

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

United States District Court  
Southern District of Texas

**ENTERED**

November 19, 2021

Nathan Ochsner, Clerk

Sean Simpson, *et al.*,

Plaintiffs,

versus

OsteoStrong Franchising, LLC,

Defendant.

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Civil Action H-19-2334

### Opinion on Partial Summary Judgment

I. *Introduction.*

OsteoStrong Franchising, LLC, offers services to promote healthy joints, strong bones and muscles, and better balance and flexibility. Kyle Zagrodzky is the founder and former CEO of OsteoStrong. He works with Manny Butera, who is the vice president of operations and franchise sales. Franchisees sell memberships, and members schedule weekly appointments to use its equipment.

In June 2013, OsteoStrong sold a franchise to Sean and Charla Simpson. A year later, the Simpsons agreed to develop additional locations in New Mexico. They continued to expand, signing a regional development agreement in Colorado. The agreements contained a development schedule, and the Simpsons agreed to develop a specified number of locations by the deadlines. The Simpsons did not meet these deadlines, and OsteoStrong terminated the agreements on April 15, 2018.

The Simpsons and their corporate entities sued OsteoStrong for: (a) common law fraud, (b) fraud by non-disclosure, (c) fraudulent inducement, (d) negligent misrepresentation, (e) breach of contract, (f) quantum meruit, (g) unjust enrichment, and (h) defamation. On April 6, 2021, this court dismissed the (f) quantum meruit, (g) unjust enrichment, and (h) defamation claims. OsteoStrong has moved for summary judgment on the remaining claims.

2. *The Release.*

From 2013 to 2017, the Simpsons worked with OsteoStrong to expand the franchise. They signed three franchise agreements with OsteoStrong on dates: (a) June 15, 2013, (b) November 9, 2015, and (c) December 7, 2017. The 2015 and 2017 agreements contained a release that waived “any and all claims, whether at law or in equity, and all contracts, controversies, claims, and demands whatsoever, at law or in equity” against OsteoStrong.

The releases were executed in connection with the franchise agreements that apply Tennessee law. The language of the release is unambiguous. By executing the release, the Simpsons released OsteoStrong from any and all claims or causes of action which existed before the dates of the respective releases.

The Simpsons say the release is limited to Sean and Charla Simpson. They are attempting to avoid the release by claiming that it does not apply to the entity plaintiffs. Sean Simpson was acting as an agent of OS New Mexico LLC and OS Regional Developers Colorado. He binds the companies in both releases as an agent of both companies.

3. *Fraud Claims.*

The Simpsons rely on two incidents to show fraud. First, the Simpsons says OsteoStrong withheld Butera’s bankruptcy and felony conviction from its Franchise Disclosure Document. Second, Simpson says OsteoStrong falsely represented that it would supply regional development training and support.

Butera’s bankruptcy and felony conviction was not reported in the Franchise Disclosure Document. This document requires that any executive officer disclose a prior felony conviction or bankruptcy. The Simpsons says that failing to disclose this information is a violation of Federal Trade Commission Act Disclosure Rules (Franchise Rule). Because no provision of Texas law incorporates the requirements of Franchise Rule, it is unnecessary to determine its application.<sup>1</sup>

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<sup>1</sup>*Yumilicious Franchise, L.L.C. v. Barrie*, 819 F.3d 170 (5th Cir. 2016)

Under the Texas Deceptive Trade Practices Act, Osteostrong must have withheld information with the intent to fraudulently induce. The former CEO of OsteoStrong, Kyle Zagrodzky says he was unaware of Butera's declared bankruptcy or fraud conviction. As an executive officer, Butera was aware of his prior convictions and failed to disclose it.

The Simpsons also claim they were fraudulently induced into purchasing the franchise with false promises of training. The regional development agreement required staff to attend an initial training program. Simpson twists this language to presume OsteoStrong was obligated to train. They also cited an email on May 14, 2014, that merely mentions training fees without a promise to train. OsteoStrong did not make a false statement the Simpsons could have reasonably relied on in the email. OsteoStrong has said that they made themselves available to the Simpsons for help.

If the Simpsons shows that there was fraudulent inducement or misrepresentation, the release and the contract is void.<sup>2</sup> The crux is whether Simpson detrimentally relied on the disclosure. Simpson testified that he would not have entered the agreement if he had known of the conviction for bankruptcy fraud. This issue of whether the Simpsons relied on the disclosure document is not ripe for consideration on summary judgment.

4. *Breach of Contract.*

To succeed on a claim that the contract was breached, the Simpsons must show that: (a) the agreement was valid, (b) he performed under it, (c) OsteoStrong breached the agreement, and (d) Simpson was damaged as a result.

The Simpsons says OsteoStrong wrongfully terminated the agreement. OsteoStrong says it terminated the contract because they did not meet the required development schedules.

On June 1, 2014, Sean and Charla Simpson signed a regional development agreement to establish locations in New Mexico. The development schedule required Simpson to open and operate twelve OsteoStrong centers by December 31, 2017. Three were opened.

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<sup>2</sup>*Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1314 (5th Cir. 1983)

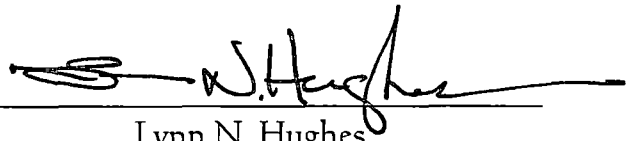
On August 10, 2014, the Simpsons and OsteoStrong signed another development agreement to open at least four centers by December 31, 2017. None were opened.

The Simpsons also claim that it was impossible to fulfill the contract. They say OsteoStrong did not train like they promised. They also say that they did not follow leads. The Simpsons do not give evidence to show how it was impossible to open a center because they did not have training. OsteoStrong was also not required to follow leads it may not have seen as credible.

5. *Conclusion.*

The claims of Charla Simpson, Sean Simpson, OS Nex Mexico LLC and OS Regional Developers Colorado for: (a) common law fraud, (b) fraud by non-disclosure, (c) fraudulent inducement, and (d) breach of contract against OsteoStrong are dismissed. Negligent representation will remain to determine whether the Simpsons materially relied on the disclosure document.

Signed on November 18, 2021, at Houston, Texas.

A handwritten signature in black ink, appearing to read "Lynn N. Hughes", written over a horizontal line.

Lynn N. Hughes  
United States District Judge