Sapienza v Crozier Fine Arts, Inc.
2017 NY Slip Op 30564(U)
March 22, 2017
Supreme Court, New York County
Docket Number: 159347/2012
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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THOMAS SAMUEL SAPIENZA and JODY ANNETTE SAPIENZA,

Plaintiffs,

-against-

CROZIER FINE ARTS, INC., (d/b/a CROZIER DECORATIVE ARTS), CROZIER LONG ISLAND, LLC, ROBERT PAUL CROZIER and JOHN DOES 1 TO 25,

Defendants.

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DECISION AND ORDER

Index No. 159347/2012
Mot. Seq. Nos. 003 and 004

O. PETER SHERWOOD, J.:

In motion sequence number 003, defendants Crozier Fine Arts, Inc., (CFA) Crozier Long Island, LLC, (CLI) and Robert Paul Crozier (Crozier) move for summary judgment dismissing plaintiffs' final remaining claim, for breach of contract. In motion sequence number 004, plaintiffs move for summary judgment on the same issue. Defendants also move by cross-motion to strike plaintiffs' Rule 19-a Statement on the ground that it does not contain citations to the evidence, as prescribed by Rule 19-a (d).

I. FACTS

The facts are taken from plaintiff's Corrected Statement of Undisputed Material Facts (SUMF)(NYSCEF Doc. No. 142) and defendants' Statement of Undisputed Facts (DSUMF)(NYSCEF Doc. No. 80) and Counterstatement to the Statement of Materially Undisputed Facts (CSUMF), unless otherwise noted.[1]

Defendant CFA is in the business of moving, handling, and storage of commercial and fine art (SUMF and CSUMF, ¶ 1). Defendant Crozier founded the business in 1976. CFA was incorporated in 1981. Crozier was its sole shareholder from 2001 until its sale to Iron Mountain Incorporated in December, 2015 (*id.* ¶ 2). Defendant CLI operates a warehouse in Suffolk

[1] Defendants e-filed a "corrected" Rule 19-a Statement on the day of oral argument. Although the submission is defective and untimely, the court will consider it, in its discretion, along with admissible evidence in the record.

County, New York which is used by CFA (Compl. ¶ 7; Answer ¶ 7). From 2003 through January of 2008, Plaintiff Thomas Sapienza (Sapienza) worked as an outside financial consultant for CFA through his consulting firm TSupport (SUMF and CSUMF, ¶ 1). Sapienza became CFA's chief financial officer in 2005 (*id.*). In January, 2008, Sapienza joined CFA as an employee and began receiving a salary (*id.*). There is no written employment agreement. Sapienza was terminated on May 18, 2012 (SUMF and CSUMF, ¶ 24).

Plaintiffs' breach of contract claim arises out of defendants' alleged refusal to grant Sapienza and his spouse, plaintiff Jody Sapienza, ownership interests in CFA and one of its affiliates. Sapienza maintains that he and Crozier reached an agreement in 2005 entitling plaintiffs to a 20% ownership interest in CFA and a 45% interest in an affiliate of CFA, Flanders Bay Holdings LLC (FBH) as partial compensation for Sapienza's services. In the context of the parties' discussions, Sapienza agreed to reduce his rate of compensation from $175 per hour to $96 per hour (Complaint ¶ 7)[2]. Sapienza states that he also agreed "to defer his compensation repeatedly over the course of more than four years from January 2008 through his termination in May of 2012" (Complaint ¶ 17). He adds that he was induced to assume the financial responsibilities of ownership, including advancing funds to meet payroll and personally guaranteeing business loans (*id* ¶¶ 13-15).

Negotiations to determine a valuation of CFA shares continued until an agreement was reached in 2008 (*id* ¶ 12). According to plaintiffs, the agreement provides for a shareholder loan of $1,500,000 (SUMF ¶ 3; Pls.' Mem. in Supp. at 5) and ownership in FBH in exchange for plaintiffs providing cash through their entity Dygan Holdings LLC ("Dygan Holdings") in connection with the purchase of real estate located in Southampton, New York ("Property") (SUMF ¶ 7). The purchase closed in October 2005, with FBH acquiring all outstanding shares of Graphics of Peconic, Inc. ("Graphics"), which owned the Property (Owens Aff. in Supp., Ex F [Crozier Aff.] ¶¶ 17-18). It appears that at least $73,000 of the cash paid at the closing can be traced to Sapienza and his spouse (*see* Sapienza aff ¶¶ 3-6, NYSCEF Doc. No. 130) (*see also* NYSCEF Doc. Nos. 131, 132).

[2] Accordingly, Count I of the complaint described this claim as one for "Breach of Employment Contract."

According to plaintiffs, following the parties' agreement granting ownership in CFA, they jointly retained attorney Lawrence Scherer to memorialize it (SUMF ¶ 3; Pls.' Mem. in Supp. at 5). Plaintiffs state that the parties explained to Scherer that the agreement was already made and that it merely needed to be put in writing (SUMF ¶ 3). Negotiations regarding the exact terms of the agreement lasted for a number of years, but plaintiffs contend that "the principal economic terms" of the CFA deal remained the same, providing that:

- Crozier, through Crozier Holdings LLC, a limited liability company, owned 80% of CFA and Mr. and Mrs. Sapienza, through through their entity, Artquisitions LLC, a limited liability company, owned the remaining 20%.

- Crozier would remain chief executive officer and president of CFA and Sapienza would remain treasurer and vice president.

- The purchase price of the shares for the Sapienza's indirect interests in CFA would be $1,500,000, payable through a shareholder loan (SUMF ¶ 3; Pls.' Mem. in Supp. 5).

Plaintiffs also argue that all terms of governance remained the same throughout negotiations. Subsequently, CFA made several representations to others which plaintiffs contend demonstrate CFA's understanding that the ownership agreement was finalized, including filing tax returns and K-1 statements that list the owners of CFA as Crozier Holdings and Artquisitions from 2007 until Sapienza was fired (SUMF ¶ 3) and representing in loan documents to Merrill Lynch and an application to the United States Small Business Association that ownership of CFA was split 80%/20% (SUMF ¶ 4).

Defendants dispute virtually all of these assertions (*see* DSUMF ¶ 88), but concede that the parties retained Scherer in 2005 and that both parties engaged in extensive negotiations thereafter (*id.* ¶ 12). Defendants insist that the parties never reached an agreement, as both parties failed to agree on many material terms including the percentage share ownership, the amount of consideration and how it would be provided, the proper valuation, the effective date of the agreement, and whether and how certain corporate debt and tax issues would be resolved (DSUMF ¶¶ 88; CSUMF ¶ 2-3; Crozier Aff. ¶¶ 4-8). Defendants also contend that, despite the fact that an agreement was never reached, Sapienza began falsely representing himself as a partial owner in CFA and FBH by filing the above-mentioned tax returns, K-1 statements, and other CFA representations (DSUMF ¶ 90-93; Defs.' Mem. in Supp. 14). Although the purported false

representations were plainly visible on documents signed by Crozier over a period of years, defendants state that discovery of these misrepresentations in 2012 lead, in part, to Sapienza's termination.

II. PARTIES' ARGUMENTS

A. Plaintiffs' Arguments

Plaintiffs' sole remaining legal argument is that the parties' actions from 2005, when the agreement was allegedly formed, until Sapienza was terminated, sufficiently demonstrate an intent to be bound by the agreement (Pls.' Mem. in Supp. 5-6).[3] Plaintiffs argue that courts may infer the existence of a contract implied in fact from the behavior of the parties and the circumstances of a given case (*id.*, citing, e.g., *Jemzura v Jemzura*, 36 NY2d 496, 503-504 [1975]). Plaintiffs offer the following evidence, which they contend demonstrates a contract in fact:

- Deposition testimony of Lawrence Scherer stating that Crozier characterized Sapienza as being a 20% owner in CFA (Grillo Aff., Ex. D at 364-366; see also Pls.' Mem. in Supp. 1-2).

- Tax returns, financial statements, and loan applications signed by Crozier reflecting the alleged ownership split. (Sapeinza Aff., Exs. A [CFA tax returns and financial statements], B [FBH tax returns and financial statements], D [Merrill Lynch Security Agreement], E [U.S. Small Business Administration application]; [NYSCEF Docs No. 74, 75, 78]; *see also* Pls.' Mem. in Supp 2; SUMF ¶ 2).

- An unsigned promissory note from Sapienza to Crozier for $1.5 million dated January 1, 2010 (Grillo Aff., Ex. E at LS_01373-01375 [NYSCEF Doc. No. 70]).

- Work papers from an outside accounting firm acknowledging shareholder loan to FBH from Sapienza's entity, Dygan Holding, in the amount of $363,500 as of December 21, 2005 (Sapienza Aff. in Opp., Ex. F; [NYSCEF Doc. No. 129]).

- A proposed settlement agreement between Sapienza and CFA following Sapienza's termination (Sapienza Aff. in Supp., Ex. F [NYSCEF Doc. No. 79]).

- A signed operating agreement dated January 5, 2007, for Crozier U.S. Holdings LLC (CUSH), a holding company formed "to engage in the management of subordinate entities engaged in fine art storage" in which Sapienza had a 20% interest through his company, Artquisitions LLC (Sapienza Reply Aff. in Supp.,

[3] While plaintiffs appear to allege two separate instances of breach of contract (one for failure to convey interest in CFA and the other for failure to convey an interest in FBH), their papers do not make this distinction. The court has treated the two matters separately for purposes of these motions.

Ex. C ¶ 4 [NYSCEF Doc. No. 133]). The exhibit also includes an organization chart that appears to show CFA and FBH as subsidiaries of CUSH (*id*).

- A single page of handwritten notes reading in part "20% CFA, US Holding, Flanders Bay," (Sapienza Aff. in Opp. Ex. C [NYSCEF Doc. No. 126]), which plaintiffs allege to be "notes of Crozier from a meeting on November 22, 2011 ... [acknowledging Sapeinza's] 20% interest in CFA (Sapienza Aff. in Opp at 3 n 3 [NYSCEF Doc. No. 123]).

- A letter of commitment that lists Sapienza as a guarantor for a $500.000 loan to one of FBH's subsidiaries, Graphics of Peconic, Inc. (Sapienza Reply Aff. in Supp., Ex. D [NYSCEF Doc. No. 134]).

- An email from an independent CPA stating "Effective 1/1/08 Bob [Crozier] had 80% of the stock in an LLC and Tom [Sapienza] had the other 20% in his LLC / Same ownership as [CUSH]" (Sapienza Aff. in Supp., Ex. C [NYSCEF Doc. No. 76]).

- An engagement letter from an outside law firm to Crozier as managing member of FBH, stating in part "This will be the first time that our firm will represent any of your interests where you do not own 100% of the shares" and referring to Sapienza as one of the "other investors ... whose signatures we request for acknowledgment of the representation" (Sapienza Aff. in Opp., Ex. E [NYSCEF Doc. No. 128]).

- A schedule prepared by Scherer reflecting that Sapienza had interests in CFA, FBH, and CUSH (Sapienza Reply Aff. in Supp., Ex. G [NYSCEF Doc. No. 137]).

- Checks aggregating to $83,000 from Sapienza payable to Crozier or FBH dated between November 17, 2004 and October 25, 2005, (Sapienza Reply Aff. and in Supp., Ex. A and B [NYSCEF Doc. Nos. 131-132]).

Plaintiffs also provide eleven draft agreements prepared with Scherer (Grillo Aff. Ex. E [NYSCEF Doc. No. 70]), which, they contend, remain consistent with the underlying material terms of the agreement.

B. Defendants' Arguments

Initially, defendants assert that, since this court has granted defendants' motion to dismiss Counts II through V of the complaint, no allegations exist against Crozier personally or against Crozier Long Island, LLC and as such, both should be dismissed (Defs.' Mem. in Supp. 14; Defs.' Reply Mem. 5). As to the first cause of action alleging breach of contract, defendants assert that

there is no enforceable contract entitling Sapienza to ownership interests in either CFA or any of its affiliates. They cite several reasons.

First, plaintiffs' claims against FBH and CFA are time-barred because FBH was formed in 2004 and plaintiffs' alleged cash contributions occurred in 2005, more than six years prior to filing of the complaint. (Defs.' Mem. in Supp. 20; Defs.' Reply Mem. 8; Defs.' Mem in Opp. 19-20).

Second, plaintiffs have demonstrated only an unenforceable "agreement to agree." (Defs.' Mem. in Supp. 21-22; Defs.' Reply Mem. 9; Defs.' Mem in Opp. 10-16, 21-24) (*see Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 [1981] ["[a] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable"]). Defendants contend that, even if there was an agreement, the following material terms either changed or were left open entirely: (1) proposed ownership percentages; (2) consideration and how it was to be paid; (3) the effective date of the agreement; (4) proper valuation; and (5) the appropriate corporate structure (*id.*; *see also* Owens Aff. in Supp., Ex. F [Crozier Aff.] ¶¶ 4-8). Defendants state that because these terms were never agreed upon, plaintiffs are unable to establish the existence of anything more than an agreement to agree.

Defendants add that while plaintiffs rely on the draft agreements to support their claim, the drafts evince the lack of an intent for the oral communications to create a binding contract (Defs.' Mem in Opp. at 11-12). Specifically, the draft agreements indicate "on virtually every page ... that they are: 'DRAFT - For Discussion Purposes Only!' " (Defs.' Mem in Opp 15). Accordingly, these drafts give a "clear, reasonable signal that [the parties] intend [ ] 'to be bound only by a written agreement' " (*id.* at 14, quoting *Kowalchuck v Stroup*, 61 AD3d 118, 134 [1st Dept 2009]).

Defendants also argue that the "drafts span a longer timeframe than 2005, when Mr. Sapienza claims he had a binding contract" (*id.*) and show an array of changes that belie the existence of a binding agreement. Defendants also note that Sapienza stated at his deposition that there was an execution copy of the draft agreement prepared in December 2010 which was never signed. Defendants contend that this concession contradicts plaintiffs' present claim that the agreement was finalized in 2005 (Defs.' Mem in Opp. 15-16, citing Owens Aff. in Opp., Ex. A, pages 105-111). Further, defendants point to ¶ 12 of the complaint which alleges that Crozier and Sapienza negotiated over FBH and CUSH "for a couple of years, and argue that this contradicts plaintiffs' present claim that the parties had already reached a finalized agreement (Defs.' Mem in

Opp. 15). These arguments fail to account for the fact that plaintiffs allege that the negotiations were meant only to determine peripheral elements of the agreement and that the essential terms binding the parties were fixed in 2005. Moreover, the CUSH Operating Agreement is signed and dated January 5, 2007 (NYSCEF Doc..No. 133).

Third, defendants cannot show that complete consideration was given. As to the work performed as evidence of consideration, defendants argue that Sapienza was "fully compensated for the work he performed ... which he now concedes" (Defs.' Mem in Opp. 16). While it is undisputed that Sapienza received some form of compensation (*see e.g.* Owens Aff. in Supp., Ex. P-R), defendants provide nothing that supports their claim that Sapienza was "fully" compensated. Sapienza maintains he agreed to a reduction in his rate of compensation in exchange for an equity share of CFA. As to funds Sapienza paid to CFA, defendants argue that those were loans, and that all the money plaintiffs allegedly provided CFA in connection with the FBH purchase was returned with interest (Defs.' Mem in Opp. 17). In support of this claim, defendants provide a chart Sapienza prepared in 2012 and produced at his deposition which describes amounts due between FBH and Sapienza's entity, Dygan Holdings (Owens Aff. in Supp., Ex. Z [NYSCEF Doc. No. 108]).

Finally, defendants note that the only evidence plaintiffs provide to show that the agreed consideration for an equity interest in CFA was a $1.5 million shareholder loan is an unsigned draft Promissory Note for the same amount (Defs.' Mem in Opp. 18, citing Grillo Aff. in Supp., Ex. E at LS_01373-01375 [NYSCEF Doc. No. 70]). In a cover letter dated December 19, 2010, the Note, which bears a date of January 1, 2010, is identified as "supporting documentation" associated with a "draft copy" of a Global Agreement (*id*, LS_01306 [NYSCEF Doc. No. 70, p. 221 of 302]).

Defendants also challenge specifically seven of plaintiffs' "claimed indicia of ownership" which defendants claim were "largely generated by Mr. Sapienza" (Defs. Mem in Opp. 24). Defendants concede Sapienza advanced funds to help pay for acquisition of the Southampton Property and to meet payroll for CFA. Defendants argue that these were loaned funds, that the loans are not evidence of equity ownership, and that Sapienza repaid himself with interest (*id.*). As to the loan guaranty, defendants maintain this was a result of conversations between the financial institutions, which requested the guaranties, and Sapienza "alone" (*id*). Defendants

deny that Crozier "was ever involved in [such] conversations . . . or [even] understood why the guarantees of Mr. Sapienza were requested" (*id.*). As to the tax returns which cover several tax years, defendants argue that Sapienza was the source of the representations of equity interests made to the taxing authorities (*id.* p. 26). Regarding the signed application to the SBA for credit, defendants again assert that Sapienza was the source of the representation and that, upon discovery of the representation by Crozier's lawyer, the application was withdrawn because "it wasn't true" (*id.* p. 27). Concerning the Merrill Lynch Security Agreement signed by Crozier and Sapienza, defendants state that the document contains no mention of shareholder percentages (*id*). The application which makes no mention of any such percentages, was made by CUSH. The Security Agreement was signed by Crozier twice (as president of CUSH and as "its Member") and by Sapienza for Artquisition "as member" (NYSCEF Doc. No. 77 at LS_00930). CUSH was owned by Crozier Holdings (a Crozier entity) and Artquisition (a Sapienza entity) on an 80/20 % basis (*see* NYSCEF Doc. No. 133).

C. Sapienza's Affidavits

Sapeinza filed two affidavits in response to defendants' memoranda. The affidavit in opposition attacks the credibility of affidavits signed by Mr. Korenberg (CFA's accountant), Mr. Hornby (a CFA executive), and Crozier, and reiterates certain of the various representations that Sapienza had interests in CFA and/or FBH, discussed above. In a separate reply affidavit, Sapienza attacks the credibility of an affidavit signed by CFA's attorney, Bhodan Kosovych, and also states that Sapienza delivered a check to Crozier in amount of $10,000 dated November 17, 2004, for the purpose of creating FBH and acquiring the Southampton Property (Sapienza Reply Aff. ¶ 3, Ex. A, NYSCEF Doc. No. 131). Notably, FBH was founded on December 3, 2004, shortly after the date reflected on the check (*see e.g.*, NYSCEF Doc. No. 103 [expert report] at 5). Sapienza also provides a statement for one of FBH's bank accounts which evidences receipt of $53,000 from Sapienza personally on October 25, 2010 (Sapienza Reply Aff., Ex. B, NYSCEF Doc. No. 132). Sapienza contends that this transaction was "for the purpose of creating FBH and acquiring the . . . Property" and was "contemporaneous with the closing on October 25, 2005" (Sapienza Reply Aff. ¶ 4, NYSCEF Doc. No. 130).

II. DISCUSSION

1. Standards

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop,* 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v*

Furia, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

In sum, in order to prevail on their motion for summary judgement, plaintiffs need to show that there is no triable issue of fact as to the existence of all four elements of a breach of contract actions. Defendants need only show there is no triable issue of fact as to the non-existence of just one of the four elements necessary for a breach of contract action.

2. Sapienza's Claim to an Interest in CFA

Sapienza has presented admissible evidence sufficient to create an inference that he owns, either directly or indirectly, an equity interest in CFA. That evidence includes the deposition testimony of Scherer (pp. 364-366) (NYSCEF Doc. No. 69); tax returns of CFA and FHB covering several years (20% interest) (NYSCEF Doc. Nos. 74-76); a signed but never filed SBA credit application (20% interest); a signed Merrill Lynch Security Agreement of CUSH[4] (in which a Sapienza entity was a 20% owner) (NYSCEF Doc. No. 77); and a signed loan guaranty (NYSCEF Doc. No. 134). There is, however, conflicting evidence, reflected in the various draft agreements prepared by Scherer, as to how, when, and on what terms, if any, Sapienza acquired an ownership interest in CFA. Although there are several draft stockholder agreements that appear to reflect the then-current state of negotiations between Sapienza and Crozier, no agreement (except the CUSH Operating Agreement) was ever signed and the terms of the parties' agreement are disputed.

[4] Sapienza states that CUSH was formed as a holding company into which CFA and other affiliated entities would be folded, but Crozier refused to make the agreed upon transfers (*see* Complaint, ¶ 11[NYSCEF Doc. No. 84]). Defendants agree that no assets were transferred (*see* NYSCEF Doc. No. 113, n. 3).

This suggests either that the parties did not reach an understanding as to all the terms of their agreement, or that the parties sought to amend the terms of their oral agreement as negotiations to document the deal progressed. In any event, the parties' other actions during the course of the negotiations are consistent with equity ownership, such as the commitment of both Crozier and Sapienza to personally guarantee debt of a FHB subsidiary, Sapienza's cash contributions to meet payroll, and the filed tax returns.

Because there are disputed issues of material fact concerning the existence of an oral agreement of the parties and the terms thereof, the motion of plaintiffs for partial summary judgment must be denied. For the same reason, the motion of defendants for summary judgment must be denied.

3. Plaintiff's Claim to an Interest in FBH

As to the claim for an equity interest in FBH, Sapienza asserts that plaintiffs "provided the cash, through their limited liability company Dygan Holdings LLC for the payment of the purchase price of the Property in exchange for a 45% interest in FBH" (Sapienza Aff. in Supp ¶ 7 [NYSCEF Doc No. 73]).

Plaintiffs state they contributed $408,000 in aggregate toward purchase of the Property and subsequent capital contributions to develop Flanders (*see* NYSCEF Doc. No. 44, ¶ 4). Crozier maintains that funds provided by Sapienza were loans, not equity contributions.

Much of the evidence defendants offer to dispute this claim is not directly relevant, since it only goes to establish that Sapienza was never granted an interest FBH and says nothing as to whether there was an agreement promising to grant him an interest (*see e.g.* Owens Aff. in Supp., Ex. F [Crozier Aff.] ¶ 12-13, 16 [stating that Sapienza falsely claimed ownership in FBH, but saying nothing as to whether there was a promise to grant him ownership]). Evidence submitted by Sapienza suggests both that there was an agreement and that he was a shareholder. For example, in late 2005, shortly before the October 25, 2005, closing on the Southampton Property, Sapienza transferred $73,000 to FBH. These funds appear to have been used in connection with the closing (*see* NYSCEF Doc. No. 132). An "Adjusted Trial Balance [of FBH] for the period ended December 31, 2005," prepared by an outside accounting firm, shows a "shareholder loan-

Dygan Holdings LLC" in account # 2250 with an outstanding balance of $363,500 (NYSCEF Doc. No. 129). In addition, the CUSH Operating Agreement and an associated organization chart creates an inference that the parties contemplated that FBH would be a subsidiary of CUSH as to which Sapienza had a 20% stake (NYSCEF Do. No. 133). Further, handwritten notes, purportedly written by Crozier, appear to reference Sapienza as having a 20% interest in CFA and FHB (NYSCEF Doc. No. 126).

Defendants submit evidence that suggests FBH owes no money to Dygan Holdings and that, as of December 31, 2012, Dygan Holding had a liability to FBH of $829,406 (NYSCEF Doc. No. 103 at 5-9 [Expert Report of Olga Danilytcheva-Averin describing her conclusions on the financial transactions between Dygan Holdings and FBH]; *see also* NYSCEF No. 108 [spreadsheet prepared by Sapienza detailing transactions between Dygan Holding and FBH]). Presumably, defendants intend to show these were loans that were repaid. Defendants also argue that the transaction to purchase the Property was heavily documented and that nowhere is there any hint of an equity interest going to Sapienza or any entry he controlled. Again, none of this speaks directly to the issue of whether the parties had a binding agreement conferring an equity interest in FBH on Sapienza

Defendants submit two other pieces of evidence intended to rebut the existence of an agreement to confer an equity interest in FBH on Sapienza. First, defendants direct the court's attention to Kosovych's affidavit (Defs.' Mem. in Opp. 21), in which he states "[m]y understanding while the transaction [for the Property] was being negotiated was that the money came from CFA" (Owens Aff. in Opp., Ex. F [Kosovych Aff.] ¶ 5). This statement is not made on first-hand knowledge and is thus does not constitute "evidentiary proof in admissible form" (*see e.g.*, *Zuckerman v City of New York*, 49 NY2d 557, 563–564 [1980]). Defendants also submit evidence that Dygan Holdings was not involved in the purchase of the Property by way of the purchase of Graphics (Owens Aff. in Supp., Ex F [Crozier Aff.] ¶ 18). Plaintiffs do not claim Dygan Holdings was involved in the purchase, only that it provided funds that went toward the purchase. As to both pieces of evidence, the documentary evidence discussed above is sufficient to create an inference that some of the funds used at the closing were contributed by either Sapienza

or a Sapienza - controlled entity. Viewed in the light most favorable to the party opposing the motion, plaintiffs have raised triable issues of fact requiring denial of defendants' motion for summary judgment (*see Negri v Stop & Shop*, 65 NY 2d at 625).

Defendants' other argument, that this claim is time barred (*see* NYSCEF Doc. No. 113, pp 19-20), fails as well. Defendants have established only the date the agreement is alleged to have been made and have failed to establish that the breach occurred more than six years prior to December 31, 2012, when the summons with notice was filed (*see* NYSCEF Doc. No. 1). The breach, if any, occurred much later, at about the time Sapienza was terminated in May 2012, well within the applicable statute of limitation period.

4. Plaintiffs' Claims for Deferred Compensation

Paragraph 12 of the Complaint alleges that "Mr. Sapienza agreed at CFA's request to defer his compensation repeatedly over the course of more than four years from January 2008 through his termination in May of 2012." Defendants submit numerous exhibits establishing that Sapienza was paid (*see e.g.*, Owens Aff. in Supp. Exs. P-R, NYSCEF Doc No. 98-100) but nothing to establish a prima facie case that there was no agreement to defer a portion of his compensation. While defendants are correct that plaintiffs have not presented evidence (apart from Sapienza's own self-serving statements) raising triable issues of fact regarding additional amounts of compensations allegedly owed, defendants have offered no evidence to carry their burden of proof on the motion for summary judgement as to this claim. While Crozier's affidavit specifically disclaims the existence of an agreement entitling plaintiffs to an interest in FBH (Owens Aff. in Supp., Ex F [Crozier Aff.] ¶ 20), he makes no statements regarding plaintiffs' claims for deferred compensation. Similarly, the affidavit of Simon Hornby, president and CEO of CFA, as of April 29, 2016, makes no statements as to this allegation, either (Owens Aff. in Supp., Ex L, NYSCEF Doc. No. 94). This aspect of defendants' motion for summary judgment is denied. For the same reasons, plaintiffs are not entitled to summary judgement as to this claim.

5. Defendants' Motion as to the Claims Against

Defendants argue that, since this court previously dismissed all of plaintiffs' claims other than Count I of the Complaint, the claims against Crozier and CLI, individually, should be dismissed (Defs.' Mem. in Supp 14-15). Count I of the Complaint specifically alleges that Sapienza rendered services "for the benefit of Crozier, CLI and the other pieces of the Crozier empire," for which Sapienza was not fully compensated (Complaint ¶ 24). Thus, defendants are incorrect that plaintiffs' remaining claim "is devoid of any substantive allegations" against Crozier or CLI. Further, as discussed above, defendants have failed to demonstrate entitlement to summary judgement as to the alleged agreement granting plaintiffs an interest in FBH. Moreover, as defendants have not demonstrated that Crozier was not a party to the alleged oral agreements, the claim against Crozier cannot be dismissed.

The court has considered the other arguments of the parties and finds them to be meritless.

It is hereby

ORDERED that the motion of defendants to strike plaintiffs' Rule 19-a Statement is DENIED; and it is further

ORDERED that the motion for summary judgment of defendants is DENIED; and it is further

ORDERED that the motion for partial summary judgment of plaintiffs is DENIED; and it is further

ORDERED that counsel for the parties shall appear at a pre-trial conference at 9:30AM on April 11, 2017, at Part 49, Room 252, 60 Centre Street, New York, New York 10007.

This constitutes the decision and order of the court.

DATED: March 22, 2017

ENTER,

O. PETER SHERWOOD
J.S.C.