UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - - - x

BMW CO., INC., GARY WILDE, ARTHUR BRADY and TIM MORRIS,

Plaintiffs,

-against-

WORKBENCH INC. and WARREN J. RUBIN,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - x

MEMORANDUM AND ORDER
86 Civ. 4200 (RO)

OWEN, District Judge

At issue is the interpretation of section 684.3(c) of the New York General Business Law, which provides an exemption from the New York State Franchise Sales Act, N.Y. Gen. Bus. Law §§ 681 *et seq.*

The individual plaintiffs in this case formed the plaintiff company, BMW Co., Inc., and entered into a franchise agreement with Workbench, Inc. to operate Workbench outlet stores in Chattanooga and Knoxville, Tennessee, and in Georgia.[1] Pursuant to this agreement, plaintiffs opened two franchise stores in Atlanta, which later failed. Between the franchise cost and expenses related to the operation of the stores, plaintiffs allege a loss of $400,000. Subsequently, plaintiffs brought suit against defendants, alleging misrepresentation, negligence, and breach of implied covenant (causes of action 5-7, respectively), and further that defendants failed to meet various New York State requirements under the Franchise Sales Act pertaining to the sale of franchises and as a result are liable to plaintiffs.

In an extensive consumer protection measure, New York in 1980 enacted the Franchise Sales Act. That Act places heavy requirements on businesses that

[1]Defendant Warren J. Rubin is the chief executive and chief operating officer of Workbench, Inc.

offer franchises, including: filing with the State, prior to any franchise offer or sale, of an "offering prospectus" (section 683(1) et seq.); distribution of the offering prospectus to prospective franchisees within certain time constraints (section 683(8)); and reference to the offering prospectus in all advertisements offering franchises (section 683(11)). Plaintiffs assert that defendants failed to meet each of these requirements, and thus are liable for civil damages under section 691 of the Act. Plaintiffs also seek, on the basis of their fourth cause of action, rescission of the contract, attorney fees and court costs, pursuant to section 691's award of such damages where a violation is "willful and material."

Defendants assert an exemption from the above requirements on the basis of section 684.3(c) of the Act. That provision exempts the offer and sale of a franchise from the registration provisions of section 683, where

> [t]he transaction is pursuant to an offer directed by the franchisor to not more than two persons, other than persons specified in this subdivision, if the franchisor does not grant the franchisee the right to offer franchises to others, a commission or other remuneration is not paid directly or indirectly for soliciting a prospective franchisee in this state, and the franchisor is domiciled in this state or has filed with the department of law its consent to service of process on the form prescribed by the department.

Under defendants' view of the foregoing, they are exempt from the Act where they offer any number of franchises, but not more than to two persons in connection with any one franchise. Read this way, however, the Act would be a nullity. Rather, I interpret the exemption prerequisite to be met only where a franchisor limits itself to making not more than two franchise offers within the ambit of an otherwise required prospectus.[2] Defendants do not and cannot contend that they meet this interpretation of the exemption prerequisite, and

---

[2]The Office of the Attorney General of the State of New York has submitted a brief amicus curiae on these motions, in which a similar interpretation of this exemption provision is reached. While the State Attorney General's view on the subject is not determinative, it is instructive.

plaintiffs have established the contrary. Thus, defendants do not raise genuine issues of material fact with regard to liability under the complaint's first three causes of action, and plaintiffs' motion for summary judgment on liability under those causes of action is granted; defendants' corresponding cross-motion for summary judgment is denied. See Murray v. Xerox Corp., No. 86-7554, slip op. at 1340-41 (2d Cir. Feb. 4, 1987).[3] The issue of damages under those three causes of action, pursuant to section 691 of the Act, remains for resolution hereafter.

As to plaintiffs' fourth cause of action, however, both plaintiffs' and defendants' motions for summary judgment are denied. Plaintiffs' fourth cause of action seeks to provide the basis for rescission of the franchise agreement and for the recovery of attorney's fees and court costs; those remedies are available upon a showing of a "material and willful" violation. See section 691 of the Act. I find that issues of fact exist as to defendants' state of mind, requiring that those issues be determined by the trier of fact.[4]

Submit order on notice.

Dated: June /ↄ, 1987
New York, New York

United States District Judge

---

[3]Having so found, I have no need to reach plaintiffs' other arguments in opposition to defendants' assertion of the Act's exemption.

[4]Defendants' unsolicited post-argument "supplemental affidavits" are unnecessary for this conclusion, although they confirm the result. In this vein, it should be noted that the fact that defendants have retained new counsel does not authorize defendants to submit post-argument affidavits not requested by or approved by the court, and which raise arguments never made on the original moving, response and reply papers.