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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

ALBERTA and JAN COLBERT, etc., et al. x

- against -

RANK AMERICA INC., et al. x

INDEX NO. 11140/98

BY: POLIZZI, J.

DATED: NOVEMBER 28, 2000

Defendant Rank America, Inc., defendant Resorts USA, Inc., and defendant Outdoor World Corporation have moved for summary judgment dismissing in whole or in part the complaint against them. Plaintiff Jan Colbert and plaintiff Alberta Colbert have cross-moved for, inter alia, summary judgment on their first three causes of action.

Plaintiff Jan Colbert, who holds a bachelor's degree in information systems management, is employed as a systems analyst with the law firm of Proskauer Rose, LP. Plaintiff Alberta Colbert, who also holds a bachelor's degree in information systems management, is a computer instructor/adjunct professor at LaGuardia Community College. Defendant Outdoor World Corporation, a Pennsylvania corporation, is a wholly-owned subsidiary of defendant Resorts USA, Inc., a Delaware corporation, which is a wholly-owned subsidiary of defendant Rank America, Inc., another Delaware corporation. The defendants allegedly advertise to consumers that they have won or may have won prizes and then sell the consumers campground membership contracts having only illusory benefits. According to the complaint, the actual cost of vacations

to consumers is "unconscionably in excess of what it would cost for vacation resorts without a membership contract."

The Colberts allegedly received a letter from the defendants offering "FREE ROUNDTRIP AIRLINE TICKETS TO THE BAHAMAS!" if they attended a sales presentation.

On or about January 27,1996, the Colberts went to the Garden City, New York sales office of the defendants, where they were shown pictures of resorts and of the defendants' RV's. The plaintiffs were made aware that the RV's varied in size. The salesman allegedly represented to the plaintiffs that by becoming a member they could visit any of the defendants' resorts without charge unless they needed a place to stay overnight. The salesman also allegedly represented to the plaintiffs that Timothy Lake, one of the defendants' resorts, was a place of calm and tranquility with only a few people visiting it. The sales representative explained the difference between a time-sharing plan and the defendants' program and also explained how the defendants' program would allegedly save the Colberts' money in comparison to the cost of taking a vacation on their own. The salesman allegedly refused to give the plaintiffs time to show the proposed contract to their attorney. After three hours of allegedly high pressure sales tactics, the plaintiffs entered into a campground membership contract which had a 15-year term. The contract required the Colberts to make, inter alia, a down payment of $790 in cash, 120 monthly payments of $125.17 with an interest rate of 16.15%, and payment of initial annual dues of $341. Jan Colbert admitted at his deposition that he knew before he signed the contract that

it required him to pay $125.17 per month and that he "might have glanced" at the stated annual interest rate of 16.5%. (JC Tr., 38.) He also admitted seeing the stated total sales price of $15,810.40 before signing the contract. Alberta Colbert also admits seeing the "numbers" in the contract. (AC Tr., 18.) A few days afterward, Jan Colbert tried to read the contract, but he allegedly "couldn't understand it, the contract, whatsoever." (JC Tr., 42.)

About two months after entering into the contract, the Colberts visited the defendants' facility at Timothy Lake where they stayed for four or five hours. The plaintiffs allegedly found the place "jam packed" (JC Tr., 16) and "made for a kid." (JC Tr., 17.) They were also disappointed that a playroom for the children had closed earlier in the day. In August 1996, the plaintiffs, accompanied by Jan Colbert's parents, mother-in-law, and daughter, also visited a facility run by the defendants in Orlando, Florida, after allegedly encountering difficulties in making reservations. (The plaintiffs had been attempting to contact one of defendants' employees who allegedly had suffered a death in the family.) The defendants could not make a condo available to the plaintiffs, and the defendants had offered them a complimentary stay in an RV. A representative of the defendants had allegedly told the plaintiffs that they would be given a 38-foot RV. Upon arriving, a security guard took the Colberts to their trailer, which allegedly was not as big as promised, and showed the bedroom, bathroom, and air conditioner. Jan Colbert looked around the trailer and allegedly discovered that the doors

had no locks and that a chair which opened into a bed was too small. The toilet also allegedly malfunctioned. After about two hours, the plaintiffs left the defendants' facility and went to a motel. During the course of their vacation, the plaintiffs visited Universal Studios, where they had difficulty obtaining the discounted rate allegedly available to members of defendants' program. The plaintiffs expressed their dissatisfaction about their experience in Orlando to the defendants who then offered them a free stay at another resort. (JC Tr., 83.)

In November 1997, the plaintiffs stopped making payments due under the contract and subsequently began this action. By decision and order dated October 16, 1998, Mr. Justice Goldstein granted in part and denied in part a motion by the defendants for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the complaint against them. By decision dated April 5, 1999, this court granted in part and denied in part a second motion by the defendants made pursuant to CPLR 3211. On June 5, 2000, the Appellate Division, Second Department granted class action certification. (Colbert v Rank America, Inc., 273 AD2d 209.)

Defendant Rank America, Inc. contends that the circumstances of this case do not warrant the imposition of liability upon it pursuant to the doctrine of "piercing the corporate veil." However, there are issues of fact in this regard which preclude summary judgment. (See, Meachum v. Outdoor World Corporation, 235 AD2d 462.) The court notes that the salesman allegedly made representations concerning Rank America, Inc. at the presentation. (JC Tr., 99.)

Accordingly, that branch of the motion which is for summary judgment dismissing the complaint against defendant Rank America, Inc. is denied.

The first cause of action alleges a violation of General Business Law § 349, "Deceptive acts and practices unlawful," which provides in relevant part: "(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." (See, Meachum v Outdoor World Corp., supra.) The statute is broad in scope. (See, Karlin v IVF Am., 93 NY2d 282.) Proof of a prima facie case under General Business Law § 349 requires "a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof * * *." (Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25.) "[A] claim for deceptive business practices under General Business Law § 349 or for false advertising under General Business Law § 350 requires proof of a causal connection between some injury to plaintiffs and some misrepresentation made by defendants * * *." (Small v Lorillard Tobacco Co., 252 AD2d 1, 15, affd 94 NY2d 43.) The test for deceptive acts and practices is an objective one, i.e., whether the defendant made representations or omissions which were "likely to mislead a reasonable consumer acting reasonably under the circumstances." (Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra.) "[R]eliance is not an element of a section 349 claim." (Stutman v Chemical Bank, 95 NY2d 24.) The court cannot hold here as a matter of law that the defendants made

a fair and adequate disclosure of all of the plaintiffs' expenses under the contract. Moreover, there are issues of fact pertaining to whether the defendants made false representations concerning their vacation facilities and concerning the benefits of the vacation contract .

Accordingly, that branch of the defendants' motion which is for summary judgment dismissing the first cause of action is denied.

The plaintiffs' second cause of action is for false advertising in violation of General Business Law § 350, "False advertising unlawful," which provides: "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." (See, Bader v Siegel, 238 AD2d 272.) In order to prove a cause of action under General Business Law § 350, the plaintiff must show, inter alia, that he knew about and relied upon advertising by the defendant. (See, McGill v General Motors Corporation, 231 AD2d 449; Gershon v Hertz Corp., 215 AD2d 202.) The Colberts' second cause of action rests on two relevant documents, the first, a letter stating "FREE ROUNDTRIP AIRLINE TICKETS TO THE BAHAMAS![.] Just for coming in to see our travel membership presentation. You can choose to leave from any airport, use any airline and plan your trip any time of the year!" and the second, a flyer stating, in part, "FREE $100 GIFT CERTIFICATE[.] Just for seeing our travel presentation you will be handed a $100 gift certificate redeemable at any store in the Roosevelt Field Mall." (The defendants' advertising involving the Chevy Blazer is irrelevant because the

plaintiffs saw it after they entered into the contract.) At his deposition, plaintiff Jan Colbert testified that he received the Bahamas letter inviting him to the defendants' sales presentation, and Alberta Colbert also testified at her deposition that the document had come by mail. However, when asked as his deposition whether he had entered the campground membership contract because of the Bahamas letter, Jan Colbert testified, "No. After I was introduced to the other things, the fact that I could go to all these recreation areas all these years without really spending money, when you make the difference between going between vacation and time sharing and the membership itself, all of the benefits you are getting from that membership." (JC Tr., 82.) Moreover, Alberta Colbert admitted that she had received a certificate for a trip to the Bahamas, but that she did not "pursue" the matter after discovering that the hotel accommodations weren't free in addition to the promised free airline tickets. In regard to the Bahamas letter, there are no genuine issues of fact concerning whether the document was deceptive or whether the plaintiffs relied on it in entering the campground contract.

In regard to the second document, the $100 gift certificate flyer, the plaintiffs allege that the flyer was deceptive because it failed to state that it was not useable by them, and, according to the plaintiffs' attorney, "the $100 Free Certificate * * * does not give any benefits to a referred person. They would have to go through the same sales presentation as the Colberts and also get no benefits." However, pretrial deposition testimony given by the plaintiffs shows that they themselves were

not deceived by the flyer, not lured to the defendants' presentation by the flyer, and not induced to rely upon it in signing the contract. Alberta Colbert testified at her deposition that she did not receive the flyer until after she went to the Garden City presentation. She testified: "This is something that was given to us at the presentation, you know, sort of like an incentive for us to share it with others." She heard the defendants' representative explain at the presentation "* * *this is what we could share with other people we knew * * *." The Colberts were not deceived because they understood that they themselves could not use the certificate, and, in regard to reliance, Alberta Colbert does not even remember whether she saw the flyer before she signed the contract. The plaintiffs failed to raise genuine issues of fact concerning whether they were deceived by the $100 flyer and whether they relied on it to their detriment.

Accordingly, that branch of the defendants' motion which is for summary judgment dismissing the second cause of action is granted.

The plaintiffs' third cause of action is based on Article 31 of the General Business Law, "The Membership Campground Act." General Business Law § 653(1) provides in relevant part that: "Prior to the execution of a membership camping contract, the purchaser must be provided with a disclosure document * * *." The third cause of action had already been dismissed to the extent that it rests on paragraphs 45(d) and 45(f) of the complaint. The defendants are now seeking summary judgment dismissing the third

cause of action to the extent that it rests on paragraphs 45(b), 45(e), 45(f), 45(g), 45(h), and 45(i) of the complaint.

Paragraph 45(b) of the complaint alleges that "any purported 'DISCLOSURE DOCUMENT' failed to properly reveal the business experience and full background of defendants involving fraud, or deceptive practices or violation of any law applicable to membership campgrounds." The Appellate Division, Second Department, has ruled that the consent decrees entered into by the defendants need not be disclosed by them pursuant to General Business Law § 653(2)(b) unless the consent decrees so require. (See, Colbert v Rank America, Inc., 273 AD2d 208.) Thomas V. Casale, Esq., the Deputy General Counsel for defendant Outdoor World Corporation and defendant Resorts USA, Inc. swears that "no consent decree has ever been entered into by Outdoor World Corporation with the Attorney General of The State of New York, including, without limitation, any fact or matter having to deal with campground memberships. I can further state that no consent decree has been entered into by Outdoor World, Resorts, or any subsidiary of Resorts, with any attorney general of any state containing a provision which directs that the consent decree be disclosed to prospective purchasers of campground memberships or otherwise." However, the Casale affidavit does not allege that there are no consent decrees against defendant Rank America, Inc. Defendant Outdoor World Corporation, a Pennsylvania corporation, is a wholly-owned subsidiary of defendant Resorts USA, Inc., a Delaware corporation, which is a wholly-owned subsidiary of defendant Rank America, Inc., another Delaware corporation.

General Business Law § 651(7) provides that "'operator' means any person, corporation, partnership, or other entity that owns or operates a membership campground." Defendant Rank America, Inc. is an operator through its wholly-owned subsidiaries, and the disclosure statement furnished to the plaintiffs, if any, should have set out consent decrees against the parent corporation required to be disclosed. Thus, the defendants have failed to show through the Casale affidavit that they are entitled to the dismissal of paragraph 45(b) of the complaint as a matter of law.

Paragraph 45(e) of the complaint alleges that the defendants have "failed to comply with GBL 349, 350, and 369-ee in the marketing, promotion and advertising of membership camping contracts." General Business Law § 656, "Advertising standards," provides: "Membership campground operators, their employees and agents shall be subject to all relevant provisions of this chapter, including, but not limited to, sections three hundred forty-nine, three hundred fifty, and three hundred sixty-nine-ee in the marketing, promotion, and advertising of membership camping contracts." Contrary to the defendants' argument, General Business Law § 656 does create liability under the Membership Campground Act. Moreover, there are issues of fact pertaining to whether the defendants violated General Business Law § 349.

Paragraph 45(f) of the complaint has already been dismissed.

Paragraph 45(g) of the complaint alleges that the defendants "misrepresented the nature and quality of the vacation facilities * * *." Contrary to the contention of the defendants,

this allegation can form a basis for a cause of action under the Membership Campground Act. (See, General Business Law §§ 653(2)(d) and 656.)

Paragraph 45(h) of the complaint alleges that the defendants "failed to comply with the remedial intent of the statute to have full disclosure of crucial information necessary for an informed consumer to make a rational decision to purchase a campground membership contract." The plaintiffs' third cause of action is insufficient to the extent that it rests on this vague and duplicative allegation.

Paragraph 45(i) of the complaint alleges that the defendants "failed to permit consumers to have a meaningful opportunity to review campground contracts." The defendants are entitled to summary judgment as a matter of law dismissing the third cause of action in this regard because they had three days after the execution of the contract to cancel it. The contract reads in bold type right above the signatures of the plaintiffs: "YOU MAY CANCEL THIS MEMBERSHIP CONTRACT WITHOUT ANY PENALTY, FORFEITURE OR FURTHER OBLIGATION WITHIN THREE (3) BUSINESS DAYS FROM THE DATE YOU EXECUTE SAID CONTRACT." Plaintiff Jan Colbert admits reading the cancellation clause in the contract at some point, and the parties signed acknowledgments that they had read the contract.

Accordingly, that branch of the defendants' motion which is for summary judgment dismissing the third cause of action is granted to the extent that the third cause of action is dismissed

insofar as it rests on paragraphs 45(f), 45(h), and 45(i) of the complaint. The branch is otherwise denied.

The plaintiffs' fourth cause of action is for breach of contract. The plaintiffs allege, inter alia, that the defendants "[f]ailed to provided resort facilities that were sanitary, in good working order and of the quality which had been represented" and that the defendants "failed to have a system in place to deal with honoring reservations, causing months of delay in being able to arrange for accommodations." The elements of a cause of action for breach of contract are "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." (See, Harsco Corp. v Segui, 91 F3d 337, 348.) In the case at bar, summary judgment is precluded by issues of fact pertaining to whether the defendants breached the contract by failing to render promised benefits and/or by failing to render them in a satisfactory manner. Moreover, a material breach of contract by one party gives the other party a right to rescind the contract. (See, Grant Entertainment, Inc. v Lee, 186 AD2d 66.) The court cannot conclude here as a matter of law that, under all of the circumstances of this case, there was no material breach of the contract. (See, Frank Felix Assocs., Ltd. v Austin Drugs, Inc., 111 F3d 284.)

Accordingly, that branch of the defendants' motion which is for summary judgment dismissing the fourth cause of action is denied.

The defendants' fifth cause of action seeks rescission of the contract on the ground of unconscionability. A party seeking to establish unconscionability generally must show that a contract is "both procedurally and substantively unconscionable when made * * *." (Gillman v Chase Manhattan Bank, 73 NY2d 1, 10.) "As a general proposition, unconscionability, a flexible doctrine with roots in equity * * *, requires some showing of 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party'* * *." (State of New York v Avco Fin. Serv., 50 NY2d 383, 389, quoting Williams v. Walker-Thomas Furniture Co., 350 F2d 445, 449; Gillman v Chase Manhattan Bank, supra.) "The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus is on such matters as the size and commercial setting of the transaction (see, UCC 2-302[2]), whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power * * *." (Gillman v Chase Manhattan Bank, supra, 10; Morris v Snappy Car Rental, 84 NY2d 21.) The substantive element of unconscionability "entails an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged * * *." (Gillman v Chase Manhattan Bank, supra, 12.) "While determinations of unconscionability are ordinarily based on the court's conclusion that both the procedural and substantive components are

present * * *, there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone * * *." (Gillman v Chase Manhattan Bank, supra, 12; Brower v Gateway 2000, Inc., 246 AD2d 246.) There are conflicting allegations in the record concerning, e.g., whether the defendants used deceptive sales tactics and whether the contract provided the plaintiffs with largely illusory benefits. Under all of the circumstances of this case, the issue of unconscionability is a question of fact which cannot be resolved here. (See, Jonathan Cass, Ltd. v Wal-Mart Stores, Inc., 216 AD2d 31; Currie v Three Guys Pizzeria, Inc., 207 AD2d 578; Niosi v Niosi, 205 AD2d 514.)

Accordingly, that branch of the defendants' motion which is for summary judgment dismissing the fifth cause of action is denied.

The plaintiffs' sixth cause of action is for unjust enrichment. "A cause of action for unjust enrichment arises when one party possesses money * * * that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another." (Mente v Wenzel, 178 AD2d 705, 706.) Since the plaintiffs have alleged breaches of duty distinct from breach of contract, this cause of action is not dismissable. (See, Express Home Care Agency, Inc., v VIP Health Services, Inc., ___ AD2d ___, 713 NYS2d 549.)

Accordingly, that branch of the defendants' motion which is for summary judgment dismissing the sixth cause of action is denied.

The complaint contains a claim for punitive damages. The elements required to state a claim for punitive damages when the claim arises from a breach of contract include: "(1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in Walker v Sheldon, 10 NY2d 401, 404-405); (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally * * *." (New York Univ. v Continental Ins. Co., 87 NY2d 308, 316.) Fraud in the inducement is actionable as an independent tort (see, New York Univ. v Continental Ins. Co., supra), and, moreover, there is sufficient evidence in the record concerning the other three elements to raise genuine issues of fact.

Accordingly, that branch of the defendants' motion which seeks summary judgment dismissing the plaintiffs' claim for punitive damages is denied.

The plaintiffs' cross motion is denied.

Settle order.

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J.S.C.