Doyle v Icon, LLC
2014 NY Slip Op 33324(U)
December 17, 2014
Supreme Court, New York County
Docket Number: 602832/2009
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

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KEITH DOYLE,

Plaintiff,

Index No. 602832/2009

- against -

ICON, LLC d/b/a "R BAR," DAVID FINNEGAN, and SEAN CUNNINGHAM,

Defendants.

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JOAN A. MADDEN, J.:

This action involves a dispute over the ownership of a Manhattan bar, formerly known as the Pioneer Bar, located at 218-220 Bowery, New York, New York, which is owned and operated by defendant Icon, LLC (Icon). Plaintiff Keith Doyle claims a one-third ownership interest in Icon and claims that the other owners, defendants Sean Cunningham (Cunningham) and David Finnegan (Finnegan), have excluded plaintiff from the day-to-day operations and business affairs of the bar, and failed to provide plaintiff with an accounting of the profits and losses and/or distributions.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on liability on his three remaining claims: (i) conversion of his interest in Icon (fourth cause of action); (ii) unjust enrichment (fifth cause of action); and (iii) an accounting (third causes of action). The sixth cause of action for breach of contract was dismissed by this court's April 4, 2011 order. The first and second causes of action, seeking the judicial dissolution of Icon and the appointment of a receiver, were dismissed by the Appellate Division (*see Doyle v Icon, LLC*, 103 AD3d 440 [1st Dept 2013]).

FACTUAL ALLEGATIONS

In support of his motion for summary judgment, plaintiff submits an affidavit in which he alleges that, in 2000, while he was working as a bartender at a midtown bar called the Mercury Bar, he met defendant Cunningham's brother, Paul Cunningham (Doyle affidavit, ¶¶ 5-6). When Paul Cunningham returned to Ireland, he contacted plaintiff and they discussed the establishment of a bar in New York and plaintiff's participation along with Cunningham and his childhood friend, defendant Finnegan (*id.*, ¶¶ 5, 9). Plaintiff went to Dublin, where he met Cunningham (*id.*, ¶ 10).

Plaintiff claims that he, as the only person with experience in the industry, designed the bar area, arranged for the purchase of inventory, supervised the stocking of that inventory, and advised on the operation and selection of the register and related order forms (Doyle affidavit, ¶¶ 8, 13-15). Cunningham handled the construction of Pioneer Bar, while Finnegan located the space and attended to the licensing and promotion of the bar (*id.*, ¶ 16). All three of them worked at Pioneer Bar from the outset, alternating evenings in the management and operations of the establishment (*id.*). It is undisputed that Icon was incorporated as a limited liability company (LLC) in early 2001, and that Pioneer Bar opened for business in November 2001. It is also undisputed that the members of Icon never adopted a written operating agreement.

Plaintiff avers that, between August 2001 and January 2002, he invested $27,000 in Icon (Doyle affidavit, ¶ 11). Later on in his affidavit, he claims that he "made a direct investment of $47,000.00 in Icon, LLP over a one-year period of time," and that he allowed some of his earnings between 2004 and 2006 to be credited towards an increased ownership interest (*id.*, ¶ 17). He avers that he is a one-third owner of Icon (*id.*, ¶ 2).

It is undisputed that, in February 2006, Imette St. Guillen, a graduate student at John Jay College of Criminal Justice, was the victim of a vicious rape and murder. Initially, it was reported that she was last seen at Pioneer Bar, although eventually a bouncer from a nearby bar was arrested, charged and convicted of the crime.

Plaintiff avers that Cunningham and Finnegan used this incident to gradually exclude him from all participation in the bar (Doyle affidavit, ¶ 19). He avers that his exclusion began in April 2006, when Cunningham met with him and Finnegan and they were told by Cunningham that he intended to renovate the bar and change its name in an effort to cleanse it of the tarnish caused by the St. Guillen murder (*id.*, ¶ 20). At this meeting, Cunningham allegedly made it clear that both were "expected to make a contribution to the renovation if [they] wanted to continue as owners" (*id.*, ¶ 21). There is no dispute that the bar was, in fact, renovated and re-opened in September 2006 under the name R Bar.

Plaintiff claims that he, along with Finnegan, were permitted to work at R Bar for the remainder of 2006 on weekends, and up until February 2007, at which point he was told that he was no longer welcome in the bar (Doyle affidavit, ¶ 23). Plaintiff claims that Finnegan, on the other hand, continued to work at R Bar beyond 2007 and that Finnegan never stopped participating in the ownership and operation of the bar (*id.*, ¶¶ 24, 35).

Plaintiff avers that defendants excluded him from the day-to-day operations of the business and took his ownership interest because, in February 2007, he acquired an interest in Stella, a bar located in lower Manhattan (Doyle affidavit, ¶ 25). At his deposition, he testified that Stella was registered as a business in June 2005, that a lease was signed in December 2005, that construction commenced in April 2006, and that the bar opened in February 2007 (Pls. Ex.

C: Doyle Tr. at 80-81). He claims he worked at Stella during weekdays, while working nights and weekends at R Bar until he was banned (Doyle affidavit, ¶ 25).

In late 2007, plaintiff claims that he approached Cunningham and told him he wished to continue his participation in the business just like Finnegan (Doyle affidavit, ¶ 36). Cunningham told plaintiff to speak to Paul Cunningham in Ireland, and when he finally got a hold of Paul Cunningham by telephone, his overture was unsuccessful (*id.*, ¶¶ 37-38). This action was commenced in September 2009.

At a minimum, plaintiff contends that the testimony and documents obtained in discovery, particularly the tax returns for Icon and deposition testimony of the company's tax accountant, Alan Bernstein, establish that plaintiff was at least a 10% owner of Icon, and that defendants Cunningham and Finnegan converted his interest in the company to their own use and benefit.

Defendants oppose summary judgment with affidavits from Cunningham and Finnegan. According to Finnegan, he, along with Cunningham and Paul Cunningham were the original members of Icon (Finnegan affidavit, ¶ 4). This is consistent with a "Corporate Resolution" and share certificates, all dated February 2001, identifying the initial members of Icon as Cunningham with 60 units, Paul Cunningham with 20 units, and Finnegan with 20 units (Pls. Ex. D: Exs. 4 & 13 to Doyle Tr. at ICON 001537-39, 000045-46). In January 2004, Finnegan allegedly agreed to split his 20% interest with plaintiff to allow plaintiff to take a 10% interest in Icon (Finnegan affidavit, ¶ 4). This agreement is allegedly memorialized in writing by Icon's lawyer, H. Roy White (*id.*, Ex. A thereto). That plaintiff owned a 10% interest is consistent with Icon's tax returns for 2004 and 2005 (*see* Pls. Ex. F: Exs. 1 & 2 to Bernstein Tr. at ICON

0000136, 0000165, 001637). Cunningham too, admits that plaintiff was a 10% member of Icon (Cunningham affidavit, ¶ 4). Defendants contend that plaintiff and Finnegan made total capital contributions of $27,000 and $25,000, respectively (Cunningham affidavit, ¶ 4; Finnegan affidavit, ¶ 3). Although plaintiff's "contribution ultimately represented less than eight percent of the total capital contributions to Icon through April of 2006, Cunningham avers that plaintiff was treated as a 10 percent owner of the business for purposes of profit-sharing" (Cunningham affidavit, ¶ 4). Cunningham further avers that neither plaintiff nor Finnegan ever made additional capital investments nor did they share in losses, and that his understanding was that both men were not in a position to bear those costs (*id.*, ¶ 5). According to Finnegan, they had an "unofficial arrangement" that he and plaintiff would receive a percentage of the profits each month, but not be required to contribute to losses or make additional capital contributions (Finnegan affidavit, ¶ 8). On the subject of losses, plaintiff testified that they had "no understanding" about losses (Doyle Tr. at 138).

Cunningham avers that Pioneer Bar's business had already been in decline in the months prior to the St. Guillen murder (Cunningham affidavit, ¶ 9). Finnegan also avers that, by the end of 2005, they were starting to notice a decline in business, because Pioneer Bar was starting to get "stale" (Finnegan affidavit, ¶ 9). At Cunningham's deposition, however, he testified that they were making money between 2001 and 2005, and that 2005 was "no different than any of the previous years" (Pls. Ex. D: Cunningham Tr. at 156). Both Cunningham and Finnegan contend that Pioneer Bar suffered losses as a result of the negative publicity surrounding the St. Guillen murder (*see* Cunningham affidavit, ¶ 9; Finnegan affidavit, ¶ 11). Finnegan testified: "It was losing money. We weren't able to cover the overhead . . ." (Pls. Ex. E: Finnegan Tr. at 86).

Even plaintiff testified that, as a result of the murder, "we had no business for a month, six weeks," and Pioneer Bar "received a lot of bad publicity and I think that's why the bar was closed" (Doyle Tr. at 22-23). Cunningham avers that he and his brother, Paul Cunningham, covered all of the losses, which he alleges amounted to approximately $162,000 from March through September 2006 (Cunningham affidavit, ¶¶ 9, 12).

In April 2006, Cunningham called a meeting of Icon's members[1] to discuss the current bleak financial situation and Icon's future (Cunningham affidavit, ¶ 10; Finnegan affidavit, ¶ 12). Cunningham advised plaintiff and Finnegan that he could no longer bear the losses of an ailing business, asked both men if they were willing to contribute to the revamping of the business, but both declined (Cunningham affidavit, ¶¶ 10-11; Finnegan affidavit, ¶ 12). According to Finnegan, "[i]t was clear in that meeting that Keith and I were both choosing to abandon any interest we had in the business. I certainly appreciated that Sean [Cunningham] did not ask us to cover our portion of the losses that the business had sustained" (Finnegan affidavit, ¶ 13).

Cunningham avers that they kept the bar open until August 2006, when "we began" a six-week renovation project to convert Pioneer Bar into R Bar (Cunningham affidavit, ¶ 13). He claims that he "contributed significant time and hundreds of thousands of dollars to the project," but that plaintiff and Finnegan were not involved in any way (*id.*, ¶ 13). At his deposition, he testified that he put $200,000 into the renovation (Cunningham Tr. at 160, 165). Finnegan agrees that Cunningham "put substantial funds and time into remodeling Pioneer Bar into R Bar" (Finnegan affidavit, ¶ 14). Plaintiff admitted at his deposition that he did not contribute any

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[1] It does not appear that Paul Cunningham was present at this meeting, either in person or by telephone.

money to the renovations and was never asked to cover any operating losses suffered as a result of the St. Guillen murder (Doyle Tr. at 20-21, 136-137, 139-140). He also testified that the reason he was not involved in the renovation was because he was working at Stella (*id.*, at 21).

R Bar opened in September 2006 (Cunningham affidavit, ¶ 13). Cunningham testified that business was good after the renovation, and that the bar sustained an overall profit for 2006 (Cunningham Tr. at 182). Based on overall capital contributions, Cunningham avers that he then owned 80% of Icon and that Paul Cunningham owned the remaining 20% (Cunningham affidavit, ¶ 14). In or about October 2006, plaintiff allegedly opened his own bar, Stella, with a new partner (*id.* ¶ 15).

Cunningham avers that plaintiff voluntarily chose to abandon or relinquish his interest in Icon when its business was suffering losses, and has now shown up in court with his hand out after years of no involvement to collect a portion of the profits that he and his brother earned through no help from the plaintiff (Cunningham affidavit, ¶ 16). Finnegan alleges that this lawsuit took him by surprise, and that he believes that both he and plaintiff, having voluntarily chosen not to reinvest in the business when it stopped being profitable, have no present interest in Icon (Finnegan affidavit, ¶ 14).

DISCUSSION

Summary judgment may be granted only when it is clear that no triable issue of material fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century–Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If there is "any doubt as to the existence of a triable issue," the motion must be

denied (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]). Furthermore, the court should view the evidence in the light most favorable to the non-moving party and give the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence (*Fundamental Portfolio Advisors, Inc., v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105–106 [2006]).

Plaintiff maintains that the undisputed evidence establishes that he invested in Icon, was given at least a 10% interest in consideration of that investment, and that his interest was never diluted or converted pursuant to any lawful company action or by operation of law. To the contrary, numerous disputed issues of fact render summary judgment on all of the plaintiff's claims wholly inappropriate. There is a very basic issue of fact as to exactly how much money plaintiff invested in Icon and whether he was a 10%, 20% or 33 and 1/3% owner at the start of 2006. There is also a sharply disputed issue of fact as to whether plaintiff voluntarily withdrew from Icon and/or abandoned his interest in Icon after the April 2006 meeting, and either refused or was unable to commit any further monies to renovate Pioneer Bar.

As to exactly how much plaintiff believes his interest in Icon was or is, his testimony is inconsistent. In his verified complaint, plaintiff alleged that he was "a member of Icon and owns a 1/3 interest thereof" (complaint, ¶ 4). As his deposition held on June 1, 2012, however, plaintiff testified that he believes that he owns 20% of the business, because he received 10% initially and then he worked for two years to build equity for an additional 10% (Doyle Tr. at 8-9, 21, 38-39, 41-42, 45-52, 66-69; *see also* Doyle affidavit, ¶ 17). When he was asked whether he believed himself to own one-third or only 20%, he answered "I don't know" (*id.* at 66-68). He further testified that his 20% interest is not reflected in any formal documents, and claimed that

the only documents he ever saw were documents submitted to the State Liquor Authority (SLA) identifying plaintiff as owning a 33 and 1/3% interest in Icon (*id.*, at 9; *see also* Doyle affidavit, ¶¶ 12, 18). In this regard, the court notes that a document entitled "Application for Approval of Corporate Change," dated March 30, 2003, listed plaintiff as the Secretary of Icon, owning 33 and 1/3 % of the common stock of Icon together with Cunningham and Finnegan (*see* Pls. Ex. D: Ex. C to Cunningham Tr. at ICON 001479-86). Finally, in his supporting affidavit, plaintiff avers that he is a one-third owner of Icon (Doyle affidavit, ¶ 2), presumably based on the SLA documentation (*id.* ¶ 18), yet, at his deposition, he admitted that the documents submitted to the SLA did not accurately reflect the ownership interests of Icon in March 2003 (Doyle Tr. at 96-97). Plaintiff also testified that initially he received 10% of the profits as calculated by Cunningham and Paul Cunningham, and that he never complained about the amount of money he was receiving (*id.*, at 45-47). As stated earlier, defendants' position is that plaintiff's interest was less than 8%, but that he was treated as a 10% owner for purposes of profit-sharing.

There is also a question of fact as to how much capital plaintiff contributed to Icon. Plaintiff's moving affidavit says he made a direct investment of $47,000 (Doyle affidavit, ¶ 17). At his deposition, plaintiff testified that he invested $27,000 plus an additional $9,000 and $6,000, the latter two which were loans from an "associate" and a relative that were never repaid, but that he has no records that evidence these investments (Doyle Tr. at 31-32). Cunningham, on the other hand, maintains that plaintiff contributed only $27,000 (Cunningham affidavit, ¶ 4). This is the amount that is reflected in Icon's records (Pls. Ex. D: Ex. A to Cunningham Tr. at ICON 000629). Resolving the issue of plaintiff's ownership interest in, and capital contributions to, Icon at the time he claims his interest was converted requires a factual

determination, largely pertaining to the credibility of the parties, that cannot be resolved at the summary judgment stage.

In addition to the lack of clear cut evidence concerning plaintiff's investment and ownership interest in Icon, there are questions of fact regarding whether plaintiff and Finnegan voluntarily abandoned their interest in Icon in or about April 2006, or whether it was significantly diluted by Cunningham's alleged 2006 capital contributions, in itself a disputed factual issue.

Plaintiff argues that since there was no written operating agreement, and thus no provision for the dilution or cancellation of a member's shares for failure to make a capital contribution such as section 502 (c) of the Limited Liability Company Law (LLCL) allows, that "neither the LLC nor its members have recourse against a non contributing member" and that Icon was required to treat Cunningham's alleged infusion of capital to pay for the 2006 losses and renovations as a loan to be repaid by Icon in the future (*see* Pls. Mem. of Law, at 11). Plaintiff relies on *Mizrahi v Cohen* (34 Misc 3d 1210[A], 2012 NY Slip Op 50030[U] [Sup Ct, Kings County 2012], *mod* 104 AD3d 917 [2d Dept 2013]), for this argument. As discussed below, this case is wholly distinguishable on the law and facts.

Since Icon had no written operating agreement, Icon's internal affairs and the rights and powers of its members are governed by the statutory default provisions of the LLCL (*see Gartner v Cardio Ventures, LLC*, 121 AD3d 609 [1st Dept 2014]; *Matter of Eight of Swords, LLC*, 96 AD3d 839 [2d Dept 2012]; *Matter of Spires v Lighthouse Solutions, LLC*, 4 Misc 3d 428, 433-435 [Sup Ct, Monroe County 2004]). However, where the members of the LLC operate on a completely informal basis and where the evidence points to an unmistakable oral agreement

amongst them to operate in a particular way that is not in conflict with the LLCL, the agreement of the parties should control.

LLCL § 502 (c) is not a default provision. It merely provides that an operating agreement can proscribe a particular consequence if any member fails to make a required contribution, such as reduction or elimination of the defaulting member's share. Nothing in LLCL § 502 (c) prohibits the members of an LLC, who were operating informally and making a steady profit and without any real agreement about how to handle losses, from reaching an agreement about what to do when they were faced with unprecedented losses and the need to contribute additional capital to turn the business back towards profitability. Defendants have raised a triable issue of fact as to whether the parties reached such an agreement in April 2006, and whether plaintiff's admitted failure to contribute any money to fund losses that may have resulted from the St. Guillen murder and to renovate Pioneer Bar constituted a valid elimination of his interest in Icon. In addition, LLCL § 504 provides that, in absence of an operating agreement, distributions are allocated on the basis of the value of the contributions of each member. Assuming Cunningham pumped hundreds of thousands of dollars into Icon in 2006, as he claims, plaintiff's right to further distributions would be significantly diluted.

In *Mizrahi v Cohen*, *supra*, an optometrist and a dentist related by marriage created an LLC to own, construct and operate a mixed-use building, a portion of which would house their respective practices. The two doctors had a written operating agreement, which provided that no member could be required to contribute any additional capital in the absence of full consent by both members. The operating agreement also provided that no member shall be required to restore a negative capital account. Over time, the defendant failed to respond to capital calls by

the LLC's bookkeeper and the plaintiff ended up unilaterally funding the deficit by thousands of dollars. In granting a judicial dissolution of the LLC, the court merely stated that since the operating agreement prevents the return of capital contributions, "that portion of the Capital Contributions of plaintiff that exceed those of defendant shall be treated as a loan and shall be repaid to plaintiff, as a debt of the LLC, prior to any distributions of remaining assets to the members based upon their percentage of ownership." (34 Misc 3d 1210[A], 2012 Slip Op 50030[U], *12). This ruling was affirmed on appeal, the Second Department finding that "[t]he record, including an affidavit submitted by the defendant, establishes *that the parties intended* that the capital contributions by the plaintiff were to be treated as loans to the LLC to the extent that those contributions exceeded those made by the defendant [emphasis added]" (104 AD3d at 920). The *Mizrahi* case offers no guidance on resolving the unique circumstances alleged by the parties in the present case. If anything, the *Mizrahi* case stands for the proposition that the intention and agreement of the parties, through their words and deeds, controls.

Plaintiff further contends that nothing that occurred at the April 2006 meeting can be construed as a valid capital call by Cunningham. To the contrary, plaintiff's own testimony is that Cunningham "indicated that we were expected to make a contribution to the renovation if we wanted to continue as owners" (Doyle affidavit, ¶ 21). Such testimony is consistent with plaintiff's deposition testimony that Cunningham asked, at the meeting, "did we want to stay in or did we want to get out;" to which plaintiff and Finnegan "said we'd leave it and sleep on it" and yet plaintiff admittedly never came back to Cunningham with an answer (Doyle Tr. at 153-154). While plaintiff contends that the evidence establishes that Cunningham did not spend $200,000 of his own money to renovate Pioneer Bar, and that a capital call was not even

necessary because Icon had at least $85,000 in its checking account, neither of these two facts has been established as a matter of law on this record.[2] Plaintiff himself admits that the St. Guillen murder "damaged the image and reputation of the bar" (Doyle affidavit, ¶ 19), that Pioneer Bar was "doing no business after the murder" (Doyle Tr. at 31), and losses occurred because there was no revenue to cover overhead expenses such as rent (*id.* at 140). While it is undisputed that Pioneer Bar was renovated, and that plaintiff did not contribute any money to the renovation, how much money was put into the renovation and how it was funded is a question of fact. It is true that Icon's accountant, Alan Bernstein, testified that Icon's 2006 federal income tax return does not show that $200,000 was used for renovations, and that he was only shown documentation to support $34,821 in improvements (Bernstein Tr. at 30-31). It is equally true that Cunningham testified that not all the receipts for the renovations were given to the accountant, some he paid with cash (Cunningham Tr. at 160-162-166). Credibility determinations must be left to the trier of fact, and cannot be resolved on summary judgment.

Plaintiff also maintains that Finnegan continued to own a 10% interest in Icon after April 2006, continued to act as Icon's President, took no action to address the wrongdoing to plaintiff, and thus benefitted from the conversion of plaintiff's interest by Cunningham. Plaintiff bases these statements on certain documentary evidence showing that Finnegan was involved in getting Icon's liquor license renewed in 2007 and 2009, identifying himself as both the "Managing Member" and "President" of Icon to Community Board 3 (*see* Pls. Ex. 3); that Finnegan executed Icon's tax returns for 2007 (Pls. Ex. F: Ex. 4 to Bernstein Tr. at ICON 000404-05); that he was

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[2] Icon's checking account statements were not submitted as evidence on this motion, and counsel fails to direct the court to where, in Icon's 2006 federal income tax return, this mid-year checking account balance can be found.

again listed on Icon's liquor license renewal application as an officer of Icon in 2011 (Pls. Ex. H); that Finnegan signed a "Tenant Estoppel Letter" as a "Partner" of Icon in April 2012 (Pls. Ex. D: Ex. H to Cunningham Tr. at ICON 001540-41); and that, in 2013, Finnegan executed documents as an officer of Icon to transfer the liquor license from Icon to Icon Two, LLC (Pls. Ex. I).

While the documentary evidence plaintiff submits seems to indicate that Finnegan continued to be involved in Icon after the 2006 renovation and conversion to R Bar, Finnegan's deposition testimony is that he stopped working at R Bar in 2006, when he returned to construction work, working for Layer Construction until 2010, and that he had no involvement with operating and managing R Bar in 2007 and 2008 (Finnegan Tr. at 8, 84-85). Cunningham testified that Finnegan, like plaintiff, was no longer treated as a member of Icon after April 2006 when he chose not to contribute any money towards the losses and renovation costs (Cunningham Tr. at 195-196). Additionally, it appears that many of the documents prepared for and submitted to the SLA, both for Pioneer/R Bar, Stella and the Brass Monkey, contain false statements as to the ownership of the three bars (*see* Doyle Tr. at 85-88, 96-97, 100-101; Cunningham Tr. at 186-188; Finnegan Tr. at 71-74). And, Finnegan did not sign Icon's 2007 federal income tax return, the signature line on page one is blank (*see* Pls. Ex. F: Ex. 4 to Bernstein Tr. at ICON 000404-05). He is merely listed as the "Tax Matters Partner" on page two of the return. Icon's accountant testified that Finnegan's name is listed only because it was not changed in the computer, and that Finnegan ceased being a partner of Icon in 2006 (Bernstein Tr. at 22-23). Regarding the Tenant Estoppel Letter, Finnegan testified that he signed the letter at the request of the landlord, who insisted it was a "formality" and needed to be signed by whoever

signed the original lease, either him or Paul Cunningham, who was in Ireland (Finnegan Tr. at 77-78). Plaintiff's documentary proof falls far short of establishing, as a matter of law, that Finnegan continued to be a member of Icon and did not voluntarily abandon his 10% interest in April 2006 as both he and Cunningham maintain.

For the foregoing reasons, plaintiff's motion for partial summary judgment on liability is denied. In his moving memorandum of law, plaintiff also seeks dismissal, pursuant to CPLR 3211 (a) (7), of defendants' two counterclaims for unjust enrichment and breach of fiduciary duty, which are based on the claims that plaintiff failed to fund losses, received distributions in excess of the amount to which he was entitled, "and abandoned his interest in Icon in its greatest time of need in favor of devoting his time to a competing business" (*see* Defs. Mem. of Law at 13-14).

Not only are defendants' claims of wrongdoing against the plaintiff lacking in any support in the record, they are completely contrary to the position that both defendants have undertaken in this lawsuit. The *sole basis* for the claim that plaintiff took money from Pioneer Bar in excess of his rightful distributions is the statement in Cunningham's affidavit that plaintiff's capital contribution represented less than 8% of the total capital contributions to Icon, but that he was treated as a 10% owner of the business for purposes of profit sharing (*see* Cunningham affidavit, ¶ 4; Defs. Mem. of Law at 14). However, according to the opposing affidavits and testimony of both Cunningham and Finnegan, they agreed to plaintiff being treated as a 10% owner, and it was Cunningham who actually disbursed the profits from Pioneer Bar to plaintiff. In addition, it was understood that neither plaintiff nor Finnegan were expected to share in any losses, and that the three men agreed in April 2006 that Cunningham would undertake the renovation of Pioneer Bar

on his own with "no hard feelings" on his part (*see* Cunningham affidavit, ¶¶ 4, 5, 11; Finnegan affidavit, ¶ 8). Defendants' theory would mean that Finnegan too, who allegedly only contributed 7% of the capital, was not expected to share in the losses, and refused to contribute funds to the renovation (Cunningham affidavit, ¶¶ 4, 5, 9, 11), is guilty of misconduct. The counterclaims are completely lacking any merit whatsoever, and are dismissed.

CONCLUSION

Fore the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on his claims for conversion, unjust enrichment and an accounting is denied; and it is further

ORDERED that plaintiff's motion for dismissal of defendants' counterclaims is granted, and the first and second counterclaims are dismissed.

Dated: December 17, 2014

ENTER:

HON. JOAN A. MADDEN
J.S.C.