SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

----------X

RAJKUMAR BABANI,

Plaintiff,

- v -

ROYAL CHAIN, INC. (D/B/A ROYAL CHAIN GROUP), PAUL MAROOF, SHAUN YAFEH

Defendant.

----------X

INDEX NO. 650811/2019

MOTION DATE 11/15/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21

were read on this motion to/for DISMISS.

Upon the foregoing documents, Royal Chain Inc. d/b/a Royal Chain Group, Paul Maroof, and Shaun Yafeh's (collectively, the **Defendants**) motion to dismiss pursuant to CPLR §§ 3211 (a)(1), (a)(5), and (a)(7) is granted solely to the extent of (i) the second cause of action for breach of the 2009 Partnership Agreement is dismissed solely to the extent of the claims that predate February 8, 2013 and (ii) all claims asserted against Mr. Yafeh in his individual capacity.

The Relevant Facts and Circumstances

Royal Chain, Inc. (**Royal Chain**) is an importer and distributor of metal jewelry, which is owned by Mr. Maroof and Mr. Yafeh (NYSCEF Doc. No. 1, ¶ 3). In 2007 and 2008, Mr. Maroof allegedly approached Mr. Babani to discuss the possibility of merging their businesses, which Mr. Babani declined to do (*id.*, ¶¶ 10, 12). At that time, Royal Chain's business relied heavily on

gold jewelry, which was subject to decreasing customer demand, while Mr. Babani owned and operated Sunraj America, Inc (**Sunraj**), a business that focused on silver jewelry (*id.*, ¶¶ 8-9, 11).

In 2009, Mr. Maroof allegedly approached Mr. Babani once more to discuss if they would merge their business given Mr. Maroof's concerns about Royal Chain's financial condition and this time, Mr. Babani agreed to form a partnership with Mr. Maroof to run a silver division of Royal Chain (the **Silver Division**) (*id.*, ¶¶ 14-16). Mr. Babani claims that he and Mr. Maroof discussed terms of the partnership and agreed on certain terms, including (i) that both individuals would be equal partners and jointly own and control the Silver Division, (ii) they would share gross profits of 30% equally except that the managing partner would receive an additional 40% of gross profits, (iii) Mr. Babani would make an initial capital investment of $75,000 and temporarily reinvest his share of gross profits in the Silver Division for up to three years, (iv) Mr. Babani would guarantee vendor deposits and customer credit during the first 5 years, (v) Mr. Maroof would contribute to the customer database of Royal Chain, and (vi) they would equally share in the losses of the Silver Division (the **Partnership Agreement**; *id.*, ¶¶ 17, 66). The Partnership Agreement was not put into writing (*id.*, ¶ 18).

Mr. Maroof became the managing partner of the Silver Division and ran the business from his then existing space (*id.*, ¶ 19). In April 2009, Mr. Babani closed Sunraj and alleges that he contributed inventory and certain sales from his shuttered business to the Silver Division (*id.*, ¶¶ 20-23). Mr. Babani alleges that the sale of silver products grew tenfold during the first year of the Silver Division partnership due to his involvement and that his share of gross profits for 2009 was reinvested in the Silver Division (*id.*, ¶ 24).

In 2012, Mr. Babani alleges that he began to receive payments for his share of the gross profit dating back to 2009, which was approximately $1,278,000 for the period of April 2009 to December 2011 (*id.*, ¶ 29). Further, Mr. Babani asserts that Mr. Maroof made payments from his personal account and that the Silver Division's revenue was co-mingled with Royal Chain's finances (*id.*).

In 2013, Mr. Babani alleges that the Silver Division's sales grew such that his share of gross profits for that year alone exceeded $1,000,000 (*id.*, ¶ 30). In the same year, Mr. Babani also alleges that he entered into a separate agreement with the Defendants wherein Mr. Babani would invest his own funds to develop products related to Royal Chain's Montreaux collection in exchange for 10% of its sales (the **Montreaux Agreement**; *id.*, ¶ 38).

As the Silver Division continued to generate increasing profits, Mr. Babani claims that Mr. Maroof became reluctant to split profits equally and that Mr. Maroof either delayed or made excuses to avoid paying Mr. Babani (*id.*, ¶ 31). Due to the Defendants' financial difficulties, Mr. Maroof allegedly asked if Mr. Babani would agree to accept 7% of the Silver Division's gross sales and 15% of overall net profits of Royal Chain, instead of 30% of the Silver Division's gross profits (*id.*, ¶¶ 33-34). In January 2014, Mr. Babani claims that he agreed to Mr. Maroof's proposal so long as their interest as equal owners of the Silver Division remained unchanged (*id.*, ¶ 35). Mr. Maroof and Mr. Babani also agreed that they would begin to discuss an 'exit clause' to divide the Silver Division if their partnership came to an end (*id.*).

In 2015, Mr. Maroof again approached Mr. Babani to modify the terms of the Partnership Agreement, which attempts were rejected by Mr. Babani (*id.*, ¶¶ 40-45). However, Mr. Babani continued to invest time and resources in the Silver Division. Towards the end of 2015, Mr. Babani alleges that he was owed over $3,500,000 in payment and after discussions with Mr. Maroof, the parties agreed on December 17, 2015 that Royal Chain would pay Mr. Babani $2,200,000 for sums owed as of December 31, 2015, which agreement was recorded by Mr. Yafeh (the **2015 Agreement**; *id.*, ¶¶ 46-47).

After Mr. Babani continued to refuse Mr. Maroof's attempts to amend the Partnership Agreement, Mr. Babani alleges that he was notified in January 2016 that he was excluded from the Silver Division as of December 31, 2015 (*id.*, ¶¶ 54-57). However, Mr. Babani claims that he continued to negotiate terms of the partnership with Mr. Maroof thereafter (*id.*). Throughout 2016, Mr. Maroof allegedly advised that he was unable to pay Mr. Babani for any amounts owed and refused to provide paperwork reflecting calculations for Mr. Babani's share of profits in the Silver Division (*id.*, ¶¶ 59-61).

In March 2018, Mr. Maroof paid Mr. Babani his remaining share of profits for the Silver Division through the end of 2011 and Mr. Babani refused to sign a release that would waive his rights to claim further moneys allegedly owed to him (*id.*, ¶ 62). Mr. Babani alleges that he has not received payment for amounts owed from 2012 to the present (*id.*, ¶ 63).

Mr. Babani filed a Complaint on May 13, 2019 and an Amended Complaint on September 6, 2019, for: (i) an accounting, (ii) breach of the Partnership Agreement, (iii) breach of the profit

sharing agreement, (iv) breach of fiduciary duty, (v) declaratory judgment, (vi) appointment of a receiver, (vi)[1] unjust enrichment and quantum meruit, (vii) breach of the 2015 Agreement, and (viii) breach of the Montreaux Agreement. The Defendants filed the instant motion to dismiss in response.

Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). A court may also dismiss an action under CPLR § 3211 (a)(5) due to the statute of limitations or the statute of frauds. Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

A. Second and Third Causes of Action (Breach of the Partnership Agreement)

The Defendants argue that the second and third causes of action which are based on the oral Partnership Agreement should be dismissed because (i) there is no allegation that the partners agreed to share in losses of the Silver Division, (ii) the Partnership Agreement is barred by General Obligations Law § 5-701 (a)(1) which requires a written agreement if performance exceeds a year, and (iii) the Partnership Agreement is barred by General Obligations Law § 5-701 (a)(10) which requires a written agreement regarding the negotiation of a business opportunity. In his opposition papers, Mr. Babani argues that the instant motion should be

[1] The Amended Complaint numbers the sixth cause of action twice and for the avoidance of doubt, the Court refers to the same numbered system without correction.

denied because (i) the Amended Complaint sufficiently alleged the existence of a partnership, (ii) performance of the Partnership Agreement was capable within one year, and (iii) that the Partnership Agreement did not concern his purported actions as an intermediary for a fee or commission.

1. Failure to State a Claim for Breach of the Partnership Agreement

To state a claim for a breach of partnership agreement, the plaintiff must show: (1) the existence of an agreement to enter into a partnership in exchange for a contribution of cash or services, (2) that plaintiff performed his duties under such agreement, (3) that defendant breached an obligation imposed by the agreement; and (4) that plaintiff sustained direct damages as a result of the breach (*Ovsyannikov v Monkey Broker, LLC*, 2011 NY Slip Op 33909[U], *7 [Sup Ct, NY County 2011], citing *J.P. Morgan Chase v J.H. Elec. Of New York, Inc.*, 69 AD3d 802, 803 [2nd Dept 2010]).

Under common law and statute, an essential element of a partnership is the existence of a mutual promise or undertaking of the parties to share in the profits and losses of the business (*Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958] [citations omitted]). In the absence of a written partnership agreement, the court must determine if a partnership in fact existed from the conduct, intent, and relationship between the parties (*Czernicki v Lawniczak*, 74 AD3d 1121, 1124 [2d Dept 2010] [citations omitted]).

Pursuant to the Partnership Agreement, Mr. Babani alleged that he would jointly own and control the Silver Division, but also agreed to reinvest his share of the gross profit into the Silver

Division for up to three years and guarantee vendor deposits and customer credit of the Silver Division for the first five years (NYSCEF Doc. No. 6, ¶ 17). Further, during Mr. Babani and Mr. Maroof's working relationship, Mr. Babani alleges that he agreed to modify the Partnership Agreement to accept a different split of profits in order to alleviate Mr. Maroof's alleged financial difficulties and expenses associated with running their business (*id.*, ¶¶ 33-34). In addition, Mr. Babani pled that he and Mr. Maroof "shared equally in [the Silver Division's] profits and losses" (*id.*, ¶ 66).

According Mr. Babani every favorable inference as this court must on a motion to dismiss, the foregoing arrangements indicate that Mr. Babani agreed to take on certain financial risk in order to facilitate the growth of the Silver Division and offset potential losses incurred by Mr. Maroof. Under these circumstances, Mr. Babani has sufficiently pled that the parties would share in both the profits and losses of Silver Division and states a viable claim regarding the existence of the Partnership Agreement (*see Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 298 [1st Dept 2003] [intent to enter into partnership may be implied from totality of conduct as alleged]; *Don v Singer*, 92 AD3d 576, 577 [1st Dept 2012] [affirming denial of summary judgment where agreement to share loss could be implied from facts]).

2. General Obligations Law § 5-701 (a)(1)

Pursuant to General Obligations Law § 5-701 (a)(1), an agreement must be in writing where the agreement, by its terms, cannot be performed within one year. If, however, it is possible to perform an agreement within one year, "in whatever manner and however impractical," the purported oral agreement need not be written and General Obligations Law § 5-701 will not bar

such an agreement (*D & N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 455 [1984]). In other words, General Obligations Law § 5-701(a)(1) should only be applied to contracts that have absolutely no possibility in fact and law of full performance within one year (*Gural v Drasner*, 114 AD3d 25, 38 [1st Dept 2013]). Further, General Obligations Law § 5-701 (a)(1) is generally inapplicable to an agreement to create a partnership because absent a definite term of duration, an oral agreement to form a partnership for an indefinite period creates a partnership at will (*Foster v Kovner*, 44 AD3d 23, 27 [1st Dept 2007]).

Inasmuch as the Partnership Agreement allegedly provided that Mr. Babani would pay his employee's salary for the first year, he would reinvest his share of gross profits for up to three years, and that he would guarantee vendor deposits and customer credit for the first five years, there is no provision that expressly regulates the time for performance of the Partnership Agreement as a whole (*see Freedman v Chem. Constr. Corp.*, 43 NY2d 260, 265 [1977] [although plaintiff admitted that it took three years for its performance and another six years until plant built, oral agreement upheld as performable within one year because no provision in agreement directly or indirectly regulated time for performance despite extreme unlikelihood of completion within one year]). Instead, the differing timeframes of certain obligations in the Partnership Agreement merely reflect minimum obligations to be met, but do not preclude performance of the Partnership Agreement within one year. Further, there is simply no identifiable termination date in the Partnership Agreement as alleged, which would indicate that that this was a partnership at will that also falls outside the scope of General Obligations Law § 5-701 (a)(1) (*see Foster*, *supra*; *contra Andrews v. Cerberus Partners*, 271 AD2d 348, 348 [1st Dept 2000] [five year employment contract barred by GBL § 5-701 (a)(1)]). As the Partnership

Agreement is capable of being performed within one year and contains no definite term of duration, it is not barred by GBL § 5-701 (a)(1).

3. General Obligations Law § 5-701 (a)(10)

General Obligations Law § 5-701 (a)(10) requires that an oral agreement be in writing where it involves the payment of compensation for services rendered in negotiating a business opportunity. Negotiating includes "procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction" (GBL § 5-701 (a)(10)). This provision generally applies to intermediaries who perform limited services to consummate certain commercial transactions (*Freedman v Chem. Constr. Corp.*, 43 NY2d 260, 266, 267 [1977] [barring action under GBL § 5-701 (a)(10) because plaintiff used his connections, ability and knowledge to arrange for defendant to meet appropriate people and plaintiff procured the opportunity for defendant to build a multimillion dollar plant]).

In sum and substance, Mr. Babani alleges that he entered into a partnership with Mr. Maroof to operate the Silver Division, and the crux of the Amended Complaint is not that Mr. Babani acted as an intermediary to procure a business opportunity for Mr. Maroof (NYSCEF Doc. No. 6, ¶¶ 14-18). Put another way, Mr. Babani is not merely seeking compensation for his purported assistance in the consummation of sales conducted by the Silver Division, but for his substantial investment and contribution to the Silver Division as a partner in the business (*contra Snyder v Bronfman*, 13 NY3d 504, 509 [2009] [plaintiff was seeking compensation for negotiation of business opportunity under General Obligations Law § 5-701 (a)(10) where essence of plaintiff's claim was that plaintiff devoted years of work to finding a business to acquire and his efforts

ultimately led to defendant's acquisition of an interest in Warner Music]). To the extent that the Defendants seek to characterize the purpose of the Partnership Agreement as the negotiation of a business opportunity, this raises factual issues not capable of resolution at this stage of the litigation. Accordingly, the Partnership Agreement is not barred by General Obligations Law § 5-701 (a)(10).

The Defendants also argue that the second cause of action for breach of the Partnership Agreement is barred by the six-year statute of limitations (CPLR § 213(2)). Here, Mr. Babani seeks damages from 2012 to the present. However, Mr. Babani's claim for damages under with the Partnership Agreement can only begin running from February 8, 2013 – i.e. six years before the date that the Summons with Notice was filed on February 8, 2019. For the avoidance of doubt, to the extent that the 2015 Agreement includes amounts which predate February 8, 2013, such amounts are not barred by the statute of limitations because the Defendants reaffirmed their obligation to pay such amounts in 2015 and, as such, they remain timely. Accordingly, the branch of the Defendants' motion to dismiss the second cause of action for breach of the Partnership Agreement is granted solely to the extent that this claim is time-barred insofar as the claim predates February 8, 2013.

B. First Fourth, Fifth and Sixth Causes of Action (Accounting, Breach of Fiduciary Duty, Declaratory Judgment, and Appointment of a Receiver)

For the reasons set forth above, the branch of the Defendants' motion to dismiss the first, fourth, fifth, and sixth causes of action is denied because those claims are based on the existence of the Partnership Agreement, which is sufficiently alleged in the Amended Complaint.

C. Sixth Cause of Action (Unjust Enrichment and Quantum Meruit)

The Defendants argue that the sixth cause of action for unjust enrichment should be dismissed because it is duplicative of Mr. Babani's claims for breach of the Partnership Agreement. Given the Defendants' prior arguments that the Partnership Agreement did not exist, Mr. Babani may plead unjust enrichment as an alternate basis for relief (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 439 [1st Dept 2014] [citation omitted] [when there is a bona fide dispute over the existence of a contract, plaintiff may proceed under theory of quasi contract and is not required to elect remedies on a motion to dismiss]). Accordingly, the branch of the Defendants' motion to dismiss the sixth cause of action for unjust enrichment is denied.

D. Seventh Cause of Action (Breach of the 2015 Agreement)

The Defendants argue that the seventh cause of action for breach of the 2015 Agreement should be dismissed because (i) the documentary evidence indicates that this was an unenforceable agreement to agree and (ii) in the alternative, that the 2015 Agreement is unenforceable for lack of specificity. In his opposition, Mr. Babani argues that the 2015 Agreement is clear on its face that the parties had an agreement.

An enforceable contract must contain terms that the parties deem as material to their bargain (*Four Seasons Hotels v Vinnik*, 127 AD2d 310, 321 [1st Dept 1987]). If the parties leave a material term of a purported agreement for future negotiation, this merely becomes an agreement to agree, which is unenforceable (*Mars. of the Future, Inc. v New York*, 87 AD2d 270, 277 [1st Dept 1982]).

The Defendants adduce the affidavit of Mr. Yafeh, who attaches a copy of the document that memorializes the 2015 Agreement as alleged in the Amended Complaint:

> Raj received $75,000 + 80,000 which will be applied towards his account & will be deducted ~~from~~ once the agreement is signed. This agreement is for $2.2 million until Dec. 31, 2015. [Signature]
>
> Raj received another 80,000 [initial] on Dec. 22, 2015.
>
> Toward 2015 contributions. [Signature]

(NYSCEF Doc. No. 12).

Mr. Babani does not dispute that the document attached by Mr. Yafeh memorialized the 2015 Agreement. The first paragraph of the writing, as set forth above, reflects the material term of an agreement to pay Mr. Babani $2,200,000 through to December 31, 2015, notwithstanding a credit of $155,000 towards the $2,200,000 sum. The writing then appears to indicate that Mr. Babani received a further $80,000 that would be applied to credit his 2015 contributions. Significantly, the writing is signed twice and initialed once. For the purposes of this motion to dismiss, the signatures appear to satisfy the Statute of Frauds and the first signature is sufficient to support the existence of the 2015 Agreement as alleged in the Amended Complaint (GBL § 5-701 (b)(3); *compare* NYSCEF Doc. No. 12, *with* NYSCEF Doc. No. 6, ¶¶ 46-48). Moreover, the second signature appears to further confirm the 2015 Agreement, pursuant to which two credits would be applied. Under these circumstances, the documentary evidence does not conclusively establish a defense to Mr. Babani's claim pursuant to the 2015 Agreement (*see Leon v Martinez*, 84 NY2d at 87). Accordingly, the branch of the Defendants' motion to dismiss the seventh cause of action for breach of the 2015 Agreement is denied.

E. Claims against Mr. Yafeh

The Defendants argue that all causes of action should be dismissed against Mr. Yafeh because the Amended Complaint does not state any claims against Mr. Yafeh in his individual capacity. In opposition, Mr. Babani concedes that all claims other than the seventh cause of action for breach of the 2015 Agreement should be dismissed against Mr. Yafeh (NYSCEF Doc. No. 20, at 18).

Inasmuch as Mr. Babani argues that Mr. Yafeh should be held personally liable for signing the 2015 Agreement, this inference is unsupported by the Amended Complaint, which alleges that the "parties agreed that Royal Chain would pay Mr. Babani $2.2 million" and that Mr. Yafeh "was present as an agent and representative for Royal Chain and Defendant Maroof" (NYSCEF Doc. No. 6, ¶¶ 47, 113-114). Put another way, the Amended Complaint merely alleges that Mr. Yafeh acted on behalf of Royal Chain with regards to the 2015 Agreement. To the extent that Mr. Babani may seek to pierce the corporate veil as to Mr. Yafeh as part owner of the Royal Chain corporation, the Amended Complaint contains no allegations that give rise to a claim for piercing the corporate veil (*see Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005] [explaining that piercing the corporate veil requires a showing that (1) the officers exercised complete domination over the corporation, and (2) that such domination was used to commit a fraud or wrong that resulted in injury]). Accordingly, the branch of the Defendants' motion to dismiss the Amended Complaint as against Mr. Yafeh is granted.

Accordingly, it is

ORDERED that the Defendants' motion to dismiss is granted solely to the extent of (i) the second cause of action for breach of the Partnership Agreement solely to the extent of claims that predate February 8, 2013 and (ii) all claims asserted against Mr. Yafeh in his individual capacity; and it is further

ORDERED that the complaint is dismissed in its entirety as against Mr. Yafeh, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption

RAJKUMAR BABANI,

Plaintiff,

- v -

ROYAL CHAIN, INC. (D/B/A ROYAL CHAIN GROUP),
PAUL MAROOF

Defendant.

; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that Royal Chain and Mr. Maroof shall file an answer within 20 days of this decision and order.

20200727113608ABORROK58CA73D055EA48C4A868AFD4B83B92EA

7/27/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE