O'Mahony v Whiston

2019 NY Slip Op 32929(U)

October 4, 2019

Supreme Court, New York County

Docket Number: 652621/2014

Judge: Jennifer G. Schecter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ESTHER J. O'MAHONY and KEN FOLEY, individually and on behalf of DUBCORK INC., a New York Corporation, d/b/a SMITHFIELD and SMITHFIELD NYC,

Plaintiffs,

-against-

GAVIN WHISTON, THOMAS MCCARTHY, KIERON SLATTERY, MOXY RESTAURANT ASSOCIATES, INC., and DUBCORK INC. d/b/a SMITHFIELD, SMITHFIELD NYC and SMITHFIELD HALL,

Defendants.

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Index No.: 652621/2014

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Motion sequence numbers 010 and 011 are consolidated for disposition.

Plaintiffs Esther O'Mahony and Ken Foley move for partial summary judgment against defendants Gavin Whiston, Thomas McCarthy, Kieron Slattery (collectively, the Individual Defendants), Moxy Restaurant Associates, Inc. (Moxy), and Dubcork, Inc. (Dubcork). Defendants oppose and separately move for summary judgment against plaintiffs. The parties also seek sanctions against each other for their alleged frivolous conduct. For the reasons that follow, the parties' motions are denied in their entirety.

Background & Procedural History

This case concerns an Irish soccer bar. In early 2010, after having previous involvement with another bar, Foley, Slattery, and McCarthy decided to open a new bar. They chose to involve Whiston, who had bar management experience. In April 2011, the four of them agreed they would be equal shareholders of the New York corporation they

formed to own the bar – Dubcork. Foley's shares, however, would nominally be held by O'Mahony, who is now his wife.[1] They named the bar Smithfield (the Old Bar).

In June 2011, Dubcork entered into a lease for the Old Bar at 215 West 28th Street in Manhattan. Plaintiffs claim that it was agreed that each of the four shareholders would make equal capital contributions and that Foley would loan some money to Dubcork. It is undisputed that Foley loaned $86,000 to Dubcork to pay for construction costs (the Foley Loan). It is also undisputed that all of the shareholders made $50,000 capital contributions, except for Whiston, who contributed $10,000. They also raised another $350,000 to finance the construction by selling 20% of Dubcork's equity. The two largest outside investors were non-party Dave Massey, who paid $150,000 for a 10% stake, and non-party Erik Manning, who paid $100,000 for a 5% stake. The four original shareholders were each left with a 20% stake.[2]

The Old Bar opened on March 30, 2012 and Whiston and McCarthy served as its managers. McCarthy paid the bills. Foley and Slattery worked in the bar. Foley also sometimes performed jazz concerts.

The Old Bar did not stay open for very long. Yet, in that limited time, plaintiffs allege that the Individual Defendants engaged in impropriates. Plaintiffs claim, for example, that: (1) Whiston contributed $40,000 less than the other shareholders; (2)

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[1] O'Mahony held the shares because she has a Social Security number. For most of the pendency of this case, O'Mahony was the only named plaintiff. The complaint was amended to add Foley due to the uncertainty as to which among them has standing, an issue not addressed by the parties. Should plaintiffs ultimately prevail, the question will need to be addressed.

[2] Dubcork does not have a shareholders agreement and thus is governed by the default rules of the New York Business Corporation Law.

McCarthy and his family illegally lived, rent free, in the Old Bar for three months and that they ate most of their meals there, also for free; (3) McCarthy issued six $1,500 checks to his wife, who did not work in the Old Bar and inexplicably issued himself two checks totaling $6,421.19 for no legitimate business purpose; (4) McCarthy wrote a $7,000 check to Whiston three days before Whiston's wedding, which McCarthy was unable to explain at his deposition; (5) Whiston and McCarthy paid themselves based on hours worked without keeping any records of such hours, unlike all others who worked at the Old Bar; (6) McCarthy caused Dubcork to pay his monthly personal credit card bills, totaling $105,247.02, without keeping any records even though some of the payments were supposedly reimbursements for him personally paying the Old Bar's expenses; and (7) Whiston and McCarthy allegedly took $903,445 of the Old Bar's cash, which they supposedly used to pay the Old Bar's expenses, for which they have no records, nor is there any record because the Point of Sale (POS) records were destroyed after the Old Bar closed.[3]

The very month after the Old Bar opened, in April 2012, its landlord sought to buy it out so the property could be developed. These negotiations devolved into litigation

[3] Based on his analysis of certain POS records attached to emails, Plaintiffs' expert contends that 80% of Old Bar's cash receipts were not accounted for in the POS system. While the Individual Defendants' shoddy record keeping and failure to retain Dubcork's POS records raises spoliation concerns, it would be premature to address the spoliation issue at this time. Defendants' failure to account for the cash will result in their liability for that cash. Thus, an adverse inference due to spoliation could be academic. Because it is not yet clear what the accounting will show, plaintiffs may renew their spoliation arguments with their in limine motions.

which, to the benefit of Dubcork's shareholders, resulted in a lucrative settlement.[4] In June 2013, the landlord agreed to pay $1.9 million to Dubcork to close the Old Bar by the end of 2013 and to vacate the premises by January 15, 2014. Plaintiffs were not consulted prior to the settlement's execution, nor were they informed that Dubcork had already received $126,000 of the settlement amount. Also supposedly unbeknownst to plaintiffs at that time was that the Individual Defendants were looking to relocate the Old Bar and, in August 2013, began negotiating a new lease for space at 138 West 25th Street in Manhattan (the New Bar). The Individual Defendants, along with Massey, would each own 25% of the shares of the New York corporation formed to own the New Bar – Moxy. Plaintiffs were not offered the opportunity to invest in Moxy, nor was Dubcork provided the opportunity to own the New Bar – even though money from Dubcork's settlement was used to fund the New Bar.

Moxy signed its lease for the New Bar on December 20, 2013. Moxy made a $70,200 down payment from proceeds Dubcork obtained from its landlord, which had agreed to the early release of the funds. The Individual Defendants were keen on opening the New Bar as soon as possible so as not to lose customers by having a lag between the Old Bar's closing and the New Bar's opening. Moxy paid $500,000 to the restaurant that had previously occupied the New Bar's space, which included the right to interior furnishings such as its chairs and tables. This obviated the need to move the Old Bar's furniture, which was placed in storage and later abandoned. The Old Bar also abandoned

[4] In January 2013, the landlord commenced a summary non-payment proceeding. In February 2013, the landlord served a notice to cure. In March 2013, the landlord served a notice of termination. Litigation over a *Yellowstone* injunction and the termination notice followed.

its POS records (which is why many records from the Old Bar were not produced in discovery). The only material item moved to the New Bar appears to be the "Smithfield" sign, which had value because the New Bar also was called Smithfield.

On January 15, 2014, after the Old Bar vacated the premises, Dubcork received the balance of the settlement payment – over $1.5 million plus the return of its $123,600 security deposit from the landlord. The following day, on January 16, Dubcork made payments of $132,450 to Whiston, McCarthy, Slattery, and Massey, who used the money to cause Moxy to pay the balance of the $500,000 owed on the new leasehold. The following week, on January 23, McCarthy misrepresented to Foley in an email that the settlement proceeds from Dubcork's landlord had not yet cleared the bank (*see* Dkt. 290 at 62), when, "[i]n fact, the balance of the sales proceeds had been received 8 days earlier, had cleared and multiple distributions had already been made to Whiston, McCarthy, Slattery and Massey" (Dkt. 292 at 14). Foley responded by asking when the Foley Loan would be repaid (*see* Dkt. 290 at 62). McCarthy did not reply. That same day, Whiston and Slattery caused Dubcork to pay them each $55,000 as "Bonus/Sale Commissions" (*see id.* at 66). These payments were not disclosed to plaintiffs. Nor is it clear why a bonus or commission was warranted, as no transaction justifying such a payment appears to have occurred.[5]

[5] Obviously, setting up the New Bar cannot be a justification for the Old Bar to pay a bonus, as the Old Bar did not benefit. To the extent the payments were due to the settlement with the landlord, it is unclear how Whiston and Slattery did anything to make this happen that could justify such an exorbitant payment or why a director would be entitled to a bonus for settling a legal action brought against the company At trial, Whiston and Slattery will have to prove that these payments satisfy the entire fairness test – that is, both the process and the amount were fair.

On February 27, 2014, McCarthy told Foley that each shareholder was getting $50,000 until a "tax situation is finalized" (*see id.* at 68). There was no "tax situation" holding up the money; the Individual Defendants had *already* received $200,000 and Massey had received $150,000 (*see* Dkt. 292 at 15).

In February and April 2014, O'Mahony received checks totaling $192,677. While she was not given an explanation for why that amount was paid to her at the time, in this case, the Individual Defendants explained this was the amount that each of Dubcork's shareholders received and represented the net proceeds from the $1.9 million settlement after all of Dubcork's expenses were paid (a claim that only holds water assuming that, for instance, the $55,000 payments are legitimate) (*compare* Dkt. 291 at 9-11, *with* Dkt. 329 at 24).[6]

At the same time, the Individual Defendants were still working on getting the New Bar up and running. They publicized that they would be reopening at a smaller location on 25th Street (*see* Dkt. 290 at 74, 76).

The New Bar opened in May 2014. It, like the Old Bar, was called Smithfield. Many of the Old Bar's patrons, particularly certain soccer "booster clubs," started

[6] The propriety of Massey, a 10% shareholder, receiving approximately the same amount of money as the other 20% shareholders, cannot be decided on this summary judgment motion. It is unclear how the parties treated the settlement distributions, namely whether (according to defendants) they were meant to be a return of capital in accordance with the alleged oral agreement reached with Massey at the time of his investment or whether (according to plaintiffs) the proceeds should have been distributed on a pro rata basis. If defendants can prove the alleged agreement with Massey (an issue that implicates their credibility), it seems that what was given to Massey was not only proper, but indeed legally required. But if that alleged agreement is not proven, then plaintiffs have a compelling claim that shareholder distributions must be made in proportion to their percentage equity, and thus plaintiffs are owed their share of the extra amount paid to Massey.

frequenting the New Bar. The New Bar also continued to use the smithfieldnyc.com website so the Old Bar's patrons would be routed to the New Bar (*see id.* at 80). Moxy did not pay anything to Dubcork for this goodwill.

In May and June 2014, as Foley did months earlier, O'Mahony asked when the Foley Loan would be repaid and inquired as to the breakdown of the settlement distribution (*see id.* at 92). The Individual Defendants promised a "full breakdown", but none was provided until discovery in this action (*see id.*). O'Mahony then hired counsel, who threatened litigation in July 2014 (*see* Dkt. 291 at 4).[7]

On August 25, 2014, O'Mahony commenced this action by filing her original complaint. After a change in counsel,[8] she filed a second amended complaint, asserting (1) direct claims concerning the Foley Loan and the amount of the settlement she received and (2) derivative claims concerning the amount of the settlement, the discussed instances of alleged theft, and the violation of the corporate opportunity doctrine by not offering Dubcork the chance to invest in and own the New Bar, which allegedly is merely a continuation of the Old Bar at a new location (*see* Dkt. 18 [the SAC]). By order dated April 6, 2016, the court granted defendants' motion to dismiss the SAC only to extent of dismissing O'Mahony's derivative claim challenging the amount of the $1.9 million

[7] This is the latest date on which litigation could reasonably have been contemplated by defendants and thus is relevant to plaintiffs' spoliation arguments.

[8] Defendants have consistently harped on the court's comment to O'Mahony's prior counsel that his original complaint suffered from serious pleading defects despite the amended pleading largely correcting these problems and surviving a motion to dismiss. The original complaint may have lacked merit, but that does not undermine the apparent merit of the current pleading and the strength of the proof, which warrants a trial.

settlement on the ground that the terms of the settlement were the result of the valid exercise of the Individual Defendants' business judgment (Dkt. 32; *see* Dkt. 38 [4/6/16 Tr.]). The direct and derivative claims concerning all other challenged transactions survived (though the court found some of the claims duplicative).

On June 17, 2016, defendants filed an amended answer to the SAC and asserted counterclaims for money had and received and defamation (Dkt. 58).[9] The court dismissed these counterclaims by order dated October 7, 2016 (Dkt. 79).

The operative pleading in this action is the third amend complaint dated January 26, 2018 (Dkt. 244 [the TAC]).[10] The TAC adds Foley as a plaintiff and asserts the following causes of action: (1) breach of fiduciary duty, asserted derivatively against the Individual Defendants and Moxy;[11] (2) breach of fiduciary duty, asserted directly against

[9] Both at this time and throughout the litigation, there were substantial disputes regarding defendants' violations of court orders. The court will not address the procedural history associated with these disputes. Suffice it to say that defendants' complaints about how long and expensive this litigation has become rings hollow because that is mostly their fault. Their dilatory tactics and discovery violations unnecessarily prolonged this case. Defendants still have significant work to do before trial. Their failure to properly account for the missing cash and undocumented expenses will automatically render them liable on those claims unless they properly account for them.

[10] The TAC was not e-filed until March 30, 2018.

[11] The court assumes Moxy is really being sued for aiding and abetting breach of fiduciary duty since a company (let alone a wrongfully competing company) does not have fiduciary duties to its shareholders; it is the directors that owe fiduciary duties (*Hyman v N.Y. Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007] ["it is well settled that a corporation does not owe fiduciary duties to its members or shareholders"]). The court makes the same assumption regarding the other causes of action based on breach of fiduciary duty.

all defendants;[12] (3) an accounting of Dubcork, asserted directly against the Individual Defendants; (4) minority shareholder oppression, asserted directly against the Individual Defendants; (5) misappropriation, asserted derivatively against the Individual Defendants and Moxy;[13] and (6) breach of contract, regarding the Foley Loan, asserted directly against all defendants.[14] Defendant answered the TAC on February 22, 2018 (Dkt. 243).

The parties each move for summary judgment. The motions are denied.

Legal Standard

Summary judgment may only be granted only if there are no material disputed facts (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The moving party bears the burden of making a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If a prima facie

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[12] The court does not understand why this claim is being asserted against "all defendants" since, as with Moxy, Dubcork lacks fiduciary duties to plaintiffs.

[13] The court is unclear why this claim is not duplicative of the first cause of action.

[14] While Moxy is not directly liable for the Foley Loan since it did not yet exist when the loan was made, paragraph 93 of the TAC indicates that plaintiffs are asserting a veil piercing claim. While the TAC certainly indicates that Dubcork lacked corporate formalities, it is unclear why plaintiffs claim the same is true of Moxy. Certainly, sufficient veil piercing allegations are not pleaded in the TAC. The claim that Moxy should be treated as the successor to Dubcork is distinct from whether the court should disregard Moxy's corporate form and treat it as the alter ego of the Individual Defendants. That said, at this summary judgment stage, defendants do not specifically address whether the record evidence supports a veil piercing claim, either as to Dubcork or Moxy. Perhaps the reason is because the amount in controversy on this claim – less than $90,000 – pales in comparison to the amount sought on the primary breach of fiduciary duty claims, on which veil piercing is irrelevant. Thus, the question of which defendants may be held liable for repayment of the Foley Loan is an issue for trial.

showing has been made, however, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of a material question of fact (*Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562). The evidence must be construed in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman,* 49 NY2d at 562). The motion must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

There are material questions of fact concerning the two categories of plaintiffs' derivative claims, namely whether: (1) the New Bar qualifies as a corporate opportunity of the Old Bar and that assets of the Old Bar, such as the Smithfield name and associated goodwill, were given to the New Bar for no consideration; and (2) the Individual Defendants committed waste by taking corporate assets, such as, for instance, paying themselves cash that was not actually used to pay the Old Bar's bills and paying unfair bonuses. There also are material questions of fact regarding plaintiffs' direct claims, namely whether the Foley Loan was repaid and whether the Individual Defendants' treatment of plaintiffs amounted to shareholder oppression.

Moreover, since the Individual Defendants managed the Old Bar, they have a duty to account for the Company's expenses to the minority shareholders (*Unitel Telecard Distr. Corp. v. Nunez*, 90 AD3d 568, 569 [1st Dept 2011] [shareholders in close

corporations owe each other fiduciary duties and are obligated to provide an accounting]; *see Mohinani v Charney*, 156 AD3d 443, 444 [1st Dept 2017] ["In view of their alleged fiduciary relationship with Charney and their allegations that Charney did not provide a full accounting even after protracted discovery, plaintiffs are entitled to pursue their claim for an equitable accounting and related costs"]). This accounting and plaintiffs' objections to it shall be filed prior to trial. Any expense that is not substantiated with proof (such as the inability to account for cash or the inability to provide receipts to justify why personal credit card debt was reimbursed) shall result, under settled law, in the Individual Defendants being held personally liable to Dubcork for such amounts (*Polish Am. Res. Corp. v Byrczek*, 270 AD2d 96 [1st Dept 2000] ["While defendant claims that he did not personally make the cash withdrawals and therefore cannot account for them, all 'obscurities and doubt' created by the failure to keep clear and accurate records **are to be resolved against him**"] [emphasis added]; *see Matter of Rockefeller*, 2 Misc3d 1004[A], at *5 [Sur Ct, NY County 2004] ["Where a fiduciary cannot or will not account or otherwise fails to discharge its record-keeping duties, all inferences are to be taken against it for that period"], citing *Matter of Reckford*, 307 NY 165, 177 [1954]). Once an accounting is provided, it appears that plaintiffs will be able to make out their prima facie case since it is undisputed that defendants do not have all of the records relating to what happened to Dubcork's cash and have not submitted the invoices for Old Bar expenses for which they were supposedly reimbursed. Thus, at trial, **it will be the Individual Defendants' burden** "to prove, by a preponderance of the evidence, that the

account **is accurate and complete**" (*Matter of Johnson*, 166 AD3d 1435, 1436 [3d Dept 2018] [emphasis added]).

That said, the parties' arguments that some of the claims are amenable to summary judgment are unpersuasive.

To begin, it is not obvious that the New Bar qualifies as a corporate opportunity of the Old Bar. "The 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., Inc. v Fritzen*, 147 AD2d 241, 246 [1st Dept 1989]). Corporate opportunities include those that the company had a "tangible expectancy" to exploit and those that are the same or similar to the company's "line of business" such that "the consequences of deprivation are so severe as to threaten the viability of the enterprise" (*id.* at 247-48). Here, the Old Bar was forced out of business by its landlord and it is clear that the net settlement proceeds were sufficient for it to continue at a new location – since that is exactly what occurred.

To be sure, had the Old Bar not closed and Dubcork sought to expand by opening additional locations, the opportunity to do so would certainly be considered Dubcork's opportunity and summary judgment for plaintiffs would be warranted (*see Stavroulakis v Pelakanos*, 58 Misc 3d 1221[A], at *10-12 [Sup Ct, NY County 2018]). But here, the facts are more complicated, since it is unclear exactly how much plaintiffs knew about the New Bar and when they knew it. For instance, during the first half of 2014, if

plaintiffs knew that the Individual Defendants were intending on opening at a new location and personally investing their share of the settlement funds in the New Bar (rather than keeping the funds as plaintiffs did), then even if the New Bar constituted a corporate opportunity, plaintiffs would have waived any objection to it (*see Lee v Manchester Real Estate & Construction, LLC*, 118 AD3d 627, 628 [1st Dept 2014] ["Even were we to conclude that the deals in question involved corporate opportunities, triable issues exist concerning whether Manchester consented to the conduct at issue"]). Plaintiffs cannot obtain the benefit of the New Bar without investing and taking any risk if they knew of the opportunity but never objected to being excluded. It would be inequitable to allow them to piggyback on the Individual Defendants' efforts under such circumstances (*see Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666-67 [1st Dept 1993] ["Mr. Ackerman fully disclosed his intention to bid on the subject apartment to the board which consented by voicing no objection. The board also waited until several months after the auction before objecting to the sale. Silence constitutes an estoppel where there is a duty to speak"]). Conversely, if plaintiffs were not aware of the material facts about the New Bar, perhaps because they were misled by the Individual Defendants, then they cannot be said to have waived (or waived on behalf of Dubcork) the right to participate.

To be sure, O'Mahony testified at her deposition that she would not further invest money with the Individual Defendants given what she now knows about their conduct (*see* Dkt. 301 at 518 [Tr. at 497]). That admission does not defeat her corporate

opportunity claim, since she does not contend that she would have had the same view back in 2014, when the opportunity existed. Thus, there is a material question of fact as to whether plaintiffs would have agreed to participate had the opportunity been fully and forthrightly presented to them in 2014.

There also are material questions of fact regarding whether the supposed goodwill of the Old Bar had any value. Defendants submitted evidence that "Smithfield is a section of Dublin, Ireland, site of the old Jameson Whiskey Distiller" and is a common name for Irish bars that "sell a lot of Jameson's whiskey" (Dkt. 342 at 8-9).[15] Defendants also claim that the soccer fans that patronize the New Bar are personal contacts of the Individual Defendants from their affiliation with other bars, and thus they do not qualify as the Old Bar's goodwill (*see* Dkt. 295 at 12). Plaintiffs have not submitted evidence disproving these assertions which, when viewed in the light most favorable to defendants, preclude summary judgment (*see Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]).

Likewise, there are disputed material facts concerning the amounts allegedly pilfered by the Individual Defendants from the Old Bar. To be sure, plaintiffs may ultimately procure a directed verdict if, as discussed, defendants fail to account for the disputed transactions. But at this juncture, where an accounting has yet to be provided and where plaintiffs admit they do not know if the payments have a legitimate basis, summary judgment must be denied. The court further reiterates that, with respect to interested transactions, such as the bonus payments, defendants will only prevail if they

[15] Plaintiffs do not claim that Dubcork owns the Smithfield trademark.

can carry their burden of proving entire fairness (*Stavroulakis*, 58 Misc 3d 1221[A], at *10 [collecting cases]). "This 'entire fairness' standard has two components:

> **fair process and fair price**. The fair process aspect concerns timing, structure, disclosure of information to independent directors and shareholders, how approvals were obtained, and similar matters. The fair price aspect can be measured by whether independent advisors rendered an opinion or other bids were considered, which may demonstrate the price that would have been established by arm's length negotiations. Considering the two components, the transaction is viewed as a whole to determine if it is fair to the minority shareholders (*see id.* at *11 [emphasis added], quoting *Matter of Kenneth Cole Prods., Inc., Shareholder Litig.*, 27 NY3d 268, 275-76 [2016]).

But here, unlike cases cited by plaintiffs, such as *Stavroulakis*, where no consideration was paid at all (as opposed to unfair consideration), fairness is a question of fact.

Turning to the direct claims, defendants conceded at oral argument that whether the Foley Loan was repaid is a question of fact (*see* Dkt. 368 [5/9/19 Tr. at 27 ["THE COURT: How do I know that (the Foley Loan) was paid off? MR. RADER: You don't"]). Plaintiffs have no records showing whether the loan was repaid since the parties agree that any repayments would have been in cash and, as discussed, the record lacks clear evidence of cash payments. Repayment of the Foley Loan is not precluded by the in pari delicto doctrine because the loan was not illegal (*see Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]). While Foley was not legally permitted to work, defendants do not claim that it was illegal for him to loan money to the Old Bar. In any event, this defense fails because the alleged illegality is not "gravely immoral" (*McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 [1960]; *see Lloyd Capital Corp. v Pat*

Henchar, Inc., 80 NY2d 124, 128 [1992] ["forfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as a sword for personal gain rather than a shield for the public good"], *accord Chirra v Bommareddy*, 22 AD3d 223, 224 [1st Dept 2005]).

The shareholder oppression claims are also rife with material questions of fact. For instance, the parties dispute, regarding the role plaintiffs were given in the Old Bar, whether plaintiffs were treated fairly in relation to the Individual Defendants such that their "reasonable expectations ... in committing their capital to the particular enterprise" were "substantially defeated" (*see Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 72 [1984]). While the court is skeptical that the damages suffered on this claim is significant, that is not a basis to grant summary judgment.[16]

In sum, in this hotly contested action where the material facts relevant to each of plaintiffs' claims are sharply in dispute, summary judgment is denied.

That said, the court would be remiss if it did not take this opportunity to encourage a sober reckoning on each side, as the parties (or at least their attorneys) have an unjustifiably rosy view of their respective positions such that each side believes sanctions are warranted against the other due their contentions being frivolous. Not so. An impartial view of the record makes clear that while the parties' actions certainly suffered from shortcomings, each side has a certain amount of justification for what they did. Before trial, perhaps cooler heads will prevail. For this reason, the pre-trial process will

[16] After all, whether Foley's "jazz night" was fully exploited is not the focus of this case.

be delayed for 30 days, during which the parties shall personally meet for good faith settlement discussions.[17] Accordingly, it is

ORDERED that the parties' motions for summary judgment and for sanctions are denied; and it is further

ORDERED that, if the parties have not not settled, a telephone conference will be held on November 6, 2019 at 4:30 p.m., at which time an accounting from defendants will be ordered and pre-trial deadlines will be set.

Dated: October 4, 2019 ENTER:

Jennifer G. Schecter, J.S.C.

[17] The parties may request the aid of the court or a mediator.