

<b>Mascarenhas v Paam Group Inc</b>
2021 NY Slip Op 32785(U)
December 15, 2021
Supreme Court, New York County
Docket Number: Index No. 652055/2017
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<p><b>PRESENT: <u>HON. MARGARET CHAN</u></b> <i>Justice</i> -----X</p> <p>PRAVIN MASCARENHAS,                            Plaintiff,</p> <p style="text-align:center">- v -</p> <p>PAAM GROUP INC, ANIL AMIN, ANZA CORPORATION                            Defendant.</p> <p>-----X</p>	<p><b>PART</b>                    <b>IAS MOTION 33</b></p> <p><b>INDEX NO.</b>            <u>652055/2017</u></p> <p><b>MOTION DATE</b>      _____</p> <p><b>MOTION SEQ. NO.</b>    <u>004</u></p> <p><b>DECISION + ORDER ON MOTION</b></p>
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The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this motion to/for JUDGMENT - SUMMARY.

In this bitter dispute between business partners, plaintiff Pravin Mascarenhas moves for summary judgment against defendants PAAM Group Inc (PAAM), Anil Amin, and Anza Corporation (ANZA) pursuant to CPLR 3212. Plaintiff seeks: (1) a declaration that plaintiff's 50% share of the business, and any attendant liabilities, are terminated as of September 2018; (2) a declaration that Anil Amin and the corporate defendants are one and the same, that Amin engaged in self-dealing through the corporate entities in breach of his fiduciary duties to plaintiff and to allow plaintiff to pierce the corporate veil; (3) an accounting of the gross revenues and to turn over to plaintiff 50% of business revenues and/or profits of not less than \$2.2 million from on or about 2011 through on or about September 2018; (4) an order for defendants to pay plaintiff's investments, contributions and labor in the subject business totaling \$220,000; (5) an order for defendants to pay pre-judgment interest; and (6) an order to indemnify and repay legal fees and costs in the amount of \$6,000.00 to plaintiff that plaintiff had paid on defendants' behalf to defend a wage and hour lawsuit. For their part, defendants cross-move for summary judgment in their favor dismissing all claims asserted by plaintiff. The motion and cross-motion are opposed. The Decision and Order is as follows:

## BACKGROUND

In 2008, plaintiff and Amin entered into a 50/50 partnership agreement to establish PAAM to open and operate Nirvana Restaurant located at 346 Lexington Avenue, New York, NY 10016. Plaintiff claims that he provided over \$320,000 to finance the operation. Plaintiff claims that he raised this money from friends and family and that these debts have not been repaid.

Plaintiff claims that Amin has exerted unilateral control over PAAM and excluded him on the tax returns and failed to provide corporate tax documents to plaintiff. Plaintiff claims that defendants have made false representations regarding the finances of the business. Plaintiff claims that defendants failed to pay him any amount during the entirety of the business relationship and that defendants mismanaged and secreted revenues and profits. Plaintiff further claims that since 2014, defendants have locked him out of the premises.

Plaintiff additionally claims that he personally paid \$6,000 to finance litigation costs for PAAM in a wage and hour lawsuit brought by Nirvana's restaurant staff that has never been reimbursed by defendants.

Plaintiff further claims that Amin has engaged in self-dealing by creating the ANZA entity to operate Nirvana's catering business and used the ANZA entity to withdraw monies from the PAAM entity.

Plaintiff therefore filed the instant lawsuit in April 2017. Plaintiff's complaint alleges breach of fiduciary duty, breach of duty of loyalty, and for an accounting (NYSCEF # 71).

Defendants, for their part, argue that plaintiff refused to work at the restaurant and abandoned the business in 2014 and that he was not locked out (NYSCEF # 97 – Amin Affidavit). Defendants claim that plaintiff utilized the restaurant as his personal playground, including dating staff members. Defendants claim that they confronted plaintiff about his behavior and that he came to the restaurant less and less, and eventually not at all.

Defendants claim that there have never been any distributions, dividends, or other sums paid out. Defendants claim that Amin received a nominal salary between \$25,000 and \$39,000 for working at the restaurant seven days a week. Defendants claim that plaintiff agreed to no salary.

Defendants claim that ANZA did not divert business from Nirvana Restaurant and was started in an attempt to generate more business for the restaurant through catering.

The parties submit tax returns (NYSCEF # 82), bank statements (NYSCEF # 83-84), and deposition transcripts (NYSCEF # 73-75).

## DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a showing has been made, the burden shifts to the

parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact that require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's motion for summary judgment is denied in its entirety. Defendants' cross-motion is granted in part and denied in part.

Defendants' cross-motion is granted to the extent that plaintiff's first cause of action for breach of fiduciary duty is dismissed. Defendants argue that plaintiff needed to bring a derivative action to assert his claim for breach of fiduciary duty; plaintiff argues that his claim is direct. To determine if a claim is derivative or direct this court must consider "(1) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)" (*Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012] [internal citations omitted]). "[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (*Abrams v Donati*, 66 NY2d 951, 953 [1985]). "[T]he reason for the rule requiring that damages generally be awarded to the corporation in suits brought by shareholders, even when the corporation is closely held, is to prevent impairment of the rights of the corporation's creditors whose claims may be superior to those of the innocent shareholder" (*Venizelos v Oceania Mar. Agency, Inc.*, 268 AD2d 291, 292 [1st Dept 2000], *citing Wolf v Rand*, 258 AD2d 401, 403 [1st Dept 1999]).

Plaintiff's claim needed to be brought derivatively. The alleged harm is to the corporation, not plaintiff, and the corporation would benefit from the recovery of Amin's alleged misappropriated funds. Crucially, on one issue, plaintiff and defendants agree: PAAM has unpaid creditors (NYSCEF # 73 at 151, NYSCEF # 78-79). As such, there may be creditors with claims superior to plaintiff which precludes direct recovery by plaintiff (*Venizelos*, 268 AD2d at 292).

Plaintiff attempts to point this court to *Venizelos* which found direct breach of fiduciary duty claims viable in a case involving a family corporation with the single asset of a ship because "[p]laintiffs [were] not seeking to vindicate their rights as stockholders but to recover their share of the family assets, which was stolen from them" (*Venizelos*, 268 AD2d at 291). However, *Venizelos* is inapplicable in this situation as plaintiff has not sustained a loss disproportionate to the business (*see Cortazar v Tomasino*, 150 AD3d 668, 671 [2d Dept 2017]). The

business has unpaid creditors, and the alleged misappropriation by Amin is a harm to the business before it is a harm to plaintiff.

The motion and cross-motion are denied as they relate to plaintiff's second and third causes of action. There are numerous questions of fact here that prevent summary judgment. This is a he-said, he-said situation. Plaintiff claims that funds have been diverted; defendants claims that no funds have been diverted. Plaintiff claims that defendants have secreted profits; defendants claim that there have been no profits to hide. Plaintiff claims that he has been locked out of the business; defendants claim that he abandoned the business. Thus, as it relates plaintiff's claims for breach of duty of loyalty and for an accounting, the motion and cross-motion must be denied.

Accordingly, it is ORDERED that plaintiff's motion for summary judgment is denied in its entirety; it is further


ORDERED that defendants' motion is granted to the extent that plaintiff's first cause of action for breach of fiduciary duty is dismissed; it is further

ORDERED that defendants' motion is denied as it relates to plaintiff's second cause of action for breach of duty of loyalty and for an accounting; it is further

ORDERED that defendants serve a copy of this Order with notice of entry upon the Clerk of the Court within ten (10) days of the issuance of this Order; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

<u>12/15/2021</u> DATE	 MARGARET A. CHAN, J.S.C. MARGARET CHAN, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE