SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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340 BREW PUB, INC.

Index No.: 114894/2009

Plaintiff,

– against –

DECISION/ORDER

STEVEN WIEBE a/k/a STEVE WIEBE, AMSTERDAM ALE HOUSE INCORPORATED SAJ HAMILTON CORP., JACOB AVID a/k/a JACOB OVID, JACOB RABINOWITZ, KIRK STRUBLE, MARTIN LEMANSKI, and JOHN DOES 1-10 (said names being fictitious, it being the intention of Plaintiff to designate any and all other participants in a breach of fiduciary duty owed to Plaintiff),

Defendant.

Motions designated Sequence Numbers 003 and 004 are consolidated for disposition.

In Motion Sequence Number 003, defendants Steven Wiebe, Amsterdam Ale House Incorporated (Ale House), SAJ Hamilton Corp. (SAJ), Jacob Avid, Jacob Rabinowitz, Kirk Struble, and Martin Lemanski move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint.

In Motion Sequence Number 004, plaintiff 340 Brew Pub, Inc. (340 Brew Pub) moves, pursuant to CPLR 3212, for summary judgment on its causes of action for breach of fiduciary duty, misappropriation of corporate opportunity, aiding and abetting breach of fiduciary duty,

conversion, and rescission of contract. Plaintiff also moves, pursuant to CPLR 3212(c), for an immediate trial on the amount and extent of damages.

BACKGROUND

This dispute arises out of defendant Wiebe's alleged self-dealing in transferring assets of plaintiff corporation, diverting a potential lease renewal, and opening a competing venture in the same space after the corporation's lease was terminated.

The material undisputed facts are as follows: Plaintiff 340 Brew Pub operated a restaurant and bar known as Westside Brewing Company (the bar) on the first floor and basement of a building located at 340 Amsterdam Avenue, New York, New York (the Premises), pursuant to a lease dated March 26, 1993, with landlord 340 Amsterdam Associates, LLC (340 Amsterdam Associates). (Joint Statement Of Undisputed Material Facts, ¶¶ 1-2 [Joint Statement].) Defendant SAJ succeeded 340 Amsterdam Associates as owner of the building and landlord under the lease. Defendant Avid was a principal of SAJ. (See id., ¶¶ 5, 9.) As of January 19, 2009, SAJ transferred ownership of the building to Steven Michigan Realty Corp.

Wiebe, along with non-parties Robert Falco, Gary DeLalla, Mark Bahna (Bahna), and his wife, Elizabeth Bahna, owned and/or operated 340 Brew Pub and Westside Brewing Company. More particularly, at the time of the events at issue, Falco, DeLalla, Wiebe, and Elizabeth Bahna were shareholders of 340 Brew Pub. (Pl's Amended Response To Defs' First Interrogatories, ¶ 1 [Pl's Interrog Resp] [Kolko Aff, Exh D].) Falco was the corporation's president, Elizabeth Bahna its vice president, Wiebe secretary, and DeLalla treasurer. (Id.) Falco and Bahna were directors. (Id.) The bar was managed by Bahna and Wiebe. (Joint Statement, ¶ 4.)

The term of 340 Brew Pub's lease was 15 years, commencing on April 1, 1993 and ending on March 31, 2008. (Lease, at P1 [Avid Aff, Exh A].) The Rider to the Lease provides

that certain fixtures in the Premises, including the "Bar and Back bar," grill, cooking range, bar stools, tables, chairs, pots, pans and dishes, "are the property of the Owner [340 Amsterdam Associates] and may be used and must be maintained by the Tenant [340 Brew Pub] at its sole cost and expense during the term of this Lease . . . ." (Id. at P14.) Plaintiff agreed to pay $20,000 to the owner "for the use of the hereinabove stated fixtures." (Id.)

The relationship between plaintiff and the landlord of the Premises was marked by litigation. In August 2007, SAJ, as landlord, commenced a nonpayment proceeding against plaintiff, seeking a final judgment of eviction and unpaid rent in the sum of $34,276.26 with interest from July 2007. (See Notice of Petition, SAJ Hamilton Corp. v 340 Brew Pub, Inc. [Civ Ct, NY County, Part 52, Index No. 085625/07] [Avid Aff, Exh C].) In September 2007, plaintiff commenced an action against SAJ and the owner and contractor of an adjacent building, alleging that defendants conspired to injure plaintiff and to force it to vacate the Premises so that a new restaurant could be built on the adjoining lot. (See Verified Complaint, ¶ 14, 340 Brew Pub, Inc. v SAJ Hamilton Corp. [Sup Ct, NY County, Index No. 603158/07] [Avid Aff, Exh D].)

By Stipulation of Settlement so ordered on January 8, 2008, the nonpayment proceeding was converted to a holdover proceeding, and 340 Brew Pub consented to, among other things, a final judgment of possession and the issuance of a warrant of eviction. (Stipulation of Settlement, ¶2 [Avid Aff, Exh F].) Execution of the warrant of eviction was stayed through August 31, 2008, on the condition that plaintiff make certain specified payments to SAJ. (Id.) The Supreme Court action was discontinued by Stipulation of Settlement so ordered on July 24, 2008. (Stipulation of Settlement [Avid Aff, Exh G].)

By agreement dated December 9, 2008, 340 Brew Pub and SAJ extended the lease on a month-to-month basis until December 31, 2008. (December 9, 2008 Agreement [Avid Aff, Exh M].) This agreement provides in pertinent part:

> "1. The rent will be seventeen thousand ($17,000) dollars per month for the months of September, October, November, December of 2008
> 2. The rent originally discussed was twenty five thousand ($25,000) dollars for the months of September thru December of 2008. In exchange for lowering the rent to $17,000 per month. [sic]
> 3. As per the lease agreement, all furniture and fixtures, kitchen appliances, bar and kitchen equipment, all refrigeration and dishwashing machines, built in furniture bar, cabinets, all tables and chairs will remain. All utensils, plates, glasses, cutlery, pots and pans and all other items on the premises and used in the usual course of running and maintaining a restaurant and bar business. [sic]
> 4. All security deposits of thirty four thousand five hundred ($34,500) dollars will be used to pay the rent for November and December 2008.
> The tenant hereby forfeits all rights to the premises as of December 31, 2008. Landlord can obtain judgment and warrant for eviction. Tenant will not take legal action to extend this lease or contest landlord's warrant for eviction."

The agreement was signed by Mark Bahna on behalf of 340 Brew Pub.

The bar operated by 340 Brew Pub at 340 Amsterdam Avenue closed on December 31, 2008, and 340 Brew Pub vacated the Premises approximately one day later. An agreement dated as of January 2, 2009 was then made between SAJ/Ale House and Jacob Avid as buyer and 340 Brew Pub as seller. This agreement transferred specified property and fixtures, as well as 340 Brew Pub's liquor license, in exchange for payment of $25,000. (January 2, 2009 Agreement [Avid Aff, Exh P].) The agreement provides in pertinent part:

> "Whereby the seller gives, grants, bargain, sell and convey [sic] to the buyer all right, title, and interest in and to the following tangible personal property, furniture & fixtures, equipment, and machinery.
> In addition the sale, assignment, transfer, grant of the liquor license that they possess for sale of alcoholic beverages at 340 Amsterdam Avenue, under the name of 340 Brew Pub Inc. to a new Corp. in agreement of New York State Law.
> [Paragraph listing twenty-two items or categories of property]

> The seller warrants that all said tangible property is owned by the seller free and clear of all claims or liens and all said tangible property can be transferred by seller.
>
> Buyer shall pay to seller for these items and the alcoholic beverage license Twenty Five Thousand ($25,000.00) Dollars . . . ."

The agreement does not print the name of the signatory on behalf of 340 Brew Pub, but appears to bear the signature of Steven Wiebe. Wiebe testified that he did not remember signing this agreement. He asserted, however, that it was possible that it had been signed in his name by defendant Jacob Rabinowitz, whom he had previously authorized to sign his name on certain documents, and that "[b]asically, I [Wiebe] wanted this deal to go forward." (See Wiebe Dep, at 456-457 [Codispoti Aff, Exh B].)

Subsequently, Steven Michigan Realty Corp., a company affiliated with defendant Avid, issued a check dated January 2, 2009, payable to plaintiff in the amount of $25,000. (Avid Aff, Exh N.) The memo line states that the check was for the "Purchase of Liquor License, Furniture & Fixtures." (Id.) The check was deposited into plaintiff's bank account on or about January 5, 2009. (Id.; see also Bahna Aff, ¶ 50.)

SAJ then entered into a lease for the Premises with defendant Ale House, dated January 15, 2009, for a term commencing on March 1, 2009 and expiring on February 28, 2012. (Avid Aff, Exh Q.) This lease was signed by defendant Rabinowitz on behalf of Ale House, and by Avid on behalf of SAJ. (Id. at D8.) At his deposition, Rabinowitz testified that he was a former bartender of 340 Brew Pub, and that he formed Ale House. (Rabinowitz Dep, at 30, 45 [Kolko Aff, Exh R].) He further testified that Wiebe and Avid are shareholders of Ale House (id. at 18, 47), and that Wiebe or his family members invested approximately $100,000 in the company between January and March of 2009. (Id. at 49-51; see also Kolko Aff, Exh O [checks by

Thomas and Renee Wiebe and Margaret Wiebe payable to Ale House].)[1] Wiebe has acknowledged that he is also an officer and manager of Ale House. (Wiebe Reply Aff, ¶ 1.) Ale House opened in March 2009. (Avid Aff, ¶ 61.)

The Complaint alleges causes of action for breach of fiduciary duty against Wiebe (first cause of action), misappropriation of a corporate opportunity against Wiebe (second cause of action), aiding and abetting breach of fiduciary duty against defendants (third cause of action), fraud against Wiebe (fourth cause of action), conversion against defendants (fifth cause of action), and rescission of contract against defendants (sixth cause of action).

DISCUSSION

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212 [b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.) "[I]ssue-finding, rather than issue-determination, is key. Issues of credibility in particular are to be resolved at trial, not by summary judgment." (Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 [1st Dept 2010], citing S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974] [other internal citations omitted].)

Breach of Fiduciary Duty

[1] The Complaint alleges that defendants Lemanski and Struble are officers, directors, shareholders and/or employees of Ale House, and had prior relationships as employees or contractors of 340 Brew Pub or the bar. (Compl., ¶¶ 15, 17, 58 [c]-[d].) Rabinowitz also testified that Struble and Nina Lemanski, defendant Lemanski's sister, contributed money to Ale House. (Rabinowitz Dep, at 49, 68.)

Plaintiff's first cause of action pleads that Wiebe breached his fiduciary duties as an officer and shareholder of plaintiff by, among other things, conspiring with Avid, Rabinowitz, and the other individual defendants to form a competing company that would operate from the Premises (see Compl., ¶ 117 [a]); "permitting Ale House to enter into a lease with SAJ, which he knew would be completely adverse to the interests of [340] Brew Pub" (id., ¶ 117 [d]); and "allowing for, and in fact soliciting the transfer of [340] Brew Pub's assets without sufficient consideration." (Id., ¶ 117 [e]; see also Pl's Memo In Supp, at 13.) Defendants contend that this claim is deficient as a matter of law because Wiebe's alleged misconduct was not a proximate cause of "plaintiff's losses, namely, its failure to get a new or renewal lease from the Landlord and/or the transfer of its assets purportedly for inadequate consideration." (Defs' Memo In Supp, at 12.) Specifically, defendants contend that any tangible expectancy of plaintiff in a new lease was extinguished as early as January 2008, when the warrant of eviction was issued; that, in the December 9, 2008 Agreement, 340 Brew Pub willingly transferred "certain assets" belonging to plaintiff to SAJ, its landlord; and that 340 Brew Pub willingly accepted and deposited $25,000 as payment for additional assets, including plaintiff's liquor license. (Id. at 13-14.)

It is well settled that "directors and officers of corporations, in the performance of their duties, stand in a fiduciary relationship to their corporation." (Yu Han Young v Chiu, 49 AD3d 535 [2d Dept 2008]; Billings v Shaw, 209 NY 265, 279 [1913] ["The relation of an officer of a corporation to it is fiduciary, and he must at all times act in good faith and unselfishly toward the corporation"].) Officers' duties include a duty of "undivided and unqualified loyalty. They should never be permitted to profit personally at the expense of the corporation. Nor must they allow their private interests to conflict with the corporate interests." (Foley v D'Agostino, 21 AD2d 60, 67 [1st Dept 1964] [internal quotation marks, ellipses, and citations omitted].)

It is further settled that "[t]he doctrine of 'corporate opportunity' provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit any

opportunity that should be deemed an asset of the corporation." (Alexander & Alexander of N.Y. v Fritzen, 147 AD2d 241, 246 [1st Dept 1989]; Yu Han Young, 49 AD3d at 536.) "A corporate opportunity is defined as any property, information, or prospective business dealing in which the corporation has an interest or tangible expectancy or which is essential to its existence or logically and naturally adaptable to its business." (Moser v Devine Real Estate, Inc. [Florida], 42 AD3d 731, 734-735 [3d Dept 2007] [internal quotation marks and citation omitted].) A tangible expectancy, in turn, "has been explained as something much less tenable than ownership, but, on the other hand, more certain than a desire or a hope." (Alexander, 147 AD2d at 248 [internal quotation marks and citation omitted].)

Plaintiff claims that it had a tangible expectancy, and thus a corporate opportunity, in a renewal lease from SAJ for the Premises, and that Wiebe's misconduct resulted in SAJ instead renting the premises to Ale House, a competing business in which Wiebe had a personal interest. (See Pl's Memo In Supp, at 23-25.) The uncontroverted documentary evidence in this record establishes, however, that 340 Brew Pub consented, in the December 9, 2008 Agreement, to the termination of its tenancy as of December 31, 2008. Plaintiff acknowledged in its amended response to defendants' interrogatories that Falco made this agreement on behalf of 340 Brew Pub, and that the agreement was "signed by Mark Bahna with the consent of Plaintiff and Jacob Avid on behalf of SAJ." (Pl's Interrog Resp, ¶ 2.)

Plaintiff appears on these motions to assert that Bahna signed the agreement under duress. In support of this contention, it submits the affidavit of Mark Bahna affirmatively stating that, in signing the December 9, 2008 Agreement, he acted "under duress and the misrepresentations made by Wiebe." (Bahna Aff, ¶ 35.) According to Bahna, "Wiebe misrepresented to me that unless I signed the 12/9/08 document, SAJ would bring a lawsuit against Brew Pub, its shareholders, directors and employees and would not permit Brew Pub

access to Westside to retake possession of 340 [sic] the property housed in the demised premises." (Id., ¶ 33.)

This affidavit is inconsistent with Bahna's deposition testimony in significant respects. For example, Bahna gave the puzzling testimony that Wiebe said he should sign the document "because we may get a new lease" – i.e., that by cooperating with the landlord's request that 340 Brew Pub sign the agreement terminating the tenancy, the landlord might be willing to negotiate a new lease. (Bahna Dep, at 298 [Kolko Aff, Ex G].) He further testified, without qualification, that in signing the agreement he did not rely on what Wiebe told him. (Id. at 298.) When asked whether what Wiebe told him before he signed the December 8, 2009 Agreement "influence[d] [his] decision of whether or not to sign," he answered "Not really." (Id. at 299.)

Under settled law, an affidavit may not be used to vary deposition testimony for purposes of defeating or supporting a summary judgment motion. (See e.g. Mayancela v Almat Realty Dev., LLC, 303 AD2d 207, 208 [1st Dept 2003]; Naposki v Au Bar, 271 AD2d 371 [1st Dept 2000].) Even if the Bahna affidavit were considered, it merely asserts that Wiebe informed Bahna that SAJ would bring a lawsuit against 340 Brew Pub and its principals unless Bahna signed the December 9, 2008 Agreement. (Bahna Aff, ¶ 33.) Wiebe's alleged statement is insufficient on its face to support a claim that Bahna signed the agreement under duress. Bahna also cannot claim that he reasonably relied upon Wiebe's statement, as it is undisputed that the relationship between Wiebe and Bahna was at that point no longer one of trust. (See Bahna Dep at 61 [testifying that, during the last two years of the bar's operations, Bahna did not "trust the operation" with Wiebe, or trust him "as a person"]; Deposition of Gary DeLalla, at 100-101 [DeLalla Dep] [Kolko Aff, Exh E] [testifying as to an attempt to terminate Wiebe initiated by Bahna and Falco, due to Wiebe's "conflict" with Bahna].) Moreover, it is undisputed that Falco, 340 Brew Pub's president, and DeLalla, its treasurer, also directly communicated with SAJ about a new lease for 340 Brew Pub prior to Bahna's signing of the December 9, 2008 Agreement.

(See e.g. Falco Dep, at 163-164 [Kolko Aff, Exh C] [testifying that he and DeLalla met with Avid "a couple times" in December 2008 "to determine his intention with [respect to] the space, and what the probability was of us continuing on our lease"].)

The court accordingly holds that, having agreed to terminate its tenancy in the December 8, 2009 Agreement, 340 Brew Pub had, at most, a mere hope of obtaining another lease, and not a tangible expectancy of a lease constituting a "corporate opportunity." (See Alexander, 147 AD2d at 246; see also Washer v Seager, 272 AD 297, 303 [1st Dept 1947]; Crittenden & Cowles Co. v Cowles, 66 AD 95, 96 [3d Dept 1901] [holding that refusal by corporation's landlord to grant new lease to corporation "disposed of and cut off that 'expectancy' which is declared by some authorities to run with every lease – the 'expectancy' of a renewal," and finding "no reason in law or equity in excluding a copartner or a director in a corporation from dealing with the landlord in respect to the premises after a renewal to the occupying tenant has been refused by the landlord"].)

The breach of fiduciary duty cause of action is therefore not maintainable based on Wiebe's alleged diversion of an opportunity to obtain a new lease for the Premises.[2] As plaintiff correctly argues, however, this cause of action is also based on allegations that Wiebe transferred

[2] In view of this holding that the prospect of a new lease was not a corporate opportunity, the court need not reach the further issue of whether a corporation's inability to avail itself of an opportunity – due, for example, to a third party's refusal to deal with the plaintiff – may constitute a defense to a claim that an officer has usurped a corporate opportunity and thus breached fiduciary duties. The availability of such a defense is the subject of dispute. (Compare Owen v Hamilton, 44 AD3d 452 [1st Dept 2007], Alexander & Alexander of N.Y. v Fritzen, 147 AD2d 241, 246 [1st Dept 1989], and Foley v D'Agostino, 21 AD2d 60 [1st Dept 1964], with Moser v Devine Real Estate, Inc. [Florida], 42 AD3d 731, 734-735 [3d Dept 2007], and Rafield v Brotman, 261 AD2d 257, 258 [1st Dept 1999]. See also Jonathan Rosenberg & Kendall Burr, Making Sense of New York's Corporate Opportunity Doctrine, 80-Jun NY S BJ 10, 11-14 [2008].) The court could not, in any event, determine on this record whether SAJ would have refused to offer plaintiff a lease. The parties' submissions on this issue – affidavits and deposition testimony – are conflicting and require credibility determinations which are not appropriate on a motion for summary judgment.

340 Brew Pub's assets, including tangible property at the Premises and 340 Brew Pub's liquor license, without authorization from 340 Brew Pub and without adequate consideration.

340 Brew Pub and defendants fail to eliminate triable issues of fact as to when, and under what circumstances, Wiebe obtained authority to transfer 340 Brew Pub's remaining assets to Ale House.[3] These assets were allegedly transferred by the January 2, 2009 Agreement. As discussed above, Wiebe expressed doubt as to whether the signature on this agreement was his, or was placed on the agreement by Jacob Rabinowitz. Rabinowitz, like Wiebe, is an officer and manager of Ale House (Rabinowitz Reply Aff, ¶ 1), the entity which took over the assets and Premises and which, along with SAJ, was a counter-party to the January 2, 2009 Agreement with 340 Brew Pub. Defendants do not explain how the counter-party to the agreement could have consented on behalf of 340 Brew Pub.

Defendants also do not contend that, prior to executing this agreement, Wiebe informed 340 Brew Pub of his interest in establishing the competing business, Ale House, with Rabinowitz. Nor do defendants demonstrate as a matter of law that such disclosure was not required. The court rejects defendants' contention that Wiebe's fiduciary duties were terminated when 340 Brew Pub ceased to operate the bar at the premises. (See Defs' Reply Memo, at 3.) There is no allegation that 340 Brew Pub was dissolved. In addition, as defendants themselves assert, retail liquor licenses under New York law stay with the premises and are transferrable with consent of the State Liquor Authority. (Defs' Memo In Supp, at 9.) That the liquor license and other assets had value is evidenced by the fact that Avid's affiliate issued the $25,000 check as consideration for the purported purchase of the assets. (Avid Aff, Exh N.)

[3] This issue exists apart from any claim by plaintiff that the transfer of the assets violated Business Corporation Law (BCL) § 909.

Finally, defendants fail to establish that Bahna's alleged deposit of the check on behalf of 340 Brew Pub effected an accord and satisfaction. A party's acceptance of a payment on account of a disputed unliquidated claim gives rise to an accord and satisfaction only if the acceptance is made with "full knowledge of the material facts." (Sabbagh v Pantano, 170 AD2d 411, 412 [1st Dept 1991]; Progressive Northeastern Ins. Co. v North State Autobahn, Inc., 71 AD3d 657, 658 [2d Dept 2010]; see generally Horn Waterproofing Corp. v Bushwick Iron & Steel Co., Inc., 66 NY2d 321, 325 [1985].) Here, as held above, issues of fact exist as whether Wiebe disclosed his interest in entering into the Ale House business with Rabinowitz.

Misappropriation of Corporate Opportunity

Plaintiff's second cause of action pleads that Wiebe misappropriated a corporate opportunity from 340 Brew Pub by causing its lease "to be diverted from [340] Brew Pub to Ale House, a competing corporation through which Wiebe derives a benefit." (Compl., ¶ 124.) As held above, the alleged diversion of the lease does not constitute misappropriation of a corporate opportunity. This cause of action will accordingly be dismissed.

Aiding and Abetting Breach of Fiduciary Duty

The third cause of action pleads that defendants SAJ, Avid, Rabinowitz, Struble, and Lemanski knowingly and affirmatively assisted Wiebe in breaching his fiduciary duties "by, among other things: forming Ale House, allowing the liquor license to be transferred into Avid's name, drafting the documents through which the lease between SAJ and [340] Brew Pub was allegedly terminated, relaying to Wiebe information concerning [340] Brew Pub's intention to negotiate a new lease, and preventing the employees of the Westside Brewery [the bar] from entering the premises." (Compl. ¶ 129.) For the reasons discussed in connection with plaintiff's first and second causes of action, Wiebe did not breach his fiduciary duties or misappropriate a corporate opportunity by diverting a lease from 340 Brew Pub. The breach of fiduciary duty

cause of action is, however, maintainable based on plaintiff's allegations as to the transfer of 340 Brew Pub's property, including its liquor license, without authorization. The third cause of action will therefore be dismissed only to the extent that it is based on the other defendants' alleged involvement in Wiebe's diversion of the lease. (See Kagan v HMC-New York, Inc., 94 AD3d 67, 73 [1st Dept 2012], appeal dismissed 19 NY3d 918 [holding that absent a "viable claim for breach of fiduciary duty, the related claims of aiding and abetting such a breach were [] properly dismissed"].)

Fraud

The fourth cause of action alleges that Wiebe made a misrepresentation of fact to Bahna "by stating that unless Bahna signed the alleged 12/9/[08] document on behalf of [340] Brew Pub, SAJ would sue [340] Brew Pub and [340] Brew Pub would not be able to retake possession of its property within Westside." (Compl., ¶ 132.)

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009].) As previously held, Bahna testified at his deposition that he was "[n]ot really" influenced by, and did not rely on, what Wiebe allegedly told him. (See also Bahna Dep, at 292 [testifying that no one made any threats to him before he signed the December 9, 2008 Agreement].) As plaintiff's own admissions demonstrate that the element of justifiable reliance is absent, defendants are entitled to summary judgment dismissing the fraud claim.

Conversion

The fifth cause of action for conversion is based on the allegations that plaintiff is the legal owner of the various assets and property left in the Premises, and of the liquor license, and that defendants have intentionally blocked its access to those assets. (Compl. ¶¶ 139-140.)

Conversion is an unauthorized exercise of the right of ownership over property belonging to another to the exclusion of the rights of the true owner. (Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Texas, 87 NY2d 36, 44 [1995].) As discussed in connection with plaintiff's fiduciary duty cause of action, triable issues of fact exist as to whether defendants intentionally and without authority assumed or exercised control over plaintiffs' personal property, thereby interfering with its ownership rights. The parties' summary judgment motions on this cause of action will accordingly be denied.

Rescission of Contract

The sixth cause of action is based on the allegations that Wiebe fraudulently induced Bahna into signing the December 9, 2008 Agreement, that 340 Brew Pub did not consent to this Agreement, and that the Agreement is unconscionable. (Compl., ¶¶ 147-150 [mistakenly referring to the date of this Agreement as December 9, 2009].) Defendants move to dismiss the rescission cause of action as pleaded. In opposition and in support of its own motion, plaintiff argues not that the December 9, 2008 Agreement should be rescinded, but instead that the January 2, 2009 Agreement should be rescinded because it violates BCL § 909. (Pl's Memo In Supp, at 4.)

To the extent that the rescission claim is based on the December 9, 2008 Agreement, it will be dismissed without opposition. In addition, plaintiff fails to make any showing that there is no complete and adequate remedy at law or that the status quo may be substantially restored, and thus that the equitable remedy of rescission is available. (See Rudman v Cowles Communications, Inc., 30 NY2d 1, 13 [1972].)

The court declines to consider plaintiff's unpleaded BCL § 909 claim, as defendants demonstrate that they would be prejudiced as a result.

It is accordingly hereby ORDERED that plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendants' motion for summary judgment is granted to the following extent: The first cause of action (breach of fiduciary duty) and the third cause of action (aiding and abetting breach of fiduciary duty) are dismissed with prejudice to the extent based on defendant Wiebe's diversion of a potential lease; the second cause of action (misappropriation of a corporate opportunity), the fourth cause of action (fraud), and the sixth cause of action (rescission of a contract) are dismissed with prejudice; and the motion is otherwise denied; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
January 18, 2016

MARCY FRIEDMAN, J.S.C.