the actual loss suffered.

According to the court "the complaints must allege facts that support an inference that Merrill's misstatements or omissions concealed the circumstances that bear upon the loss suffered such that plaintiffs would have been spared all or an ascertainable portion of that loss absent the fraud"(*id* at 175). The court held plaintiffs complaints do not make such allegations. The court found there were no allegations that there was a negative market reaction "to a corrective disclosure regarding the falsity of Merrill's 'buy' and 'accumulate' recommendations"(*id*). Furthermore, the court found there were no allegations that Merrill's misstatement or omission of risk lead to loss (*id*). However, the plaintiffs did allege Merrill's misstatements and omissions induced disparity between the transaction price and investment value, that they caused an artificial inflation and when plaintiffs purchased securities at artificially inflated prices it caused damage (*id*). The court held, those allegations fail to establish loss causation. The court stated while plaintiffs challenge the ratings given to 24/7 Media and Interliant by Merrill they do not challenge the detailed financial information and investment analysis that was published alongside the recommendation. "It is thus incontestible that the risk of price volatility- and hence, the risk of implosion- is apparent on the face of every report challenged in the underlying complaints" (*id* at 176). The court affirmed the judgment of the District court dismissing the plaintiffs claims (*id* at 178).

Here, Defendants argue Plaintiffs have arguably established transaction causation, but for Defendants' failure to publish the offering prospectus they would not have purchased the franchise and paid the upfront fee. Therefore, Defendants concede Plaintiffs could be entitled to a return of the franchise fee ($40,000) and recision of the contract because those were the costs incurred by Plaintiffs upon entering the agreement.

At issue here, is whether Plaintiffs have proven loss causation. Defendants argue this Court's dismissal of Plaintiffs' fraud claims forecloses a finding of loss causation. In other words, this Court's finding that Plaintiffs' pleadings failed to plead a cause of action for fraud, fraud in the inducement and for violation of New York General Business Law § 687 means that Plaintiffs have failed to establish from its pleadings that the Contract between the parties was fraudulent. As such, "one cannot be induced to tender a performance which is required as part of a preexisting contractual obligation... a plaintiff 'cannot claim to have been defrauded into doing what it already was legally bound to do" (*Megaris Furs Inc. v Gimbel Bros., Inc.,* 172 AD2d 209, 212-213 [1st Dept 1991]).

Therefore, Plaintiffs' claim that it suffered damages in the form of rent payments for the storefront where it operated the franchise, construction costs associated with the store front, employee wages and all other damages that were Plaintiffs' obligations under the contract, cannot now be recovered.

The opposition was improperly filed under motion sequence number two. However, pursuant to CPLR 2001 the Court will overlook the omission because the Court finds no prejudice to the Defendants, since the Defendants had the opportunity to submit reply papers (see CPLR 2001; see also *Grskovic v. Holmes,* 111 A.D.3d 234 [2d Dept 2013]).

In opposition, Plaintiffs claim in addition to the franchise fee, had Defendants filed the offering prospectus they would not have entered the Franchise Agreement, and therefore would not have had the contractual obligation to incur various costs, such as renting a storefront, employee salaries, ingredients, etc.

In reply, Defendants allege Plaintiffs have failed to demonstrate loss causation. This Court agrees,"[e]ven if the defendants violated the Franchise Sales Act by failing to register an offering prospectus, the plaintiff must still prove that it sustained damages as a result of the violation, and must further prove that the violation was 'willful and material' in order to be entitled to an award of an attorney's fee." (*Burgers Bar Five Towns, LLC v Burger Holdings Corp a/k/a/ Burgers Holding Inc.*, et al., 71 AD3d 939, 941 [2d Dept 2010]) In *Burgers Bar,* "the plaintiff failed to submit evidentiary proof that it sustained damages as a result of the defendants' alleged violation of the Franchise Sales Act, or that the alleged violation was willful and material. The plaintiff's failure to make a prima facie showing of its entitlement either to damages or an award of an attorney's fee provides an additional basis for denial of its motion for summary judgment" (*id*). The plaintiff in *Burgers Bar* was able to establish that defendants violated the Franchise Sales Act by failing to file an offering prospectus so they were granted a return of the franchise fee.

Here, as previously established Plaintiffs have failed to properly plead that the Franchise Agreement was fraudulent or that they were fraudulently induced into entering it, therefore, they cannot seek to recover the sum of money they spent in compliance with their responsibilities under the Franchise Agreement under the guise of damages (*see Megaris Furs* at 212-213) . Therefore it is,

ORDERED, that Defendants' motion is granted. At the trial on damages Plaintiffs' recovery will be limited to recission of the Agreement and a refund of the $40,000 franchise fee plus interest as demanded in the Complaint.

Dated: September 17, 2020

HON. CHEREÉ A. BUGGS. J.S.C.

FILED

9/23/2020
12:37 PM

COUNTY CLERK
QUEENS COUNTY