

El Toro Group, LLC v Bareburger Group, LLC
2022 NY Slip Op 32160(U)
July 7, 2022
Supreme Court, New York County
Docket Number: Index No. 651018/2018
Judge: Barry Ostrager
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**SUPREME COURT OF THE STATE OF NEW
YORK NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER, PART IAS 61EF

Justice

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EL TORO GROUP, LLC, NGM MANAGEMENT GROUP,
LLC, COLUMBUS VILLAGE LLC, FIDI DISTRICT LLC,
MIDTOWN EAST NY, LLC and FUBER LLC,

Plaintiffs,

- v -

BAREBURGER GROUP, LLC, TIDM, CORP., RE-GRUB
LLC, BE MY BURGER, LLC, EURIPIDES PELAKANOS,
GEORGE RODAS, GEORGE DELLIS, EFTYCHIOS
PELEKANOS, JOHN SIMEONIDIS, SPIRIDON
APOSTOLATOS, DEMETRIOS J. VOIKLIS,
APOSTOLATOS, LLC, KMVA HOLDINGS, LLC
APOSTOLATOS CPA, PLLC, GAMMA, LLC, YURI
GAGARIN RETURNS, LLC, EVP HOLDINGS, LLC,
NEGROPONTE, LLC, JOHN DOE ENTITIES 1-10 and
JOHN DOE individuals 1-10,

Defendants.

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HON. BARRY R. OSTRAGER

INDEX NO.	651018/2018
MOTION DATE	
MOTION SEQ. NO.	013

**DECISION AND ORDER ON
MOTION and STATUS
CONFERENCE ORDER**

The Court heard oral argument on July 7, 2022 via Microsoft Teams on the motion by defendants Bareburger Group, LLC and TIDM, Corp. for an Order pursuant to CPLR 3211 (a)(1), (5), and (7) dismissing the Second Amended Verified Complaint efiled on January 14, 2022 (NYSCEF Doc. Nos. 766 and 795) and for sanctions. The motion is granted in part and denied in part as follows in accordance with the July 7, 2022 transcript of proceedings.

The Court grants dismissal of the First Cause of Action for damages based on fraudulent inducement to enter into the Franchise Agreements. The Appellate Division in its January 14, 2021 Decision and Order related to the First Amended Complaint (NYSCEF Doc. No. 778) dismissed the rescission claim related to the Franchise Agreements, finding that plaintiff had an adequate remedy at law. Plaintiff attempts to distinguish the Appellate Division's decision,

noting that plaintiff's First Cause of Action only seeks damages, not rescission, and that the claim relates to issues involving rebates, mark-ups and development fees, which matters the Appellate Division allowed to remain in the case. Nevertheless, a fraudulent inducement claim would effectively nullify the Franchise Agreement, which would contravene the Appellate Division's Decision rejecting plaintiff's request to rescind the Franchise Agreement. Further, plaintiff has an adequate damages remedy at law under the Second Cause of Action for breach of the Franchise Agreement, which defendants do not seek to dismiss.

The Court grants dismissal of the Third Cause of Action for breach of the implied covenant of good faith and fair dealing. As the covenant of good faith and fair dealing is implied in every contract, the claim is duplicative of the breach of contract claim and the allegations can be asserted in that context. No new and separate cause of action need be asserted. To the extent plaintiff seeks to include any allegations related to matters such as rebates and mark-ups not previously asserted, they all relate back to the same transactions and do not constitute new allegations resulting in prejudice to defendants. Quite the contrary, defendants vigorously argued during the July 7 proceedings that the issues that plaintiff sought to raise under the umbrella of the implied covenant claim were issues addressed by the parties' written contracts.

The Court denies dismissal of the Fourth Cause of Action seeking rescission of the Restated Note based on defendants' alleged failure to advance funds. The Appellate Division expressly left open claims regarding the enforceability of the Restated Note for lack of consideration. The defendant's affidavit does not resolve all issues related to the claim or constitute a defense as a matter of law justifying dismissal of the claim at the pleading stage. *See Leon v Martinez*, 84 NY2d 83 (1994).

The Court denies dismissal of the Fifth and Seventh Causes of Action seeking declaratory relief regarding the enforceability of the Step-In Rights Agreement and the Restated Note. The Appellate Division did not dismiss the claims related to those issues and allowed them to proceed. To the extents defendants may have been seeking to dismiss those claims only in part, the Court finds no need to parse through the pleadings, which shall be liberally construed on a 3211 motion to dismiss.

The Court denies dismissal of the Sixth Cause of Action seeking damages for fraud related to the Step-In Rights Agreement and the Restated Note. Defendants argue for the first time that the claim is barred by provisions in the Statute of Frauds that require a writing. But the Court finds that defendants have failed to establish that defense as a matter of law. Further, the Appellate Division held that fraud claims seeking damages could proceed if properly pled, and the pleadings, liberally construed, sufficiently state a cause of action. *See Leon v Martinez, supra*.

The Court grants dismissal of all claims for punitive damages. Even if, as plaintiff claims, the Appellate Division only dismissed certain punitive damages claims, the Court does not find under the circumstances, and in light of the various claims the Appellate Division did dismiss, that this private commercial dispute states a claim for the imposition of punitive damages.

The Court declines to assess sanctions against either party for frivolous conduct, as the conduct of both parties has contributed to the delays here.

A Note of Issue for a jury trial has been filed in this action, which shall be tried jointly with the related action *Bareburger Group, LLC v NGM Management Group LLC, et al.*, Index No. 653672/2018. As the pleadings have not yet been finalized, the Court is cancelling the October 24, 2022 trial date and will set a new trial date when the summary judgment motions are

decided. In that regard, plaintiff must properly efile the Second Amended Complaint and a stipulation amending the caption. Defendants indicated an intent to file an Answer and a summary judgment motion thirty days thereafter. Counsel shall meet and confer to agree upon a briefing schedule that includes any dispositive motion to be filed by plaintiff. A status conference is scheduled for November 9, 2022 at 10:00 a.m. Based on the status of the motions, the Court will advise counsel whether oral argument will proceed at that time or whether the date will be adjusted.

Dated: July 7, 2022



 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

APPLICATION:

APPROPRIATE:

☐	CASE DISPOSED	☐	DENIED	☒	NON-FINAL DISPOSITION	☐	OTHER
☐	GRANTED			☒	GRANTED IN PART		
☐	SETTLE ORDER			☐	SUBMIT ORDER		
☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE