

**Court of Appeals, State of Michigan**

**ORDER**

David Abbo v Wireless Toyz Franchise LLC

Docket No. 304185

LC No. 2007-082804-CK

Elizabeth L. Gleicher  
Presiding Judge

Amy Ronayne Krause

Michael J. Riordan  
Judges

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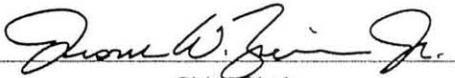
The Court orders that the motion for reconsideration is GRANTED, and this Court's majority and dissenting opinions issued February 4, 2014 are hereby VACATED. New majority and dissenting opinions are attached to this order.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

**MAY 13 2014**

Date

  
Chief Clerk

STATE OF MICHIGAN  
COURT OF APPEALS

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DAVID ABBO, COLORADO TOYZ, INC., and  
WIRELESS PHONES, L.L.C.,

UNPUBLISHED  
May 13, 2014

Plaintiffs-Appellants,

v

No. 304185  
Oakland Circuit  
LC No. 2007-082804-CK

WIRELESS TOYZ FRANCHISE, L.L.C., JOE  
BARBAT, RICHARD SIMTOB, JSB  
ENTERPRIZES, INC., and JACK BARBAT,

Defendants-Appellees.

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Before: GLEICHER, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

RIORDAN, J. (*dissenting*).

Because the trial court correctly granted defendants' motion for JNOV, I respectfully dissent from the majority's opinion.

We review *de novo* a trial court's decision on a motion for JNOV. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). A court must "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). Because the evidence viewed in a light most favorable to the plaintiffs fails to establish a claim of fraud against the defendants as a matter of law, the trial court should be affirmed.

I. MERGER CLAUSE

A valid merger clause is conclusive evidence of the parties' intent that a written instrument represents their final agreement. As the majority recognizes, "[t]he *raison d'être* of an integration clause is to prohibit consideration of parol evidence by nullifying agreements not included in the written agreement." *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 507 n 14; 579 NW2d 411 (1998); see also *Barclae v Zarb*, 300 Mich App 455, 480; 834 NW2d 100 (2013). Thus, a valid integration clause nullifies "all prior and contemporaneous agreements, understandings, representations, and warranties" so that a "plaintiff may not use parol evidence to contradict the explicit terms of the integration clause." *Hamade v Sunoco Inc (R & M)*, 271 Mich App 145, 171; 721 NW2d 233 (2006).

If parol evidence always is admissible with regard to the threshold issue whether the written agreement was integrated despite the existence of a merger clause, there would be no point in even including such a clause in a contract. *UAW-GM Human Res Ctr*, 228 Mich App at 495. By including such a clause, the parties to a contract are clearly indicating that the written agreement is a final, complete, and integrated document. *Id.* An integration clause is intended to dispense of the threshold issue of whether the agreement is integrated and completely reflects the parties' agreement. *Id.* Thus, when a contract contains a valid merger clause, there is no need to resort to parol evidence. *Id.* This is especially so when parties to an agreement are in equal bargaining positions, each with the ability to fend for themselves.

In the instant case, the franchise contract provides that “[t]his agreement and the Manuals contain all of the covenants and agreements of the parties with respect to this subject matter, and supersede any and all prior or contemporaneous agreements, whether oral, written, express or implied, between the parties with respect to the subject matter.” Likewise, the development agent agreement states: “This Agreement and all appendices and other documents attached to this Agreement are incorporated in this Agreement and will constitute the entire agreement between the parties.” It further states that: “This Agreement supersedes all previous written and oral agreements or understandings between the parties” and that the agreement “may not be amended or modified except in a writing executed by both parties.”

## II. FRAUD

Plaintiffs' claims for silent fraud based on representations made prior to the parties' execution of the franchise or development agent agreement fail as a matter of law. The agreement's integration clause nullified “all prior and contemporaneous agreements, understandings, representations, and warranties[.]” *Hamade*, 271 Mich App at 171. Any alleged representations about hits and chargebacks directly contradict the statements in the franchise agreement disclaiming guarantees of profitability. Therefore, those misrepresentations cannot be a basis for a fraud claim. Because any pre-contractual statements were “collateral agreements or understandings between two parties that [were] not expressed in a written contract,” they were “eviscerated by [the] merger clause[.]” *Barclae*, 300 Mich App at 481.

As this Court has recognized, where a contract contains a merger clause, the only fraud that could vitiate the contract is if the merger clause itself was the product of fraud or the entire contract was based upon a fraud. *Barclae*, 300 Mich App at 480-483; see also *UAW-GM Human Res Ctr*, 228 Mich App at 503. “Fraud will invalidate a contract when a party's assent to said contract is induced through *justified* reliance upon a fraudulent misrepresentation.” *Barclae*, 300 Mich App at 482 (emphasis in original), quoting *Star Ins Co v United Commercial Ins Agency, Inc*, 392 F Supp 2d 927 (ED Mich 2005); see also *UAW-GM Human Res Ctr*, 228 Mich App at 504; *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 243; 733 NW2d 102 (2006); see *Cook v Little Caesar Enterprises, Inc*, 210 F3d 653, 659 (CA 6, 2000). There is no evidence in the instant matter that supports such a conclusion.

In order to establish silent fraud, “the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure.” *Barclae*, 300 Mich App at 477 (quotation marks and citation omitted). However, “[a] plaintiff cannot merely prove that the defendant failed to disclose something;

instead, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive.” *Id.* Plaintiffs fail as a matter of law to demonstrate any facts that justified reliance on any alleged misrepresentations.

During Simtob’s Discovery Day, plaintiffs were informed about profit reductions in the form of hits and chargebacks. After hearing this sales pitch, Abbo and Bober reviewed Wireless Toy’s Uniform Franchise Offering Circular (UFOC), a disclosure statement mandated by the Federal Trade Commission (FTC). The UFOC warned prospective franchisees that it only provided estimates of revenues, and was not extending financial guarantees. The UFOC specifically stated: “There is a charge back for customer contracts that are cancelled by the customer within a period specified by the Carrier.”

Moreover, Abbo admitted that he was aware of hits and chargebacks. While the precise data regarding hits was not included in the UFOC, the UFOC encouraged prospective buyers to contact several Wireless Toyz retail locations directly to obtain such information, and provided the names and addresses. Those retailers were not exclusively relatives and friends. Furthermore, item 19 of the UFOC, encourages prospective franchisees to consult other stores, as it stated in capital letters: “YOU SHOULD CONDUCT AN INDEPENDENT INVESTIGATION OF THE COSTS AND EXPENSES YOU WILL INCUR IN OPERATING YOUR FRANCHISED BUSINESS. FRANCHISEES OR FORMER FRANCHISEES, LISTED IN THE OFFERING CIRCULAR, MAY BE ONE SOURCE OF THIS INFORMATION. WE DO NOT REPRESENT THAT YOUR STORE WILL BE PROFITABLE.”

Of even greater significance is that the franchise agreement directly disclaimed any guarantee regarding profitability. Paragraph 11.2 of the franchise agreement states:

Except as provided in the Offering Circular delivered to the Franchise Owner, the Franchise Owner acknowledges that Wireless Toyz has not, either orally or in writing, represented, estimated or projected any specified level of sales, costs or profits for this Franchise, nor represented the sales, costs or profit level of any other Wireless Toyz Store.

Likewise the development agent agreement stated:

Development Agent also acknowledges that the success of Development Agent’s business depends primarily on Development Agent’s efforts and that neither Wireless Toyz nor any of its agents have made or are authorized to make any oral, written or visual representations or projections of potential earnings, sales, profits, costs, expenses, prospects or changes of success except as set forth in Wireless Toyz’s Franchise Offering Circular or as otherwise set forth in writing. Development Agent agrees that he has not relied on and that Wireless Toyz will not be bound by allegations of any representations regarding as to potential earnings, sales, profits, costs, expenses, prospects or chances of success except as set forth In Wireless Toyz’s Franchise Offering Circular or as otherwise as set forth in writing.

In light of these significant warnings and disclaimers, it cannot be concluded that plaintiffs reasonably relied on any statements made before the parties entered into the written franchise agreement. “Because of the abundant and meaningful cautionary language contained in the” documents, they “truly bespeak[] caution because, not only [do they] generally convey the riskiness of the investment, but [their] warnings and cautionary language directly address the substance of the statement the plaintiffs challenge. That is to say, the cautionary statements were tailored precisely to address the uncertainty concerning” the profitability of the franchise. *In re Donald J Trump Casino Secuirites Litigation-Taj Mahal Litigation*, 7 F3d 357, 372 (CA 3, 1993).<sup>1</sup> Even more so, “[a] person may not enter into a transaction with his eyes closed to available information and then charge he has been deceived by another.” *Adler v William Blair & Co*, 271 Ill App 3d 117, 125-126; 648 NE2d 226 (1995) (quotation marks and citation omitted).

“The way information is disclosed can be as important as its content.” *SEC v Morgan Keegan & Co, Inc*, 678 F3d 1233, 1250 (CA 11, 2012). Here, the UFOC constituted federally mandated disclosures, and unequivocally informed plaintiffs that there was a chargeback for cancelled customer contracts, and that prospective franchisers should contact other retailers for more specific details regarding profitability. Because this document “invit[ed] them to ask questions concerning the investment and to verify the accuracy of the information given” it cannot “reasonably be interpreted as authorizing the plaintiffs to rely on representations totally at odds with the written statements. To accept the plaintiffs’ contention is to hold the written agreement for naught.” *Adler*, 271 Ill App 3d at 127. Moreover, the controlling document in this case, the franchise agreement, called for plaintiffs’ acknowledgment that defendants had not, either orally or in writing, represented or estimated costs or profits. As the trial court noted, Abbo testified that he initialed each page of the franchise and development agent agreement, including the pages containing the merger clause, indicating such an acknowledgment.

It is significant that plaintiffs were not unsophisticated nor naïve parties to the franchise agreement. As the majority acknowledges, Abbo was an entrepreneur, and has proven business acumen. The plaintiffs had an accountant working on their behalf. This was not a case of parties with unequal bargaining power or plaintiffs with an exploitable susceptibility. In fact, plaintiffs actively sought out this opportunity and were fully aware of the agreement to which they consented and the associated risks. The evidence simply does not support the conclusion that these business savvy plaintiffs were seduced into a franchise agreement due to their reasonable reliance on misrepresentations or omissions.

In light of the frequent disclaimers and warnings regarding decreased profits, the motion for JNOV should have been granted “as a matter of law” because plaintiffs’ alleged reliance on pre-contractual statements was not justified. *Wilkinson*, 463 Mich at 391. Moreover, as a matter of law, written disclosures, cautionary language, and “the merger clause made it unreasonable for

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<sup>1</sup> Albeit *Trump Casino Secuirites Litigation* was in the context of federal securities litigation, it considered § 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated thereunder. Rule 10(b)(5)’s language mirrors exactly that of the MFIL’s fraud provision, MCL 445.1505, which is at issue in this case.

[plaintiffs] to rely on any representations not included” in the agreement. *UAW-GM Human Res Ctr*, 228 Mich App at 504; see also *Barclae*, 300 Mich App at 482.

### III. CONCLUSION

The merger clause, written disclosures, and cautionary language precludes a finding that plaintiffs were entitled to recovery for silent fraud. The merger clause is valid and enforceable because there is no evidence that plaintiffs were “defrauded regarding the integration clause or defrauded into believing that the written contract included a provision” requiring a guarantee of profitability “when it did not.” *UAW-GM Human Res Ctr*, 228 Mich App at 505.

I would affirm the trial court’s order.

/s/ Michael J. Riordan