

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND DEPARTMENT

Burgers Bar Five Towns, LLC v. Burger Holdings Corp.

71 A.D.3d 939 (N.Y. App. Div. 2010) · Decided March 23, 2010

SUMMARY

The Appellate Division, Second Department, reversed a judgment awarding the plaintiff damages and attorney’s fees for an alleged violation of New York’s Franchise Sales Act. The court held that the defendants raised a triable issue regarding the isolated-sales exemption and that the plaintiff failed to establish damages or a willful and material violation supporting attorney’s fees.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Fisher, J.P.; Santucci, J.; Eng, J.; Chambers, J.
JURISDICTION	New York
DECIDED	March 23, 2010
DISPOSITION	reversed
PROCEDURAL POSTURE	Defendants appealed from specified portions of several orders granting the plaintiff summary judgment on its Franchise Sales Act claim and awarding attorney's fees, and from the resulting judgment.
STANDARD OF REVIEW	Summary judgment is appropriate only where the movant makes a prima facie showing of entitlement to judgment as a matter of law; once that showing is made, the opposing party must demonstrate a triable issue of fact. On appeal, the court reviews legal errors and whether the movant established entitlement to judgment as a matter of law.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Burger Holdings Corp., Defendants v. Burgers Bar Five Towns, LLC, Plaintiff

TOPICS

- commercial litigation
- statutory interpretation
- summary judgment
- appellate procedure
- remedies

PRACTICE AREAS

commercial litigation

contracts

franchise law

appellate procedure

remedies

QUESTIONS PRESENTED

1. Whether the licensing agreement constituted a franchise agreement under General Business Law § 681(3).
2. Whether the defendants raised a triable issue of fact regarding the isolated-sales exemption from the Franchise Sales Act's registration requirement under General Business Law § 684(3)(c).
3. Whether the plaintiff established damages caused by the alleged Franchise Sales Act violation.
4. Whether the plaintiff established that the alleged violation was willful and material so as to support an attorney's-fee award under General Business Law § 691(1).
5. Whether the appeals from the intermediate orders remained appealable after entry of the final judgment.

HOLDINGS

1. The appeals from the intermediate orders must be dismissed because the right of direct appeal from those orders terminated upon entry of the final judgment; issues raised in those appeals are reviewable on the appeal from the judgment.
2. Although the plaintiff made a prima facie showing that the licensing agreement was a franchise and that no offering prospectus had been registered, the defendants raised a triable issue of fact concerning whether the agreement qualified for the isolated-sales exemption under General Business Law § 684(3)(c).
3. The plaintiff was not entitled to summary judgment because it failed to submit evidentiary proof that it sustained damages as a result of the alleged Franchise Sales Act violation or that the violation was willful and material, as required for an attorney's-fee award.

KEY QUOTATIONS

“It shall be unlawful and prohibited for any person to offer to sell or sell in this state any franchise unless and until there shall have been registered with the department of law, prior to such offer or sale, a written statement to be known as an ‘offering prospectus’ concerning the contemplated offer or sale” (940)

FACTUAL BACKGROUND

The defendants operated a kosher hamburger restaurant in Brooklyn under the name Burger Bar. The parties entered into a licensing agreement allowing the plaintiff to open a restaurant using the defendants' name and logo in exchange for a fee, royalties, and an obligation to purchase supplies from the defendants. The defendants had not registered an offering prospectus before entering the agreement, but they raised a triable issue as to whether the transaction qualified for the isolated-sales exemption. The plaintiff also failed to submit proof of damages caused by the alleged violation or that the violation was willful and material.

PROCEDURAL HISTORY

The Supreme Court, Nassau County, granted the plaintiff summary judgment on its claim that the parties' licensing agreement violated the Franchise Sales Act, directed return of the plaintiff's fee payment, and awarded \$27,709.25 in attorney's fees after a hearing. A judgment totaling \$84,642.58 was entered for the plaintiff. The Appellate Division dismissed the appeals from the intermediate orders and reversed the judgment, denying the branches of the plaintiff's motion seeking summary judgment and attorney's fees.

DISPOSITION

reversed

CASES CITED

- Matter of Aho, 39 N.Y.2d 241, 248 (1976)
- Jung Hing Leung v. Lotus Ride, 198 A.D.2d 155, 156-157 (N.Y. App. Div. 1993)
- Baker Boy of Glendale v. 35-63 82nd St. Corp., 166 A.D.2d 397, 398-399 (N.Y. App. Div. 1990)

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