

NGM Mgt. Group, LLC v Bareburger Group, LLC
2023 NY Slip Op 30311(U)
January 27, 2023
Supreme Court, New York County
Docket Number: Index No. 651018/2018
Judge: Barry R. Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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

Plaintiffs,

-- against --

BAREBURGER GROUP, LLC, and TIDM, CORP.,

Defendants,

BAREBURGER GROUP, LLC,

Counterclaim Plaintiff,

-- against --

INDEX NO.	651018/2018
MOTION DATE	
MOTION SEQ. NO.	014, 015 & 016

DECISION + ORDER ON MOTIONS

EL TORO GROUP, LLC, NGM MANAGEMENT GROUP, LLC, COLUMBUS VILLAGE LLC, FIDI DISTRICT LLC, MIDTOWN EAST NY, LLC, and FUBER, LLC, Counterclaim Defendants, AND MICHAEL PITSINOS, BASIL MESSADOS, GEORGE HADJIPANAYI, and JENNY EMEXEZIDIS,

Counterclaim Defendants,

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HON. BARRY R. OSTRAGER

The Court heard very extended oral argument on January 27, 2023, via Microsoft Teams on three motions in this trial-ready action in which a jury has been demanded: sequence 014 is the motion by defendants and counterclaim plaintiff (collectively, “the Franchisor”) for partial summary judgment dismissing with prejudice the five Causes of Action remaining in plaintiffs’ Second Amended Complaint (the Second and the Fourth through Seventh Causes of Action, NYSCEF Doc. No. 877) and awarding the Franchisor summary judgment in its favor on the Second, Third, Fifth, Seventh, Eighth and Tenth Counterclaims of the eighteen asserted in the

Franchisor's Answer (NYSCEF Doc. No. 878); sequence 015 is the motion by the plaintiffs and the counterclaim defendants (collectively, "the Franchisees") for partial summary judgment in their favor on the Fourth and Fifth Causes of Action in the Second Amended Complaint and dismissing with prejudice the First, Second, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, and Eighteenth Counterclaims; and in motion sequence 016 the Franchisees seek to preclude the report and testimony of the Franchisor's expert, and the Franchisor cross-moves for sanctions against the Franchisees for including in their papers allegedly inappropriate comments regarding a nonparty. Underlying the dispute are five Franchise Agreements, a Step-In Rights Agreement, and a Note related to various Bareburger restaurants the Franchisees sought to open and operate.

Beginning first with motion sequence 016, the Court grants in part the Franchisees' motion to preclude the report and testimony of Harold L. Deiters, III, the expert put forth by the Franchisor. The expert report is not admissible into evidence. However, the Court declines to preclude the expert's testimony. The Franchisees raise various issues, such as the expert's alleged lack of qualifications, his lack of expertise to opine on the issues at the heart of the case, the absence of a reliable methodology to support the analysis, the expert's failure to produce his underlying papers, and a lack of independence. Those issues can be raised at trial through cross-examination and by other means. The Court denies the Franchisor's cross-motion for sanctions on the ground that the Franchisees' papers allegedly include "unnecessary and unprofessional shots" at Demetrios Voiklis, a non-party. Because the Franchisor's expert relied on information provided by Voiklis, who had been associated with the Franchisor, it was not inappropriate, and it was certainly not sanctionable, for the Franchisees to note -- when challenging the expert's opinion -- that Voiklis had been disbarred based on a fraud conviction, a matter of public record.

The Court heard approximately two hours of oral argument on the competing summary judgment motions. As indicated above, in motion sequence 014, the Franchisor moved for summary judgment dismissing all five of the causes of action remaining in the Second Amended Complaint and for summary judgment in its favor on six of its eighteen counterclaims. In motion sequence 015, the Franchisees moved for summary judgment in their favor only on their Fourth and Fifth Causes of Action and for dismissal of the Franchisor's First, Second, and Sixth through Eighteenth Counterclaims. With some exceptions, the motions are denied based on triable issues of fact created by the many competing party affidavits and deposition testimony included among the hundreds of documents filed in connection with these motions.

Addressing first the claims by the Franchisees in the Second Amended Complaint, through motion practice, appeals, and otherwise, the Franchisees have commendably limited their claims to five causes of action. The Franchisor's attempt to dismiss the Second Amended Complaint in its entirety must be rejected. It cannot be said based on the extremely voluminous record here, which consists of multiple competing party and expert affidavits, depositions, and countless exhibits, that the Franchisor has established as a matter of law that all of the Franchisee's claims lack merit.

But nor have the Franchisees established as a matter of law that they are entitled to rescission of the Note based on the Franchisor's alleged failure to advance the funds (the Fourth Cause of Action). The Franchisor has introduced some proof of payments, and issues of fact exist as to the purpose of those payments and whether they were paid to fund the Note or for some other purpose. Similarly, the Franchisees have not established their right to summary judgment on the Fifth Cause of Action to rescind the Step-In Rights ("SIR") Agreement for lack of consideration, , notwithstanding the statement by the Appellate Division in its January 14,

2021, Decision and Order on the motion to dismiss that the Franchisees claim for a “declaratory judgment rescinding the SIR Agreement due to lack of consideration ... may proceed...”

(NYSCEF Doc. No. 778, p 5). Again, the record evidence is voluminous, and the facts are disputed, barring summary judgment based on triable issues of fact.

In contrast to the relatively streamlined Second Amended Complaint, the Franchisor in its Answer asserted Eighteen Counterclaims, and it seeks summary judgment in its favor on six of the Counterclaims: the Second, Third, Fifth, Seventh, Eighth, and Tenth. The Franchisees seek summary judgment dismissing all but the Third, Fourth, and Fifth Counterclaims. The Franchisor’s motion is denied in its entirety as the claims have not been established as a matter of law. The Franchisees’ motion is similarly denied with the following limited exceptions:

The Court grants the Franchisees summary judgment dismissing the Sixth Counterclaim alleging a refusal by the Franchisees to provide the Franchisor a Power of Attorney (POA). The evidence establishes that the POA was provided. To the extent the Franchisor argues that it could not fully utilize the POA because of other issues between the parties, those issues can be raised in connection with the many other claims between the parties.

The Court dismisses the Franchisor’s Second Counterclaim alleging the Franchisees breached the Franchise Agreement by contesting the validity of the Marks and the Eleventh, Twelfth, and Thirteenth Counterclaims for trademark infringement by the Franchisees. The Court is mindful of the findings by Justice Shirley Kornreich in *Stavroulakis v Pelakanos*, Index No. 653478/2015, finding against the Franchisor on various trademark issues, and rejects the Franchisor’s efforts to nullify those finding by use of a subsequent Stipulation of Settlement in that case. However, this Court’s decision is not based on collateral estoppel. Rather, the Franchisor’s Second Counterclaim is dismissed because the record does not support a claimed

breach of the Franchise Agreement. The trademark infringement counterclaims (Eleventh – Thirteenth) fail due to a lack of proof related, among other things, to identifiable damages.

Similarly, the Fourteenth Counterclaim for injurious falsehood is dismissed based on a lack of special damages. The Fifteenth Counterclaim for prima facie tort is dismissed as the record belies the claim that “disinterested malevolence” was the “sole motive” for the Franchisee’s conduct. The Eighteenth Counterclaim for common law contribution is dismissed because the underlying claims primarily seek economic damages, and the requirements of CPLR 1401 have not been met.

Punitive damages are stricken, as the required level of misconduct is not supported by the record. However, the Court declines to strike the request for liquidated damages at this time based on the various triable issues detailed in the papers and at oral argument.

A pre-trial conference is scheduled for March 23, 2023, at 2:00 p.m. Counsel shall appear in person in Courtroom 232 at 60 Centre Street with party representatives who have knowledge and full settlement authority.

Dated: January 27, 2023


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE