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| ADVENTURE PARK HAMILTON, LLC, ADVENTURE QUEST, INC., ADVENTURE PARK MANCHESTER, LLC, and TBSM ADVENTURE CORPORATION,<br><br>Plaintiffs,<br><br>v.<br><br>UATP MANAGEMENT, LLC, MICHAEL O. BROWNING, JR., ALIX WREN, and JAMES CROWLEY,<br><br>Defendants. | **SUPERIOR COURT OF NEW JERSEY**<br>LAW DIVISION – BERGEN COUNTY<br><br>DOCKET NO. **BER-L-6331-20**<br><br>Civil Action<br><br>**OPINION** |

**Argued:** **March 19, 2021**
**Decided:** **March 25, 2021**

**HONORABLE ROBERT C. WILSON, J.S.C.**

Brent Davis, Esq. appearing on behalf of Plaintiffs Adventure Park Hamilton, LLC, Adventure Quest, Inc., Adventure Park Manchester, LLC, and TBSM Adventure Corporation (from Marks & Klein, LLP)

David S. Sager, Esq., and William J. Diggs, Esq. appearing on behalf of Defendants UATP Management, LLC, Michael O. Browning, Jr., Alix Wren, and James Crowley (from DLA Piper LLP)

## PROCEDURAL HISTORY & FACTUAL BACKGROUND

**THIS MATER** initially began on October 22, 2020, when Plaintiffs filed a Verified Complaint alleging that UATP Management, LLC ("UATP") (1) breached certain obligations under the franchise agreements and (2) fraudulently induced Plaintiffs to enter into those agreements. UATP is a national franchisor of indoor adventure parks. Plaintiffs are three current franchisees and one former franchisee of UATP. All four Plaintiffs entered into written franchise agreements with UATP, each of which contains a forum selection clause requiring the Plaintiffs to bring these claims in Texas. Plaintiffs dispute the validity of those forum selection

clauses and claim that the New Jersey Franchise Practices Act ("NJFPA") invalidates those forum selection clauses.

Each of the four Plaintiffs entered into their own separate franchise agreement with UATP, which gave each Plaintiff the right to operate an Urban Air adventure park in a specified location. Three of the locations are outside of New Jersey, but the fourth franchise location for Plaintiff Adventure Park Hamilton, LLC ("APH"), was meant to be in Hamilton, NJ, but never proceeded past the execution of an agreement. UATP is a Texas LLC, which at the time this litigation was initiated, only maintained its principal place of business in Texas. Adventure Quest, Inc. ("AQI"), maintained a park location in Connecticut. TBSM Adventure Corporation ("TBSM") attempted to open park location in New York. Adventure Park Manchester ("APM") maintained a park location in Manchester, Connecticut.

For the reasons set forth below, Defendant's Motion to Dismiss is hereby **GRANTED**.

**MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)**

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id. It is simply not enough for a party to file mere conclusory allegations as the basis of its complaint. See Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012); see also Camden Cty. Energy Recovery Assocs., L.P. v. New Jersey Dept. of Envtl. Prot., 320 N.J. Super 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

## RULES OF LAW AND DECISION

Defendant's Motion to Dismiss is granted because the Texas forum selection clauses are valid, the NJFPA does not invalidate the forum selection clauses, and the individual defendants must be dismissed for lack of personal jurisdiction.

### I. The Complaint Against APH, AQI, APM, and TBSM Must be Dismissed Because of the Texas Forum Selection Clauses

Forum selection clauses are generally enforceable in New Jersey. Caspi v. Microsoft Network, LLC, 323 N.J. Super. 118, 123 (App. Div. 1999). A party opposing the forum selection clause has the burden of proving it is unenforceable. Unless a party satisfies that burden, the party cannot file suit in a court other than the one in which it agreed to bring its claims. Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 611, n.7 (App. Div. 2011) (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94 (1991)). Where a party

files suit in another court without satisfying that burden the case must be dismissed, as a court lacks subject matter jurisdiction over a case brought in an ineligible forum. Hoffman, 419 N.J. Super. at 606 (citing Pepper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 65 (1978)).

Here, all four Plaintiffs entered into franchise agreements containing broad forum selection clauses which require that their claims be brought in Texas. The forum selection clauses in APH's and APM's franchise agreements encompass not just claims for breach of contract, but any litigation arising out of the Agreement or between the parties. The forum selection clauses in AQI's and TBSM's franchise agreements are equally broad, embracing any dispute arising under or in connection with the agreement. The claims in the Complaint fall within the scope of these broad provisions as Plaintiffs assert breach of the franchise agreement (Counts VI and VII); violation of the New Jersey Consumer Fraud Act, the Connecticut Unfair Trade Practices Act, the Florida Deceptive and Unfair Trade Practices Act, the New York Franchise Sales Act, and common law fraud based on the offer and sale of the franchise agreements (Counts I, III, IV, V, and VIII); violation of the New Jersey Franchise Practices Act based on standards of performance allegedly imposed in connection with the franchise agreements (Count II); and, tortious interference with prospective economic advantage in connection with effort to transfer the franchise agreements (Count IX).

Plaintiffs assert that the forum selection clauses are invalid based on Kubis & Perszyk Assocs. v. Sun Microsystems. 146 N.J. 176 (1996). Kubis only applies when a plaintiff has asserted a valid claim under the NJFPA. See Cadapult Graphic Sys., Inc. v. Tektronix, Inc., 98 F. Supp. 2d 560, 565 (D.N.J. 2000) ("Kubis only applies where, unlike the instant case, a plaintiff asserted a valid claim under the [NJFPA]"). The NJFPA only applies to franchises where all three of the following requirements are met: (1) the performance of the franchise contemplates or requires the franchisee to establish or maintain a place of business within the

State of New Jersey; (2) gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to the NJFPA; and, (3) more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise. N.J.S.A. § 56:10-4.

Here, the NJFPA does not apply to any of the Plaintiffs' four franchises. Three franchises (AQI, APM, TBSM) did not contemplate nor require the franchisee to establish or maintain a place of business within the State of New Jersey—AQI's and APM's require a place of business in Connecticut, and TBSM's franchise agreement requires a place of business in New York. The franchise agreement with APH contemplated a park in New Jersey, but it never opened and had no gross sales. As a result, while APH may satisfy the first prong, it does not satisfy the second prong requiring "gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to [the NJFPA]." N.J.S.A. § 56:10-4.

Plaintiffs acknowledge that the separate companies (AQI, APM, TBSM, and APH) are in fact separate legal entities but attempt to use APH's contemplation of establishing a franchise location in New Jersey as a hook to attach the remaining entities to New Jersey. Plaintiffs argue that the separate companies are owned by a resident of New Jersey and that can somehow satisfy the NJFPA. By linking these separate entities in such a way, the Plaintiff also argues that the $35,000 threshold is met, because the other entities—which have separate franchise agreements—have met that threshold. Plaintiffs misinterpret the statute. In order for the NJFPA to apply each entity must contemplate or maintain a place of business in New Jersey, meet the $35,000 threshold, and have more than 20% of the franchisee's gross sales intended to be or actually derived from such franchise. Because the NJFPA does not apply to any of the Plaintiffs'

franchises, the forum selection clauses must be enforced, and the Defendants' motion to dismiss must be granted.

## II. The Complaint Against Defendants Browning, Wren, and Crowley Must be Dismissed for Lack of Personal Jurisdiction

The burden is on the Plaintiff to allege sufficient facts to warrant the Court's exercise of jurisdiction. See Baanyan Software Servs., Inc. v. Kuncha, 433 N.J. Super. 466, 477 (App. Div. 2013). Plaintiffs have not met their burden here with respect to Defendants Browning, Wren, and Crowley (the "Individual Defendants"). The Individual Defendants are citizens and residents of Texas, and although Plaintiffs allege that the Individual Defendants made misrepresentations to Lakshman Paidi, the Plaintiffs never tie these representations to New Jersey. Plaintiffs claim that the Complaint is replete with allegations that the Individual Defendants knowingly sent false statements into New Jersey with the intent that Plaintiffs rely on those statements, but none of the paragraphs cited by the Plaintiffs allege specifically that the Defendants knowingly sent false information into New Jersey. The Complaint therefore must also be dismissed against the Individual Defendants for lack of jurisdiction.

## CONCLUSION

For the aforementioned reasons, Defendant's Motion to Dismiss is hereby **GRANTED**.