

Freedman v McInnis
2018 NY Slip Op 31491(U)
February 2, 2018
Supreme Court, New York County
Docket Number: 655244/2017
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER

PART 61

Justice

-----X

RICHARD FREEDMAN, individually and derivatively on
behalf of ROOT & BONE LLC, and AVENUE BEE
DEVELOPMENT CORP.,

INDEX NO. 655244/2017

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

JEFFREY MCINNIS and JANINE BOOTH,

DECISION AND ORDER

Defendants.

-----X

OSTRAGER, J.,

An evidentiary hearing was held on plaintiff's motion for a preliminary injunction on January 18, 2018. On the basis of the testimony adduced at the hearing and the exhibits introduced into evidence at the hearing, the motion for a preliminary injunction is granted to the extent provided herein on condition that plaintiff post a \$500,000 bond for the benefit of the defendants in the event the defendants suffer damages as a result of the preliminary injunction and the defendants ultimately prevail at the trial on the merits.

The facts adduced at the preliminary injunction hearing established that on September 27, 2013 plaintiff Freedman and the defendants entered into a 33-page single spaced "Limited Liability Company Operating Agreement of Root & Bone LLC" with respect to the opening and operation of a restaurant under the name "Root & Bone" at 200 East 3rd Street, New York, New York in a building owned by Mr. Freedman. The members of the LLC (Messrs. Freedman and

McInnis and Ms. Booth) were each represented by counsel, and the Agreement appointed defendant McInnis as the managing member. Mr. McInnis had the right to manage the affairs of the company and to take any actions on behalf of the company without the consent of the other parties to the Operating Agreement, except actions specified in Section 7.01 (c) of the Agreement, which actions required the consent of plaintiff Freedman. Mr. McInnis was required under the Agreement to work in the capacity of executive chef during the first ten months of the operation of the restaurant and, thereafter, to make himself available as reasonably necessary to serve as executive chef. The Agreement established a salary structure for Mr. McInnis in Section 13.02 but expressly provided in Section 12.02 that the signatories to the Agreement could engage in unrelated business activities. Each of the signatories to the Operating Agreement had a one-third interest in Root & Bone LLC.

The restaurant opened on June 30, 2014 and apparently became an overnight success due to the talents of Mr. McInnis and his lifetime partner Ms. Booth and the extraordinary menu Mr. McInnis and Ms. Booth assembled based upon their long experience in the restaurant industry. Prior to entering into the Operating Agreement, Mr. McInnis had had experience operating successful restaurants at various locations throughout the United States.

Critically, prior to entering into the September 2013 Operating Agreement, Mr. McInnis filed a registration request for the "Root & Bone" service mark in May 2013 with the United States Patent and Trademark Office in the name of Chef Jeff McInnis LLC. There was no credible evidence adduced at the hearing that Mr. McInnis disclosed to Mr. Freedman that Mr. McInnis had sought to register the "Root & Bone" service mark in the name of Chef Jeff McInnis LLC, and the Root & Bone LLC Operating Agreement is silent about the ownership of the name, although it is implicit that absent evidence to the contrary, the entity that owns the

restaurant called Root & Bone would own the name. At trial, defendants may be able to produce such evidence to the contrary. In all events, the name “Root & Bone” was first utilized in connection with the restaurant at 200 East 3rd Street and generated value as a result of the success of the restaurant.

Significantly, the service mark “Root & Bone” was not registered by the Patent and Trademark Office in the name of Chef Jeff McInnis LLC until May 26, 2015, by which time Mr. McInnis had relocated with Ms. Booth to Miami, Florida. In July 2015 Mr. McInnis executed both on behalf of Root & Bone LLC and Chef Jeff McInnis LLC a “Restaurant Management and Licensing Agreement” that granted Chef Jeff McInnis LLC the right to license the name Root & Bone to third parties along with food and drink menus, operational manuals and other intellectual property. The Restaurant Management and Licensing Agreement made provision for a 6% management fee for Mr. McInnis in exchange for various services and made provision for monthly “Target Distribution Amounts” for Mr. Freedman, variances from which would affect the management fee upwards or downwards. No evidence was adduced at the hearing as to how the Target Distribution Amount compared to the prior financial arrangements among the parties, although plaintiff alleges that defendants have wrongfully converted funds from Root & Bone LLC.

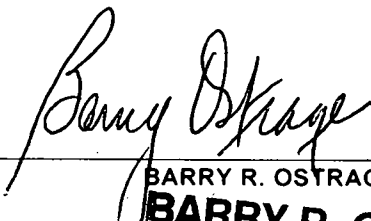
The execution of the “Restaurant Management and Licensing Agreement” is unquestionably an action specified in Section 7.01 (c) of the Operating Agreement. Plaintiff Freedman denies that the procedures outlined in Section 7.01 (c) were followed, denies that he consented to the provisions of the Restaurant Management and Licensing Agreement, and asserts that Mr. McInnis’ conduct violated New York Limited Liability Company Law § 411 (which

appears to be the case). Mr. McInnis claims otherwise and relies on inconclusive emails to support his contention.

It is undisputed that Chef Jeff McInnis LLC has licensed the name Root & Bone to restaurants in Miami and Puerto Rico, although no documentary evidence was presented with respect to the terms of those licenses. Pending the trial of this action, defendants are preliminarily enjoined from further licensing the Root & Bone name and intellectual property prospectively, but no other injunctive relief is granted. The preliminary injunction is issued based upon a finding that plaintiff has established a likelihood of success on the merits, irreparable harm, and that a balance of the equities tips in favor of the plaintiff, recognizing that plaintiff Freedman has benefitted from his association with the defendants who are largely responsible for creating the value associated with the Root & Bone name and intellectual property.

The parties shall proceed with discovery pursuant to December 19, 2017 Preliminary Conference Order and appear on March 13, 2018 at 9:30 a.m. prepared to select an expeditious trial date.

DATE: February 2, 2018


BARRY R. OSTRAGER, JSC
BARRY R. OSTRAGER
JSC