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United States District Court, C.D. California.

John K. SHAW Et Al
v.
ULTIMATE FRANCHISES, INC. Et Al

Case No. 8:18-cv-02273-JLS-ADS
|
Signed 01/15/2021

Attorneys and Law Firms

David C. Gurnick, Erin C. Johnsen, Pro Hac Vice, Garner and Ginsburg PA, Jessica Wynette Rosen, Lewitt Hackman Shapiro Marshall and Harlan, Encino, CA, William Michael Garner, Minneapolis, MN, for Plaintiff.

John A. Delis, Warren B. Campbell, Aaron A. Kupchella, Craig J. Erickson, Ronald V. Larson, Grant Genovese and Baratta LLP, Irvine, CA, Long and Delis APC, Santa Ana, CA, for Defendants.

W. Scott Griffiths, Laguna Niguel, CA, pro se.

Loretta Hwong Griffiths, Laguna Niguel, CA, pro se.

Brigitte Love Thewes, Irvine, CA, pro se.

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE

***1** Before the Court is a Motion for Partial Summary Judgment against Defendant Ron Love ("Love") filed by Plaintiffs John K. Shaw, Midori G. Shaw, and Shipshape Collective of Fitchburg, LLC (collectively, "Plaintiffs"). (Mot., Doc. 145; Mem., 145-1.) Love opposed and Plaintiffs responded. (Opp., Doc. 153; Reply, Doc. 159.) The Court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Accordingly, the hearing set for **January 15, 2021, at 10:30 a.m., is VACATED.** Having considered the parties' briefs, the materials submitted in support, and for the reasons below, the Court now DENIES Plaintiffs' Motion.

I. BACKGROUND

On December 21, 2018, Plaintiffs filed suit in this Court, asserting the following claims against Ron Love: (1) fraud, (2) fraud by omission, (3) violation of the California Franchise Investment Law, and (4) violation of the California Unfair Practices Act. (*See* First Amended Complaint ("FAC"), Doc. 101, ¶¶ 63–69, 70–77, 85–92, 93–99.)

Plaintiffs allege that Love—and other defendants not subject to the present Motion—through misrepresentations and material omissions, induced Plaintiffs to invest in a men's salon franchise called 18/8, which was owned by Ultimate Franchise ("UF"). Two of the entity defendants (Ultimate Franchises, Inc. and Ultimate Brands, Inc.) are in bankruptcy. A third defendant, Brigitte Love Thewes, obtained a bankruptcy discharge. Two more defendants (Scott Griffiths and Loretta Hwong Griffiths) have not participated in this action and the Clerk has entered default against them. (*See* Doc. 150.) Here, Plaintiffs move for partial

summary judgment as to three of their claims against Love. The Court therefore summarizes only the facts relevant to this Motion. Unless specified, the facts recounted here are undisputed.

Plaintiffs purchased the right to three UF franchises. (Defendant's Statement of Genuine Disputes ("SGD"), Doc. 154, ¶ 31.) Plaintiffs incurred significant lease obligations and invested in building out and opening their first location. (*Id.* ¶ 32.) Plaintiffs claim that the franchise location never performed at the levels represented by Love and other defendants; that they were eventually forced to close the franchise; and that, had Plaintiffs known of the alleged misrepresentations, they would not have purchased the franchises from UF. (*Id.* ¶¶ 33–34.) Love disputes these points, stating that he did not make any representations concerning salon performance, and that Plaintiffs produce no such evidence. (*Id.* (citing Love Decl., Doc. 156, ¶¶10–12).) He specifically argues that he had no knowledge of the revenues achieved at the UF-owned salons. (*Id.*)

Prior to purchasing the franchises, Plaintiffs received UF's Franchise Disclosure Document ("FDD"), which identified Love as president of Ultimate Brands, UF's parent company. (SGD ¶ 19.) Item 19 of UF's FDD noted that franchisees may experience different labor costs. (SGD ¶ 28.) But Plaintiffs argue that the FDD improperly failed to disclose the different classifications of stylists and different operating costs franchisees would encounter as compared to the 18/8 salons that were owned by the franchisor—UF. (*Id.*) Plaintiffs further assert that the FDD improperly failed to disclose a previous lawsuit against Ultimate Brands' predecessor Mana Concepts. (*Id.* ¶ 29.)

***2** On July 17 and 18, 2014, and prior to the purchase, Plaintiffs attended an in-person "Discovery Day" event with UF to learn more about the franchise system. (SGD ¶ 20.) Plaintiffs claim that, at the Discovery Day event, Love gave a detailed presentation about stylist pay, average ticket price, and daily and weekly guest counts at salons. (*Id.* ¶ 21.) Love disputes Plaintiffs' characterization of his presentation. He states that his Discovery Day presentation was "about the methodology of running a salon." (*Id.* (citing Love Depo., Doc. 145-7, 195:10–14).) Love further testifies that his presentation "made no financial representations whatsoever," (SGD ¶ 20 (citing Love Depo. 195:15–19; Love Decl. ¶10)), and that he did not suggest stylist pay or recommend any stylist commission structure. (SGD ¶ 20 (citing Love Depo. 197:3–198:110; Love Decl. ¶11).) Rather, Love asserts, the presentation discussed "how to evaluate the progress of a stylist." (SGD ¶ 20 (citing Love Depo. 198:3–4.)

Plaintiffs contend that, in his Discovery Day presentation, Love presented figures based on his experience with franchisor-owned salons (SGD ¶¶ 22, 23); that Love was aware that franchisor-owned salons treated some higher level stylists as independent contractors, not as employees (SGD ¶ 24); and that Love was aware that franchisees would have to treat stylists as employees. (*Id.* ¶ 25.) Finally, Plaintiffs contend that, during his presentation, Love failed to disclose that franchisor-owned salons treated higher level stylists as independent contractors, not as employees, and that this meant franchisee-owned salons—which treat their stylists as employees—would incur to higher costs by comparison. (*Id.* ¶¶ 26–27.) Love does not dispute that he did not present information about worker classification in franchisee-owned salons. Nor does he dispute that some franchisor-owned salons treated some stylists as independent contractors. But Love states that, during the Discovery Day presentation, he discussed only performance indicators for salons, and did not present any "figures." (*Id.* ¶ 22.) Moreover, he testifies that he believes only 3 or 4 out of the 25 to 28 stylists in those UF-owned salons were independent contractors, and the rest were employees. (*Id.* ¶ 27.) Finally, Love states that he had "received no financial information on the company since 2007-2008," and had no knowledge of revenues at franchisor-owned salons. (SGD ¶ 26 (citing Love Depo. p.273:3–22; Love Decl. ¶11 and Ex. "A").)

The parties also disagree about the nature of Love's relationship with UF and Ultimate Brands. It is undisputed that Love, who is a stylist, visited and reviewed franchise locations, provided coaching and training to franchisee-and franchisor-owned salons, and presented to new franchisees at UF training events. (SGD ¶¶ 7–11.) It is also undisputed that the FDD listed Love as a president of Ultimate Brands. (SGD ¶ 19.) But whereas Plaintiffs contend that Love was an owner of Ultimate Brands, Love testifies that he held a minority interest in the company; that he was "never an officer of Ultimate Brands or Ultimate Franchises"; and he was not involved in running the two corporations. (SGD ¶ 4 (citing Love Depo. 66:6–22).) Love further testifies that he "wasn't involved in this documentation or anything to do with the FDD." (*Id.* ¶ 27 (Love Depo. 224:10–225:8; Love Decl. ¶¶ 9–12).)

Finally, Love disputes Plaintiffs' assertion that he "invested his own money and time—primarily without pay—because he wanted UF to succeed so he could succeed." (SGD ¶ 6.) Love testifies that the only money he received was a speaking fee of $7,000 per month to give talks at Discovery Day. (*Id.* (citing Love Depo. p.182:1-25; Love Decl. ¶¶ 7, 10.) Love states that he never received a salary or dividends, and that he offered his consulting services to salons for free.

Plaintiffs move for partial summary judgment on three of their claims against Love on the foregoing evidentiary record.

II. LEGAL STANDARD

***3** Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See also Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1079-80 (9th Cir. 2004) ("Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " (quoting Fed. R. Civ. P. 56(c))). "A dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *FreecycleSunnyvale v. Freecycle Network*, 626 F.3d 509, 514 (9th Cir. 2010) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A fact is "material" when its resolution " 'might affect the outcome of the suit under the governing law.' " *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013) (quoting *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of identifying " 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.' " *Fed. Trade Comm'n v. Stefanchik*, 559 F.3d 924, 927 (9th Cir. 2009) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted)). "Once the moving party meets its initial burden, however, the burden shifts to the non-moving party to set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007) (internal quotation marks and citation omitted). To defeat a motion for summary judgment, the non-moving party "must 'do more than simply show that there is some metaphysical doubt as to the material facts.' " *Sluimer v. Verity, Inc.*, 606 F.3d 584, 586 (9th Cir. 2010) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Furthermore, the non-moving party may not rely on "conclusory allegations" or "mere speculation." *Rogers v. Giurbino*, No. 11-CV-0560-IEG RBB, 2013 WL 692961, at *14 (S.D. Cal. Feb. 26, 2013). Rather, the "non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson*, 477 U.S. at 252).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant. *See Anderson*, 477 U.S. at 255. However, " 'credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.' " *Acosta v. City of Costa Mesa*, 718 F.3d 800, 828 (9th Cir. 2013) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)).

III. DISCUSSION

Plaintiffs move for summary judgment on three of the claims it has asserted against Love: (1) fraud, (2) fraud by omission, and (3) violation of California's Franchise Investment Law by making material misrepresentations or omissions. For the reasons stated below, the Court finds that Plaintiffs have failed to carry their burden of showing that they are entitled to summary judgment on any of these claims.

A. Fraud

To obtain summary judgment on their fraud claim, Plaintiffs must ultimately prove: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable

reliance; and (5) resulting damage. *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.4th 979, 990 (2004). Plaintiffs bear the burden of showing that the undisputed facts establish all five elements. Because Plaintiffs have failed to carry their burden to show that no issue of material fact exists as to whether Love materially misrepresented facts about franchise profitability, the Court need not address the other elements.

***4** Plaintiffs assert that Love made a misrepresentation because his presentation to franchisees included false representations about salon profitability. Specifically, Plaintiffs contend that Love made a detailed presentation about stylist pay, average ticket price, and daily and weekly guest counts (SGD ¶ 21); that the figures Love used were of franchisor-owned salons that treated high-level stylists as independent contractors, not as employees, (*Id.* ¶ 22); Love was aware that franchisees were required to treat their stylists as employees, which would costs more (*Id.* ¶ 25); and that Love therefore made a material misrepresentation about the potential financial performance of a franchisee-owned salon when he presented data based on franchisor-owned salons. (*Id.* ¶ 26.)

As an initial matter, even if the facts proffered by Plaintiffs were undisputed, the Court cannot conclude that any reasonable fact finder presented with these facts would conclude that Love made a misrepresentation. That is, it is not clear that presenting data about salon profitability based on *franchisor-owned* salons constitutes a material misrepresentation about the profitability of *franchisee-owned* salons. Whether this is a misrepresentation depends on the context and details of the presentation, and the disparity between the revenues of franchisor-owned and franchisee-owned salons. But Plaintiffs present no details about the content of Love's presentations. [1] And they have provided no evidence to show the difference in profitability of the two kinds of salons.

In any event, the record here is not undisputed and a disputed issue of material fact about whether Love made a material misrepresentation. Love contends that he made no financial representations whatsoever. Indeed, at his deposition, Love testified that his presentation was "about the methodology of running a salon." (Love Depo. 195:10–14.) Love contends that his presentation discussed how to evaluate the progress of a stylist, but it did not suggest stylist pay or recommend stylist commission structures. If the trier-of fact believes Love's testimony, Plaintiffs' claim fails. Accordingly, the dispute over Plaintiffs' and Love's account of the presentation precludes summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge").

B. Fraud by Omission

Plaintiffs also move on their claim for fraud by omission against Love. California law requires plaintiffs to prove: (1) defendant concealed or suppressed a material fact; (2) defendant was under a duty to disclose the fact to the plaintiff; (3) defendant intentionally concealed or suppressed the fact with intent to defraud the plaintiff; (4) plaintiff was unaware of the fact and would not have acted as they did if they had known of the fact; and (5) plaintiff was harmed because of the concealment or suppression of the fact. *Hahn v, Mirda*, 147 Cal.App.4th 740, 748 (2007).

Relying on the same evidence about Love's presentation, Plaintiffs argue that Love committed fraud by omission in failing to disclose that franchisor-owned salons treated stylists as independent contractors. (Mot. at 9.) In support of the proposition that Love had a duty to disclose this information, Plaintiffs argue that "[b]y undertaking to provide information to franchisees on stylist commission-based pay, Love had a duty to provide complete information." (*Id.*)

***5** However, as discussed above, there remain disputed issues of material fact about the nature of Love's presentation. Love asserts that his presentation was about the methodology of running a salon, and that he made no financial representations whatsoever. Love's general discussion of salons and their revenues would not create a duty for him to disclose the stylist pay-structures specific to franchisee-or franchisor-owned salons. And Plaintiffs offer no other evidence in support of their assertion that Love had a duty to disclose that franchisor-owned salons treated some stylists as independent contractors. For example,

they offer no details about statements that Love made at the presentation to show that failing to disclose that franchisor-owned salons treated stylists as independent contractors rendered his presentation incomplete and misleading given context.

Accordingly, the Court finds that Plaintiffs have failed to meet their burden and are not entitled to summary judgment on this claim.

C. California Franchise Investment Law

Under the California Franchise Investment Law ("CFIL"), it is unlawful for any person to offer or sell a franchise by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading. Cal. Corp. Code. § 31201.

Plaintiffs argue that UF's Financial Disclosure Document ("FDD") violated this law because it noted that franchisees may experience different labor costs but it failed to disclose the different classifications of stylists and different operating costs franchisees would encounter as compared to the 18/8 salons that were owned UF. (Mot. at 10–11.) But Love testifies that he was not an officer of UF or its parent company, Ultimate Brands; that he did not prepare the FDD; and that he had not seen the FDD before commencement of this action. (SGD ¶ 4 (citing Love Depo. 66:6–22).) Love states that he had no hand in running the two corporations; rather, he consulted for free for some of the salons and received a speaker's fee for presenting at Discovery Day. (*Id.*) Again, the Court does not resolve credibility determinations on a motion for summary judgment. Plaintiffs have adduced no independent evidence to show that, contrary to his testimony, Love had a senior role in the company and helped prepare the FDD. Therefore, even assuming the FDD contains a material misrepresentation or omission—which the Court does not decide—there exists an issue of material fact about whether Love can be held liable for any statements in the FDD.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' Motion for Partial Summary Judgment.

All Citations

Not Reported in Fed. Supp., 2021 WL 678687

Footnotes

1 Love devotes a substantial portion of his opposition to the argument that Plaintiffs fail to plead fraud with particularity as required by Rule 9(b) and cites case law dismissing fraud claims at the 12(b)(6) stage when the supporting allegations are general and conclusory. The summary judgment standard is concerned with the evidentiary record and not the pleadings.

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