South Shore D'Lites, LLC v First Class Prods. Group, LLC
2022 NY Slip Op 31447(U)
April 26, 2022
Supreme Court, New York County
Docket Number: Index No. 650827/2012
Judge: Laurence Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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SOUTH SHORE D'LITES, LLC, D'LITES OF WEST CALDWELL, LLC, HGB D'LITES OF SMITHTOWN, LLC,

Plaintiffs,

- v -

FIRST CLASS PRODUCTS GROUP, LLC, TODD COVEN, MAGDA ABT,

Defendants.

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INDEX NO. 650827/2012

MOTION DATE 10/26/2021, 11/15/2021

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 330, 331, 332, 337

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 009) 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 296, 297, 298, 299, 300, 301, 302, 303, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 333, 334, 335, 336, 338

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following read on defendants' motion, mot. seq. no. 008, to grant summary judgment and dismiss the complaint in its entirety, CPLR 3212; and on plaintiffs' motion, mot. seq. no. 009, for partial summary judgment, CPLR 3212, on their claims under the New York Franchise Act. The New York Franchise Act are New York General Business Laws §§ 680 – 695.

The complaint states causes of action for i) breach of good faith and fair dealing, ii) breach of fiduciary duty, iii) violation of New York General Business Law § 349, iv) fraud in the inducement, and v) violation of New York General Business Law § 683, § 687, and § 691. Plaintiff seeks damages of or about $1,500,000.

Defendants submit an answer with counterclaims for "breach of the agreements." This litigation involves the operation of a frozen dietary dessert franchise.

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact." *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

DEFENDANTS' SUMMARY JUDGMENT MOTION TO DISMISS

Defendants' affirmation in support of summary judgment, mot. seq. no. 008, highlights the various exhibits submitted on their motion (see NYSCEF Doc. No. 276).

The affidavit of named Defendant – Todd Coven affirms,

> "Abt and I are the co – members of First Class Group LLC, which owns a license to sell 'D-Lites" ice – cream products in the tri – state area. First Class obtained the license from non – party D'Lites Enterprises, Inc. in 2009. In 2010 and 2011, First Class entered into various sub – license agreements with each of the Plaintiffs to sell the product" (see NYSCEF Doc. No. 288 Pars. 3 – 4, 7).

The Todd Coven affidavit continues with submissions of various exhibits (see NYSCEF Doc. No. 288 Pars. 8 – 12).

Plaintiffs' affirmation in opposition to summary judgment, mot. seq. no. 008, also points to the various exhibits submitted (see NYSCEF Doc. No. 305). The memorandum of law put forth by plaintiff asserts "a good claim under GBL 349, a good claim for fraudulent inducement, and a good claim under the New York Franchise Act" (see NYSCEF Doc. No. 330 P. 2).

NEW YORK GENERAL BUSINESS LAW § 349 CLAIM

"A plaintiff asserting a claim under GBL § 349 must establish three elements: first, that the challenged act or practice was consumer oriented; second, that it was misleading in a material

way; and third, that the plaintiff suffered injury as a result of the deceptive act" (see *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 [2000]).

Here, Plaintiff seeking to claim as detailed in their memorandum of law in opposition, which states, "Defendants are incorrect to argue that their scheme to cause franchisees to over – serve ice cream was somehow not a 'consumer oriented' practice under GBL § 349. '[T]he Court had indicted that limiting the scope of section 349 to only consumers would be in contravention of the statute's plain language permitting recovery by any person injured by reason of any violation (see *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 15 [2d Dept. 2012])'" (see NYSCEF Doc. No. 330 P. 8).

The memorandum of law continues with that "a Fox – 5 news … expose aired, highlighting the fact that the D'Lites chain was overserving customers in their 'small' cups and feeding consumers many, many more calories than advertised. So … both the Plaintiffs and the public were harmed" (see NYSCEF Doc. No. 330 P. 7 – 8).

Defendants' Reply states, "in order for GBL § 349 to apply, the challenged acts or practices 'must have a broad impact on consumers at large' (see *New York University v. Continental Ins. Co.*, 87 N.Y.2d 308 [1995]). Plaintiffs concede that the only conduct they allege that Defendants engaged in that was directed to the public is that First Class misrepresented the calorie count of the ice cream cups they were selling to its own customers. *See* Nina Schurz June 4, 2014 Dep. Tr. 78:13-81:7; Plaintiffs' Opposition Memo of Law (NYSCEF Doc. No. 130 at 4-5) (see NYSCEF Doc. No. 337 Ps. 2 – 3).

Defendant cites *N. State Autobahn, Inc.* and *Silvercorp Metals Inc.* Although a plaintiff does not need to be an "individual member of the consuming public" (see *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 15 [2d Dept. 2012]), it must nonetheless be a

consumer or a similarly – situated consumer to maintain a private right of action under the statute. "Deceptive and misleading conduct that is aimed at consumers not 'similarly situated' with plaintiff [does not fall] within the ambit of the statute" (see *Silvercorp Metals Inc. v. Anthion Management LLC*, 36 Misc.3d 1231(A), at *15 (Sup. Ct. N.Y. Cty. Aug. 16, 2012); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 – 27 [1995]).

Upon review by the Court of all the documents filed in the instant motion the Court has no alternative but to agree with Defendant's arguments related to this cause of action. The sole basis for plaintiffs claim of the first element – "consumer oriented" is that they were over charged for the whole sale price of the ice cream, and were instructed to over-serve the product which contributed to bad publicity when a television report called into question the calorie count of the product. As a starting point it is difficult to understand plaintiffs' argument that common sense disappears in the face of a silver-tongued salesman. Essentially plaintiffs claim they were told putting twice as much ice cream in the serving cup would not increase the calorie count because of some magic – it defies logic and using their own actions of doubling the amount of ice cream put in a serving cup does not put them in the shoes of the consumer. Just as relevant, the fact that a television exposé called into question the calorie count of the product does not protect plaintiff.

FRAUDULENT INDUCEMENT

Plaintiffs' claim for fraudulent inducement argues, "[d]efendants stated that 'their store was doing $3,500 to $5,000 a day and I should expect the same kind of revenue.' Yet, the truth was the opposite: Defendants' Woodbury store had sales – not profit, but just sales – of $306,842 in 2010" (see NYSCEF Doc. No. 330 P. 10).

Defendants' Reply counters the fraudulent inducement claim. "Plaintiffs could not have relied on 'forecasts' or 'expectations' made by Defendants as to Plaintiffs' stores because these are not statements of fact" (see NYSCEF Doc. No. 337 P. 5). "Mere puffery, opinions of value or future expectations" could not support fraud claim (see *Sidamonidze v. Kay*, 304 A.D.2d 415, 416 [1st Dept. 2003]).

Here too the Court finds Defendants argument persuasive. No matter how plaintiff seeks to portray the process leading up to signing an agreement the simple fact remains that they relied on statements of the Defendant without doing any real due diligence before entering into the business agreement.

NEW YORK FRANCHISE ACT

Plaintiffs' claim under the New York Franchise Act contends that "the Franchise Act specifically forbids the enforcement of such a purported waiver" (see NYSCEF Doc. No. 330 P. 13). "Such waivers are barred by the Franchise Act" (see *Solanki v. 7 – Eleven, Inc.*, No. 12-cv-0027, 2014 WL 320236, at *5 [S.D.N.Y. Jan. 29, 2014]).

Defendants' Reply counters with, "[p]laintiffs cite to the anti-waiver provision of the Franchise Sales Act. But the language in the sub-license agreements does not implicate this provision because its (sic) does not purport to vitiate the protections of the Franchise Sales Act. Rather, the sub-license agreements reflect an acknowledgement by all of the parties that no franchise relationship was created. '[T]here shall be no franchisor – franchisee relationship deemed created by this Agreement' (see *El Toro Group, LLC v. Bareburger Group, LLC* 190 A.D.3d 536 [1st Dept. 2021])" (see NYSCEF Doc. No. 337 P. 7 – 8).

Plaintiff's cross-motion for Summary judgment addresses the same cause of action.

PLAINTIFF'S SUMMARY JUDGMENT MOTION UNDER NEW YORK FRANCHISE ACT

For plaintiffs' partial motion for summary judgment on the claim under the New York Franchise Act, motion sequence no. 009, plaintiff's attorney submits an affirmation with various exhibits (see NYSCEF Doc. No. 253). Plaintiff's statement of material facts states, "[e]ach plaintiff paid $50,000 to Defendants" (see NYSCEF Doc. No. 301 Par. 1). A further read of said document does not explain how the New York Franchise Act was violated.

Defendants' memorandum of law in opposition states, "First class did not sell a franchise. The sub – license agreements that governed the parties' relationship expressly disclaimed the creation of a franchisor – franchisee relationship" (see NYSCEF Doc. No. 329 P. 6). The sub – license agreements have been submitted (see NYSCEF Doc. Nos. 320 – 324).

Defendants' memorandum of law in opposition continues, "[s]econd, … Plaintiff's contention that First Class violated the Franchise Sales Act by not disclosing that First Class made $5.00 on the sale of each gallon is bitterly disputed. Defendants have testified that they informed Plaintiffs of this fact. This is clearly a disputed material issue of fact" (see NYSCEF Doc. No. 329 P. 6).

General Business Law 681(3) defines a franchise as:

> A contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which (a) [a] franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, and the franchisee is required to pay, directly or indirectly, a franchise fee …

Defendants contend that, "First Class did not sell a franchise. Plaintiffs admitted in their depositions that First Class had very little control over Plaintiffs' operations, (see Nina Schurz June 4, 2014 Dep. Tr. 156:21 – 157:1) stating that defendants did not dominate day – to – day

operations of the store; (157:6 – 157:21) First Class did not mandate the opening hours, the number of employees or the exact price of the product; (158:22 – 160:5) First Class did not control store layout, employee salaries or hiring, or store hours" (see NYSCEF Doc. No. 329 P. 10).

Defendants' memorandum of law in opposition continues with admission of various deposition testimony (see NYSCEF Doc. No. 329 Ps. 10 – 11). Defendant concludes that "[p]laintiffs cannot plausibly claim that the DEI manual prescribed their operations in any way when they either i) never looked at it; ii) did not receive it from Defendants; iii) did not follow it; or iv) did not consider it binding" (see NYSCEF Doc. No. 329 P. 11).

"Nor can Plaintiffs establish that Defendants a (sic) franchise under GBL 681(3)(b), because the Sub – License Agreements themselves expressly confirm that no franchise relationship was created. Article nine of the (sic) each of the agreements provides that '[t]here shall be no franchisor-franchisee relationship deemed created by this Agreement'" (see NYSCEF Doc. No. 329 P. 12).

Defendant cites *El Toro* from the First Department. "The third cause of action as asserted by El Toro must be dismissed because El Toro did not enter into a franchise agreement but rather a Multi – Unit Operator Agreement, which , moreover, states that it is not a franchise agreement and does not grant to El Toro any right to use the marks or 'the System'" (See *El Toro Group, LLC v. Bareburger Group, LLC*, 190 A.D.3d 536 (1st Dept. 2021]).

Defendants continue, "[p]laintiffs contend that Defendants violated GBL 687 by 'hiding the markup on the D'Lites brand ice cream.' This relates to the fact that Defendants made $5.00 per every gallon that Plaintiffs purchased. Plaintiffs allege that Defendants told them that they were not making any money on the ice cream sales. Defendants dispute ever making these

statements and so this allegation cannot possibly form the basis of a summary judgment motion" (see NYSCEF Doc. No. 329 P. 13).

As to this cause of action the Court agrees with Plaintiff. Although Defendant characterizes the agreement as a sub license and points to specific language within the agreement stating that the agreement is not a franchise agreement, that is not enough. If all the terms of the agreement itself contain the elements of a franchise agreement, simply calling it something else does not make it so. As the saying goes, if it walks like a duck, and talks like a duck, then it's a duck. In this instance there is sufficient question of fact and plaintiff has met their burden for this cause of action to survive. However, such a claim remains a question of fact that a tier of facts must determine at trial and is not sufficient to grant summary judgment.

SUFFERED DAMAGES

To establish summary judgment on a violation of GBL § 691, Plaintiffs must establish that i) they would not have entered into the transactions but for the alleged violations of the Franchise Sales Act and ii) that they suffered damages as a direct result of the alleged violations of the Franchise Sales Act (see *Burgers Bar Five Towns, LLC v. Burger Holdings Corp.*, 71 A.D.3d 939 [2d Dept. 2010]).

Plaintiff's Reply states, "[t]hey [Defendants] suggest that partial summary judgment cannot be granted because Plaintiffs 'Have Not Established That They Suffered Damages.' (Opp'n Mem. At 10.) But so what? The issue of damages is expressly reserved for trial. And, in this State, "summary judgment may be granted as to one or more causes of action, or part thereof …' CPLR 3212(3)" (see NYSCEF Doc. No. 338 P. 15).

"To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968).

After a review of all the papers and exhibits submitted it is now,

ORDERED that defendants' motion for summary judgment on the first cause of action – breach of good faith and fair dealing is GRANTED, and the first cause of action – breach of good faith and fair dealing is dismissed; and it is further

ORDERED that defendants' motion for summary judgment on the second cause of action – breach of fiduciary duty is GRANTED, and the second cause of action – breach of fiduciary duty is dismissed; and it is further

ORDERED that defendants' motion for summary judgment on the third cause of action – violation of New York General Business Law § 349 is GRANTED, and the third cause of action – violation of New York General Business Law § 349 is dismissed; and it is further

ORDERED that defendants' motion for summary judgment on the fourth cause of action – fraud in the inducement is GRANTED, and the fourth cause of action – fraud in the inducement is dismissed; and it is further

ORDERED that defendants' motion for summary judgment on the fifth cause of action for i) violation of New York General Business Law § 683 is DENIED, ii) violation of New York General Business Law § 687 is DENIED, and iii) violation of New York General Business Law § 691, is DENIED; and it is further

ORDERED that plaintiffs motion for partial summary judgment, is DENIED.

ORDERED that the Clerk is directed to enter judgment accordingly.

4/26/2022
DATE

LAURENCE LOVE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE