SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COM. DIV. PART 45

DAVID SCIRICA and JENNIFER METALLO, Plaintiffs, -against- CIRO COLANTONIO, PATRICK LIMA, 772 NINTH RESTAURANT CORP., CAP RESTAURANT CORP., DPNC RESTAURANT CORP., 166 EAST 82ND STREET BISTRO INC., CORNER 47th RESTAURANT CORP., and RACHEL ON NINTH CORP., Defendants.	DECISION & ORDER Index No. 651699/11 Motion Sequence No. 014

MELVIN L. SCHWEITZER, J.:

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the plaintiffs' claims in this action and for summary judgment in defendants' favor in the amount of $375,000 on their first counterclaim for breach of contract.

Factual Background

In the Fall of 2010, plaintiff David Scirica (David) and his two brothers, Giralamo Scirica (Jerry) and Giuseppe Scirica (Joe), learned about a possible business opportunity involving a restaurant located at 772 Ninth Avenue in Manhattan (Cmplt., ¶ 16). Jerry approached defendant Patrick Lima, one of the two owners of 772 Ninth Restaurant Corp. (772 Corporation), the corporate entity that owned the restaurant, after hearing that the place was on the market from a mutual acquaintance (Lima Tr. at 8). Jerry suggested opening a bar/lounge catering to the gay community since Ninth Avenue had become "a big gay neighborhood" (*id.*). Lima thought this was a good idea since two prior restaurant businesses at that location had not done well (*id.*).

However, the three Scirica brothers did not have enough money to buy the whole restaurant business and a partnership was proposed (Lima Tr. at 8-9).

David, Jerry and Joe then met with Lima and defendant Ciro Colantonio and they negotiated a deal for the Scirica brothers to purchase 50% of 772 Corporation's shares (Cmplt., ¶ 18). The deal was memorialized in a written agreement dated October 1, 2010 entitled "Agreement to Sell Stock in 772 Ninth Restaurant Corp." (the Agreement) (Wagner Affirm., Ex. C at 1).

The Agreement was originally made by the three Scirica brothers individually, as purchasers, but was later amended to make Flavor Lounge LLC the purchaser (Wagner Affirm., Ex. C at 1; *see also* David Tr. at 150). David, Jerry and Joe were the original three members of Flavor Lounge LLC (David Tr. at 10-11; Metallo Tr. at 8-10). The Agreement provides that Colantonio and Lima (identified as the Sellers) would sell the purchaser 50 of the 100 shares of stock,

> "which shares represent 100 percent of the issued and outstanding shares of stock of the CORPORATION; subject however to the rights of Carlos Ribeiro and Rogelio Rojas, under separate contract of sales in which Ribeiro and Rojas each will be entitled to receive a total of 10 shares of stock in the CORPORATION from the shares of stock owned by COLANTONIO and LIMA"

(Wagner Affirm., Ex. C at 1).

The total sales price for 50% of the shares of 772 Corporation was payable as follows:

--$75,000 payable to sellers upon execution and approval by purchasers less $30,000 already paid;

-- $25,000 representing 50% of the current rent security held by the landlord; and

--"[t]aking subject to ½ of a total debt of $200,000 owed by the CORPORATION as listed on Schedule A annexed to this agreement."

(*id.*, ¶ 1). Attached as Schedule A is a handwritten list of the debts of 772 Corporation. It lists 20 vendors with outstanding bills totaling approximately $65,000 and identifies two additional debts "totaling $135,000 plus or minus" stemming from a credit card and line of credit. With respect to this corporate debt, paragraph 6 of the Agreement provides:

> "SELLERS and PURCHASERS agree that the CORPORATION shall pay the debts listed on Schedule A, plus interest on any debt accruing after closing, but excluding rent and sales tax debt to be paid by Seller up to September 30, 2010, every month after the CORPORATION is open and operating its business, at the rate of $5,000 a month, with the debts of the CORPORATION that are also personally against one or both of the SELLERS (listed on Schedule A) paid first, or as otherwise designated by SELLERS."

(*id.*, ¶ 6 at 6). Defense counsel claims that the sales price was $300,000 (*see* Wagner Affirm., ¶ 10 [b]). However, Colantonio, Lima, Jennifer Metallo (*see infra* at p. 11) and David all testified that Flavor Lounge LLC was only required to pay $100,000 of the corporate debt (*see* Colantonio Tr. at 108-110; Lima Tr. at 15-16; Metallo Tr. at 110-111; David Tr. at 137-138).

On October 20, 2010, the three Scirica brothers and Colantonio and Lima signed what appears to be an amendment to the Agreement. It provides, in full:

> "The undersigned shareholders and shareholders under contract agree that 772 Ninth Restaurant Corp. will be managed by [Jerry] Scirica on all day to day operating decisions.
>
> [Jerry] Scirica agrees to manage the business to be operating on the above premises for the benefit of all current and future shareholders.
>
> [Jerry] Scirica agrees to indemnify and hold harmless Patrick Lima against 50% of all claims, debts, obligations, judgment, liens, etc., arising from the attached Credit Cards and Line of Credit in Patrick Lima's name, including reasonable legal fees and costs and disbursement, up to the total sum of $135,000."

(Wagner Affirm., Ex. C at 14). Attached thereto are bank statements for a Chase line of credit account in the name of "C.A.P. Restaurant Corp." with a total outstanding balance as of August 8, 2010 of approximately $93,000 and a CitiBusiness/AAdvantage credit card in the name of "Patrick Lima/772 Ninth Restaurant Corp." with an outstanding balance of approximately $61,800 as of August 20, 2010 (Wagner Affirm., Ex. C at 15-16). Lima was a guarantor of $10,000 on the line of credit and personally liable for the credit card (Lima Tr. at 13).

It is undisputed that, beginning on October 31, 2010, the Scirica brothers commenced operation of a gay bar/lounge at the premises they called "Flavor Lounge" (the Lounge) (David Tr. at 11-12). Prior to the opening, Joe or his construction company renovated the space to turn it from a restaurant into a lounge (Metallo Tr. at 13, 22; Lima Tr. at 24-26). However, within two weeks of the opening, David took over the day-to-day operations from Jerry who could no longer run the business due to personal financial reasons and Joe was also "out" (David Tr. at 22-23, 148; Metallo Tr. at 18, 25-26; Lima Tr. at 23). Jennifer Metallo testified that, in mid-November 2010, she bought into Flavor Lounge LLC by paying $25,000 to David. Metallo was a close personal friend of David and his wife and had started helping out David in mid-October 2010 with the bookkeeping for the Lounge. Metallo Tr. at 11. She never got paid for this work, because she decided to buy into the business (*id.*) at 14, 46. Although no legal paperwork was drawn up for her purchase, she testified that it was her understanding that she was buying out Jerry and Joe and that she and David would own the Lounge as 50-50 partners when they bought the entire 100% of 772 Corporation from Colantonio and Lima (Metallo Tr. at 14-17).

It is also undisputed that the Lounge operated until the Spring of 2011, when it was closed. Why and how it was managed and ultimately closed is the subject of dispute, as is just about everything that occurred after the Agreement was signed.

Regarding the management of the Lounge, Metallo testified that Colantonio and Lima were supposed to be their "advisors" and "show us the ropes" (Metallo Tr. at 25), but believes that she and David were "set up to fail" and that Colantonio and Lima did not fulfill their role as 50-50 partners (*id.*, at 66-67, 70-72). She submits an affidavit in opposition to the motion in which she avers that Colantonio and Lima "did absolutely nothing to aid the venture. When we asked for advice or assistance, our so-called 'partners' ignored us" (Metallo Aff., ¶ 10). Lima tells a different story. He testified that Jerry told him to stay away during the renovations of the space, because he had no experience with running a lounge, only restaurants (Lima Tr. at 24-25). He further testified that plaintiffs never asked for any assistance in running the Lounge (*id.*, at 26).

While it appears that the parties were negotiating, in the late Fall of 2010 and Spring of 2011, a purchase of 100% of 772 Corporation and at least three draft agreements were drawn up, but never signed; how those negotiations were conducted and eventually ended is also the subject of much dispute. The documentary evidence before the court shows a draft agreement dated December 1, 2010 which has Colantonio and Lima selling all 100 shares of stock in 772 Corporation to Flavor Lounge LLC and listing the members as Jerry Scirica, Joe Scirica and David Scirica, with Jerry's name crossed out (*see* Weissman Affirm., Ex. D). A second draft agreement dated January 1, 2011 still lists the purchaser as Flavor Lounge LLC, but provides that its sole member is Metallo (*id.*, Ex. E). The final draft is dated March 2011, and the purchasers

are now listed as Metallo and Carlos Ribeiro (*id.*, Ex. F). The first draft agreement still mentions the alleged contractual rights of Carlos Ribeiro and Rogelio Rojas to 10 shares of stock each, while the second draft drops any reference to Rogelio Rojas and provides that Mr. Ribeiro has "an option to purchase 10 shares of stock" (*id.*, Ex. E at 1). In the third draft, the only mention of either of these gentlemen is that Mr. Rojas will be a purchaser of 10 shares.

The crux of plaintiffs' case is that they were initially defrauded by the defendants into investing money into the lounge based on defendants' prior assurances that all profits and expenses would be split on a 50-50 basis (Cmplt., ¶ 22). Plaintiffs claim that they met with defendants at the end of November 2010 to discuss the Lounge's finances and "what the cost of operation was and would be going forward," and presented Colantonio with a "detailed spreadsheet" (*id.*, ¶¶ 22- 23). Colantonio and Lima allegedly stated that the Lounge had not made enough money, that they were refusing to fund the Lounge, as promised, and "further demanded that the plaintiffs either 'buy them out' or 'sell the place'" (*id.*, ¶ 24, 25). Plaintiffs then claim that defendants defrauded them into continuing to pay the debts of 772 Corporation through the end of March 2011, by dangling promises of full 100% ownership, without taking the necessary legal steps to ensure plaintiffs' ownership interests and corporate status (*id.*, ¶¶ 30-37).

According to Lima, although everyone initially thought a gay lounge at the location was a good idea, the relationship quickly soured when the two checks for $30,000 that were given at the closing bounced and plaintiffs failed to make the additional $20,000 payment (Lima Aff., ¶ 18; Wagner Affirm., Ex. G). They ended up in discussions with David and Metallo about them buying the whole place because he and Colantonio were "disgusted with the operation and [they] saw the place running not the way it was supposed to be," and wanted out (Lima Tr. at 26-29).

He claims that the Lounge was caught selling alcohol after hours and to minors (*id.* at 30). As further support for this claim, defendants' counsel submits correspondence from the New York State Division of Alcoholic Beverage Control charging that, on January 19, 2011, the Lounge sold liquor to an undercover police officer whose identification showed him to be under the legal age (*see* Wagner Affirm., Ex. J). Defendants also submit documentary evidence that the Lounge was cited for an excessive noise violation on March 18, 2011 by the city's Environmental Control Board (*id.*).

Metallo testified that they closed the Lounge in April 2011 on the advice of an attorney after getting a noise violation and a poor grade from New York State, and were working on fixing these problems and making repairs, when defendants locked them out (Metallo Tr. at 149-157, 162-165). This is somewhat consistent with the complaint, which alleges that, sometime after March 3, 2011, plaintiffs consulted with an attorney who counseled plaintiffs not to invest any further money into the venture as it appeared to be a "scam," wherein the defendants were taking plaintiffs' money with "mere promises of ownership" and no legal documentation (Cmplt., ¶ 37). "As a result, as of the end of March, 2011, the Lounge closed" (*id.*, ¶ 38). The complaint then references the plaintiffs having "financed certain repairs to the Lounge so that the Lounge would be fully operational once all open issues were addressed" (*id.*, ¶ 39). However, "[b]y the end of May, 2011, the defendants refused to have any further communications with the plaintiffs; changed the locks at the [Lounge] without notice; and texted a message to plaintiff Scirica telling him to: stay out" (*id.*, ¶ 42).

Again, Lima's deposition testimony tells a completely different story. He testified that the plaintiffs "abandoned the place" at the end of April 2011, opened in May for two days for the

Ninth Avenue Food Festival, after which they closed the place for good and refused to return his telephone calls (Lima Tr. at 27). He claims that when the landlord posted an eviction notice on the front door, he and Colantonio were forced to take the place over (*id.*). As of the date of Lima's deposition taken in August 2012, 772 Corporation was operating a new Mexican restaurant called Patron at the premises (*id.* at 3).

On this motion, defendants claim that plaintiffs have never adequately accounted for the income that the Lounge received, only its expenses. Colantonio submits an affidavit in which he avers that, based on his experience in the restaurant industry and based on what the plaintiffs expended in purchasing food and alcohol between November 2010 and May 2011, the Lounge should have netted a return in excess of $850,000 during that time (Colantonio Aff., ¶¶ 27-37).

The other five corporate defendants are Cap Restaurant Corp., DPNC Restaurant Corp., 166 East 82nd Bistro Inc., Corner 47th Restaurant Corp. and Rachel On Ninth Corp. These corporations each own or owned restaurant businesses in Manhattan, and are owned by Colantonio and Lima. For example, Cap Restaurant Corp. owns a restaurant called Sombrero located at 303 West 48th Street; Lima owns 75% and Colantonio owns 25% (Lima Tr. at 3). Corner 47th Restaurant Corp. owns a restaurant called Pietrasanta located on the corner of 47th Street and Ninth Avenue; Lima owns 40% and Colantonio owns 60% (*id.* at 5, 15; Colantonio Tr. at 6-7). With the exception of Cap Restaurant Corp., plaintiffs admittedly had no involvement with these companies and they have been sued, because plaintiffs believe that these companies received money from Colantonio and Lima that should have been paid to 772 Corporation (*see* Metallo Tr. at 122-128). Cap Restaurant Corp. was the actual borrower on the Chase line-of-credit account listed on Schedule A to the Agreement. Lima testified that he

lent about $65,000 from Sombrero's $100,000 line of credit to 772 Corporation (Lima Tr. at 13-15).

This lawsuit was commenced in June of 2011. The complaint alleges the following four causes of action: (1) fraud; (2) unjust enrichment; (3) "lost business opportunity;" and (4) deceptive practices in violation of General Business Law § 349. Flavor Lounge LLC was originally named a plaintiff, but was dismissed from the case by this court for lack of capacity to sue, because it failed to meet the necessary publication requirements of Limited Liability Law § 206 (a). After motion practice, defendants have two remaining counterclaims for breach of the Agreement and an accounting.

Discussion

As an initial matter, plaintiffs complain that defendants' motion should be denied for failure to comply with Rule 19-a of the Rules of the Commercial Division. This rule, applicable to motions seeking summary judgment, provides that "the court may direct[1] that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried" (22 NYCRR 202.70 [g], [Rule 19-a [a]). The opposition papers must include "a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party" (*id.*, Rule 19-a [b]). Furthermore, both sides' statements "must be followed by citation to evidence submitted in support of or in opposition to the motion" (*id.*, Rule 19-a [d]).

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[1] In New York County, all justices of the Commercial Division require compliance with this rule (*see* Statement of the Administrative Judge Regarding Implementation of Certain Rules of the Commercial Division dated June 8, 2007).

The moving affirmation of Jimmy Wagner dated November 8, 2013 contains a separate section entitled "STATEMENT OF THE UNDISPUTED FACTS" which sets forth, in paragraphs 5 through 42, short, concise statements of fact which are alleged to be the undisputed facts of the case and which are, for the most part, supported by admissible evidence. To the extent any of Mr. Wagner's averments are not supported by any evidence, they have not been considered by the court since defense counsel has no personal knowledge and "such an affirmation by counsel is without evidentiary value" (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Bendik v Dybowski*, 227 AD2d 228, 229 [1st Dept 1996]). It is plaintiffs' counsel who is more at fault for not submitting a correspondingly numbered paragraph response as required by Rule 19-a (b). In order to resolve this motion on the merits, the court has carefully considered all of the deposition testimony and documentary evidence submitted by both sides in determining whether there are any material issues of fact that would require the denial of summary judgment and a plenary trial.

Turning to the merits, in order to obtain summary judgment, the defendants must establish their defense sufficiently to warrant the court's directing judgment in their favor as a matter of law (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d at 562). The motion papers must be scrutinized "in a light most favorable to the plaintiffs" (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Haseley v Abels*, 84 AD3d 480, 482 [1st Dept 2011]), and the motion denied "where there is any doubt as to the existence of a triable issue of fact or where such issue is even arguable [citations omitted]" (*Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-29 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

Plaintiffs' first cause of action alleges common-law fraud. It is based on the claim that Lima and Colantonio sold overlapping interests in 772 Corporation to Carlos Ribeiro and Rogelio Rojas as part of "a practice to dangle ownership interests in their various restaurant establishments, including the [Lounge], in order to raise monies for their other business ventures at the expense of unsuspecting investors such as the plaintiffs" (Cmplt., ¶¶ 28-31). Plaintiffs also allege that Lima and Colantonio made false representations about drawing up the necessary paperwork to make plaintiffs shareholders and officers of 772 Corporation and adding their names to the liquor license for the Lounge (*id.*, ¶¶ 32, 44). Finally, plaintiffs claim that Lima and Colantonio exploited plaintiffs by having them unilaterally finance and repair the Lounge and work to build and promote the Lounge without making comparable contributions. Plaintiffs allege that the scheme allowed Colantonio and Lima to funnel funds to their other business ventures.

The documentary and testimonial evidence belie any claim that David and Metallo were unaware that Messrs. Ribeiro and Rojas had some type of ownership interest in 772 Corporation. On the very first page of the Agreement, it references the fact that these gentlemen had some type of contractual right to receive 10 shares each of 772 Corporation from Colantonio and Lima's shares (*see* Wagner Affirm., Ex. C at 1). The second draft agreement contains the same language (Weissman Affirm., Ex. D at 1). David stated at his deposition that he knew Carlos Ribeiro was one of the owners of the Lounge from the Agreement (David Tr. at 57-58). Metallo testified that she read the Agreement prior to her investment, and that she was aware of the provision about Messrs. Ribeiro and Rojas (Metallo Tr. at 20, 73-74). Nevertheless, there is a question of fact as to exactly what type of interest Messrs. Ribeiro and Rojas actually owned, or whether they too

were merely promised shares of stock in exchange for a monetary investment. Colantonio testified that Mr. Ribeiro was a 10% owner (Colantonio Tr. at 28). Yet, back in January 2011, defendants' counsel described him as having an option to purchase 10 shares of stock, and then, two months later, Mr. Ribeiro appears to be purchasing the same 10 shares all over again (*see* Weissman Affirm., Exs. E & F). Colantonio also testified that Ribeiro was eventually given back his investment and Rojas brought a lawsuit which was settled (Colantonio Tr. at 28-31, 100-101). In short, the involvement of these gentlemen in this business is entirely unclear.

The next allegation concerns the claim that Colantonio and Lima reneged on their promise to place Metallo and David on the liquor license. Paragraph 7 of the Agreement addresses the liquor license for the Lounge (*see* Wagner Affirm., Ex. C at 6). It provides that the parties will cooperate and sign all the papers necessary for the preparation and filing with the New York State Liquor Authority (SLA) an application for a corporate change so that the purchasers will be added as shareholders, directors and officers of 772 Corporation by the SLA. The final provision of the Agreement contains a handwritten change which provides that: "[u]pon SLA approval, Sellers will sign all necessary documents to transfer to Purchaser 50% share interest in the Corporation" (*id.* at 8).

The evidence submitted on this motion establishes that, within two weeks of the Lounge opening, Jerry and Joe were no longer involved in the business. It is further undisputed that, because of a prior felony conviction, there were concerns that David was not a good candidate to be placed on the liquor license (David Tr. at 143-149; Metallo Tr. at 38), and Metallo consented to her name being put on the license (Metallo Tr. 38-39). Metallo testified that Colantonio and Lima's then attorney, George Karp, Esq., drew up the necessary paperwork in mid-November

2010 which Metallo filled out (*id.* at 39; *see also* Wagner Affirm., Ex. K). The "Personal Questionnaire" that Metallo testified she filled out identifies the applicant as 772 Corporation. Metallo is listed as holding a position in 772 Corporation as both "LLC Manager" and "LLC Member," and provides that the "Nature of Change" was "Change of Tradename to Flavor Lounge" (Wagner Affirm., Ex. K). A liquor license was then issued, effective December 15, 2010, for "772 Ninth Restaurant Corp Flavor Lounge" (*id.*, Ex. F).

Defendants contend that, by placing plaintiffs' business, Flavor Lounge LLC, on the liquor license they fulfilled all of their obligations under the Agreement. In response, plaintiffs contend that there was never any signed contract between the parties to this lawsuit (*see* Metallo Aff., ¶ 5), and that they were promised that their names would be placed on the liquor license (*id.*, ¶ 10). While there is some testimony that plaintiffs took over the running of the Lounge and were operating pursuant to the terms of the Agreement and Schedule A thereto (*see* Metallo Tr. at 90-92, 108, 110-111, 123), there is an issue of fact as to whether the Agreement was basically abandoned soon after it was signed and whether plaintiffs were running the Lounge pursuant to an oral understanding with Colantonio and Lima.

The Agreement provides that 772 Corporation would be managed by Jerry Scirica on all day to day operating decisions, yet he was out of the picture within two weeks, and it does not appear that Colantonio and Lima objected to it being run by David and Metallo. There is evidence that the Scirica brothers never paid the full $75,000 down payment and that the parties were negotiating a new agreement wherein David and Metallo would own 100% of 772 Corporation (Weissman Affirm., Exs. D-F). Presumably, if the Agreement already transferred 50 shares of 772 Corporation to Flavor Lounge LLC back on October 1, 2010,

Colantonio and Lima could only transfer their remaining 50 shares. Yet the subsequent draft agreements that defendants' attorney allegedly drew up continued to provide that Colantonio and Lima own all 100 shares of 772 Corporation (*see* Weissman Affirm., Exs. D-F). It is also undisputed that Metallo never signed the Agreement. And while Metallo admitted at her deposition that she invested in Flavor Lounge LLC by paying $25,000 to David in mid-November 2010, this was based on an oral understanding with David and no paperwork was ever drawn up (Metallo Tr. at 15-16, 110-111, 130). Lastly, defendants permitted the Agreement to be amended to make Flavor Lounge LLC the purchaser, and now they are attempting to hold Metallo and David liable for a breach of contract.

Even if the jury were to find that the Agreement governs the rights and obligations of the parties, the documentary evidence does not prove that *Flavor Lounge LLC* was ever added to the liquor license. It appears that the only change was that "Flavor Lounge" was added as a trade name for 772 Corporation (*see* Wagner Affirm., Exs. F and K). And, if Flavor Lounge LLC was added to the liquor license, as defendants contend, this would have triggered an obligation on the part of Colantonio and Lima to "sign all necessary paperwork to transfer to Purchaser [*i.e.* Flavor Lounge LLC] 50% share interest in the Corporation" (Agreement, at 8), which apparently never happened.

Finally, there are multiple questions of fact regarding the plaintiffs' claim that Colantonio and Lima exploited plaintiffs by having them unilaterally finance and repair the Lounge and work to build and promote the Lounge without making comparable contributions. It is completely unclear from the record on this motion how much of the Schedule A debt of 772 Corporation had been paid by plaintiffs. It is also unclear how much was paid by the individual defendants. Lima

admitted at his deposition that the purchasers were only responsible to pay half of the $200,000 of the old debt listed on Schedule A, and that he, Colantonio and Rojas were responsible to pay the other half (Lima Tr. at 15-16). When asked how much of the Schedule A debt that he paid, he claims he paid "some" of the principal and interest on the Chase line of credit (*id.* at 16-17), but his testimony is vague and unclear and certainly no records have been produced to substantiate this claim. There is also a question of fact as to who was paying the "new" debts of the Lounge; presumably if the Lounge was not generating enough income to pay all of its expenses, including the rent, which Metallo testified was always a month behind (Metallo Tr. at 79), new debts were being created. Even if Colantonio and Lima were only 30% owners, presumably they were responsible to pay 30% of any new debts that 772 Corporation was incurring in operating the Lounge.

Factual issues prevent the court from dismissing the first cause of action against Colantonio, Lima and 772 Corporation. However, there is absolutely no evidence that any of the other corporate defendants committed any fraud, and thus, the first cause of action is dismissed against Cap Restaurant Corp., DPNC Restaurant Corp., 166 East 82nd Bistro Inc., Corner 47th Restaurant Corp. and Rachel On Ninth Corp.

The second cause of action is based on the theory of unjust enrichment. Where a cause of action is based on unjust enrichment, the plaintiff must establish "'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered'" (*Georgia Malone & Co. v Rider*, 19 NY3d 511, 516 [2012], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]).

Defendants contend that there is no evidence showing that any of the money plaintiffs allegedly spent on the Lounge went to either Colantonio or Lima. They further contend that the two $15,000 checks they received at the closing subsequently bounced, and that they never received the entire $75,000 down payment. Their counsel further contends that plaintiffs failed to pay *any* money towards paying off the Schedule A debt and have failed to provide any proof of payment for any of these items (Wagner Affirm., ¶ 29).

Contrary to defendants' contention, there are triable issues of fact regarding whether Colantonio, Lima and Cap Restaurant Corp. may have been unjustly enriched. Regarding the $75,000 down payment, there is evidence that plaintiffs were given a credit of $25,000 for the renovation work that Joe made to the Lounge (Wagner Affirm., ¶ 19) and that defendants received $25,000 in March of 2011 (Cmplt., ¶ 35; Lima Aff., ¶ 19). Metallo testified that some of the old corporate debt on Schedule A was being paid by 772 Corporation (*see* Metallo Tr. at 92-109), and she also testified that the Chase line of credit was being paid $5,000 a month from 772 Corporation's bank account (*id.* at 90, 109-110, 114-115, 175). Metallo also testified that she and David were paying corporate expenses out of their own pocket (Metallo Tr. at 29, 57-59; *see also* Metallo Aff., Ex. A). Lima, himself, admitted that some of the old corporate debt was being paid by the plaintiffs (Lima Tr. at 17-18; 22-24); and testified that he and Metallo together would decide what bills needed to be paid (*id.* at 24). Accordingly, there is evidence that plaintiffs were working to pay off 772 Corporation's old debt, some of which had been personally guaranteed by Lima (*see* Lima Tr. at 13; David Tr. at 53-54), and some of which was a loan from Cap Restaurant Corp. In addition, plaintiffs were paying, at least in part, 772 Corporation's $15,000 monthly rent (*see* Metallo Tr. at 79; Cmplt. ¶ 41), another debt that

Colantonio and Lima had personally guaranteed (Lima Tr. at 29). Dismissal of plaintiffs' unjust enrichment claim against DPNC Restaurant Corp., 166 East 82nd Bistro Inc., Corner 47th Restaurant Corp. and Rachel On Ninth Corp., however, is granted. There is no evidence that these other restaurant businesses were involved in the Lounge, 772 Corporation, or received any money resulting from plaintiffs' efforts.

Although the third cause of action is entitled "Lost Business Opportunity," plaintiffs appear to be seeking the same $800,000 that they claim they invested in this failed restaurant venture (*see* Cmplt., ¶¶ 53,54). To the extent that they are seeking an award of lost profits, the claim is dismissed, since the alleged loss of profits must be capable of proof with reasonable certainty and the evidence is undisputed that the Lounge was not profitable (*see Ashland Mgt. v Janien*, 82 NY2d 395, 404 [1993]).

The fourth cause of action for the violation of General Business Law § 349 is likewise dismissed. There is no evidence that any of the defendants' alleged misconduct had "a broad impact on consumers at large" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). "Private contract disputes, unique to the parties [do] not fall within the ambit of the statute" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]).

Summary judgment is also denied on defendants' counterclaim for breach of the Agreement. Even if a jury were to conclude that David and Metallo are bound by the Agreement and are in breach of its terms, there are triable issues of fact regarding whether defendants fulfilled all of their obligations pursuant to that document. There is also a triable issue of fact as to any damages suffered by Colantonio and Lima.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendants' motion for summary judgment is granted only to the extent of dismissing:

--the first cause of action against defendants Cap Restaurant Corp., DPNC Restaurant Corp., 166 East 82nd Bistro Inc., Corner 47th Restaurant Corp. and Rachel On Ninth Corp.;

--the second cause of action against defendants DPNC Restaurant Corp., 166 East 82nd Bistro Inc., Corner 47th Restaurant Corp. and Rachel On Ninth Corp.;

--the third and fourth causes of action in their entirety; and

the motion is denied in all other respects.

Dated: April 11 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER