

An area developer for an upstart fast Mexican concept not only lost its arbitration case against its franchisor, it has to pay more than \$800,000 in attorney's fees and court costs. The developer had been seeking \$16 million in unearned, future profits.

Legal Briefs

Area developer loses case and legal fees

The case involves real estate developers who turned their unpaid \$253,000 loan to a Utah restaurateur into the rights to become the restaurant's first area developer for Bajio Mexican Grill. Their area development company, Bueno Conato, was to build locations from Texas to Kansas and started working on the first two units in Texas in late 2004, even without written area development or franchise agreements.

Bueno Conato finally got an area development agreement by June 2005 as well as a signed franchise deal for the first location, in Rowlett, Texas. But its second location opened in Garland, Texas, without a signed agreement.

At the same time, Bajio was sold to Franchise Brands, a company controlled by Doctors Associates, owners of the giant Subway chain. Bueno Conato and Doctors Associates then spent months haggling over the deal for the Garland location. Bueno wanted a separate agreement, Doctors proposed a rider to the agreement for the Rowlett restaurant.

Amidst the dispute, Bueno didn't open a third store. Yet its existing stores were losing money—as much as \$70,000 one month. The developer ultimately lost \$4 million on the two locations. Bajio ultimately terminated Bueno for failing to open a third store.

Bueno filed an arbitration complaint against Bajio and Doctors Associates, claiming that the franchisor's failure to provide a franchise agreement for the second store kept them from opening new stores. The lack of additional stores, Bueno claimed, caused the existing units to suffer. The developer also claimed that the franchisor failed to provide the support necessary for the new restaurants to succeed.

The arbitrator, Michael Zimmerman, disagreed, saying that the rider Doctors Associates offered would have been sufficient. There was "nothing Bajio did which precluded (Bueno) from opening a third location," he said. In addition, Zimmerman noted that the locations of the units were poor, they weren't open on Sundays and the owners acknowledged it had too many employees.

"Arbitrators sometimes cut the baby in half," said Jack Dunham, an attorney with Wiggin & Dana who represented the franchisor. "In this case, since they were seeking \$16 million, that would have been unfortunate. Here we had an arbitrator who closely followed the facts, went by the law and got to the right place."

Zimmerman also cited a provision in Bajio's area development agreement that requires the loser in the arbitration to pay legal fees. The sum: more than \$844,000. Such awards don't happen often, Dunham said.

WIGGIN AND DANA

Counsellors at Law