

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
DONALD G. FELLNER,

Plaintiff,

Index No. 600560/2005

-against-

MASAHARU MORIMOTO,

Defendant.

-----X
CAHN, J.:

Defendant Masaharu Morimoto moves for summary judgment, CPLR 3212, seeking the following relief: (1) dismissal of the complaint in its entirety; (2) declaratory judgment declaring that plaintiff Donald G. Fellner is not entitled to any share of profits in ventures that he did not bring to Moridon, LLC (Moridon), the company formed by plaintiff and defendant; (3) declaratory judgment declaring that plaintiff is not entitled to any profit from, specifically, Morimoto Philadelphia Restaurant, Morimoto India Restaurant, Morimoto New York Restaurant, Sake, Mishima Foods, Rogue Breweries, Nenohi Knives, Iron Chef America, and Next Food Network Star, because plaintiff breached the Operating Agreement; and (4) an order finding plaintiff liable to defendant for monies wrongfully taken from Moridon, referring the issue of damages owed to defendant to a referee, and requiring plaintiff to produce the Moridon accounting records contained in Quicken.

Plaintiff cross-moves for partial summary judgment on the issue of liability with respect to the first, second, and third causes of action of the complaint, for breach of contract, breach of fiduciary duty, and promissory estoppel, respectively, and requests that the issue of damages be

referred to a referee. Plaintiff also seeks additional discovery in order to calculate damages.

Background

Plaintiff and defendant met in the 1980s when defendant was working as a chef at a Japanese restaurant where plaintiff was a customer. As plaintiff and defendant's friendship ripened over the years, they discussed forming a company to market defendant's talents as a chef.

The Operating Agreement:

On June 12, 2000, the parties formed Moridon and entered into an operating agreement (the Operating Agreement), governing their relationship as members of the LLC. Under the Operating Agreement, plaintiff was to receive 45% of Moridon's profits, while defendant would receive 55%. Both plaintiff and defendant would manage Moridon, and both had the right to act for and bind Moridon in the ordinary course of business. *See* Operating Agreement, 5.1. However, the affirmative vote of members holding 80% or more of the interest in Moridon was required with respect to all major decisions and/or actions pertaining to the management of Moridon and its business, such as disposition of a major portion of the company's assets, the starting of, or withdrawal from, a major business venture, accepting new members, or other matters of similar scope and effect. *See* Operating Agreement, 5.2.4.

Shortly after signing the Operating Agreement, plaintiff, as "Managing Member" of Moridon, defendant, individually, and Stephen Starr, president of Starr Restaurant Organization, LLC (SRO), entered into the Moridon-Starr Joint Venture Agreement (Moridon-Starr Agreement). The Moridon-Starr Agreement provides that "SRO and Moridon have agreed to cause the formation of two limited liability entities, to establish and operate one restaurant in the Philadelphia metropolitan area and a second restaurant in the New York City metropolitan

area.” Paragraph 3 of the Moridon-Starr Agreement further provides that “Morimoto PA¹ shall be owned 80% by SRO affiliates and 20% by Moridon or its designees. Morimoto NY shall be owned 50% by SRO affiliates and 50% by Moridon or its designees.”

The Addendum:

Defendant alleges that it became clear to him that plaintiff was not providing much help to Moridon. Therefore, defendant had his lawyers draft an Addendum to modify the Operating Agreement (the Addendum). On October 2, 2000, plaintiff and defendant entered into the Addendum. The Addendum states, in part,

Notwithstanding anything to the contrary contained in the Operating Agreement, [defendant] Morimoto may accept, negotiate, handle or otherwise make decisions on any business opportunities which is based on, or arising out of, [defendant] Morimoto’s personal services or celebrity, to the extent they are offered to or introduced to Morimoto directly, as opposed to such business opportunities that will require [plaintiff] Fellner’s cooperation or working framework of Moridon Group, LLC to accomplish (such business opportunities are hereafter collectively called the “Private Work”).

The Addendum also provided that the Operating Agreement did not prevent defendant from engaging in Private Work as long as such does not directly compete with a preexisting engagement made by or through Moridon. Further, defendant was entitled to keep monies generated from his Private Work without having to treat them as income of Moridon.

Plaintiff and defendant’s relationship deteriorated around the beginning of 2004, when plaintiff learned that defendant planned to exclude Moridon from the Morimoto NY restaurant venture. On February 27, 2004, defendant, as “Managing Member” of Moridon, individually, and as President of his own corporation, Morimoto, Inc., entered into an amendment to the

¹ Morimoto PA refers to the restaurant to be established in the Philadelphia area, and Morimoto NY refers to the restaurant to be established in the New York City area.

Moridon-Starr Agreement with Starr (the Amendment). The Amendment excluded Moridon from any interest in Morimoto, Inc., the Morimoto NY restaurant, and future restaurants co-developed or owned by defendant and Starr. Instead, the Amendment vested defendant and Morimoto, Inc. with an interest in the Morimoto NY restaurant.

On February 11, 2005, plaintiff commenced this action for breach of contract, breach of fiduciary duty, promissory estoppel, unjust enrichment, fraud, and misrepresentation.

Specifically, plaintiff seeks an interest in the following business ventures: the Morimoto PA restaurant, the Morimoto NY restaurant, the India restaurant, the Rogue Breweries agreement, defendant's appearances on Iron Chef America (a television program), defendant's appearances on the Next Food Network Star television show, the Mishima Foods agreement, and all future profits generated from existing Moridon contracts or business ventures.

Defendant counterclaims for breach of contract, misappropriation, unjust enrichment, quantum meruit, breach of fiduciary duty, injunctive relief requiring plaintiff to produce certain documents, injunctive relief requiring plaintiff to attend a Moridon special meeting, declaratory relief, and an accounting.

Analysis

In order to grant summary judgment, it must clearly appear that no material and triable issue of fact is present. The movant must make an initial prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *Santiago v Filstein*, 35 AD3d 184, 185 (1st Dept 2006); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1st Dept 1996). After the movant makes a prima facie case, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact requiring a trial. *Winegrad v New York Medical Univ. Med.*

Cen., 64 NY2d 851 (1985).

Defendant's Motion for Summary Judgment

Defendant moves for summary judgment dismissing the complaint and granting judgment in his favor on his counterclaims. Defendant also seeks declaratory judgment, declaring that plaintiff is not entitled to any share of profits in ventures that he did not bring to Moridon, pursuant to the Addendum to the Operating Agreement, as well as declaratory judgment, declaring that plaintiff is not entitled to profits from, specifically, the Morimoto PA restaurant, the Morimoto NY restaurant, the India restaurant, Sake, Mishima Foods, Rogue Breweries, Nenohi Knives, defendant's Iron Chef America appearances, and defendant's Next Food Network Star appearances, because plaintiff breached the Operating Agreement.

1. Private Work Under the Addendum

Defendant argues that the Addendum precludes plaintiff from seeking a share in ventures that came to defendant directly. However, defendant concedes that, at one point, 45% of the profits that Moridon derived from the Morimoto PA restaurant², the Indian restaurant, Nenohi knives, and Rogue Breweries were payable to plaintiff. As defendant has conceded that plaintiff was entitled to a share of the profits from these ventures, the court need not address the issue of whether these ventures were Private Work. Defendant's argument that plaintiff should not be entitled to any more monies from these ventures because he breached the Operating Agreement will be addressed later.

 This leaves the court to determine whether plaintiff has a right to a share of the profits

² The Moridon-Starr Agreement, establishing this restaurant, was entered into before the Addendum was in effect.

from the following ventures: the Morimoto NY restaurant, defendant's appearances on Iron Chef America, defendant's appearances on the Next Food Network Star television show, the Food Network Merchandising agreement, the Mishima Foods agreement, and Fukumitsuya Sake agreement.

The Addendum clearly states that, despite anything to the contrary contained in the Operating Agreement, defendant may accept, negotiate, handle, or otherwise make decisions as to any business opportunities which are based on, or arising out of his personal services or celebrity, to the extent that they are offered to or introduced to defendant directly. However, the Addendum also makes it very clear that this excludes business opportunities that required plaintiff's cooperation or the "working framework" of Moridon.

"A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms Courts are obliged to interpret a contract so as to give meaning to all of its terms. *Excel Graphics Techs., Inc. v CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 AD3d 65, 69 (1st Dept 2003) (internal quotations and citations omitted). Here, the Addendum's provisions permit defendant to engage in business ventures that come to him directly, but he can only do so outside the working framework of Moridon or the plaintiff's cooperation, in order for the ventures to be considered Private Work. This interpretation is supported by the Addendum's provision that plaintiff and defendant shall discuss and determine each time whether the matter should be deemed Private Work or "an engagement to be carried by Moridon."

Iron Chef America Agreement

On September 20, 2004, plaintiff, as an authorized representative and President of Moridon, entered into an agreement on behalf of Moridon with the Television Food Network

d/b/a Food Network. Defendant also signed the agreement individually, agreeing and accepting the terms and conditions of the agreement as applicable to him. The agreement provided that defendant, as the talent, shall serve as a participating chef in the Iron Chef USA television program, Season 2 (Iron Chef Agreement). Defendant was to participate in two days of taping on October 7 and 8, 2004, and one promotional day on October 9, 2004. Payment was \$20,000.

The Iron Chef Agreement clearly utilized the framework of Moridon and required plaintiff's cooperation. Therefore, the agreement for the Iron Chef USA television program, Season 2 does not fall under the classification of Private Work, and profits from the venture are owed to Moridon.

There are also contracts for other seasons of the Iron Chef television program, but the court was only provided with the contract for Season 2. Plaintiff alleges that he negotiated the terms of all of defendant's appearances on the Iron Chef shows and that he signed, on behalf of Moridon, contracts for these appearances. This is disputed by defendant.

Therefore, there is no question of fact as to Season 2, but a dispute exists as to whether the contracts for the other seasons qualify as Private Work. These issues as to the other seasons can only be resolved at trial.

Food Network Merchandising Agreement

On June 24, 2004, plaintiff, on behalf of Moridon, entered into a merchandising agreement with the Food Network. Defendant concedes that this agreement was apparently negotiated by plaintiff and Moridon's attorneys. Thus, the profits arising from the merchandising agreement are also outside the scope of Private Work, and profits from this venture are owed to Moridon.

Next Food Network Star Agreement

Defendant claims that the agreement for his appearance on the Next Food Network Star television program was between the Food Network and his corporation, Morimoto, Inc.

Plaintiff claims he is entitled to share in the profits from this venture as he negotiated this deal.

The parties have failed to provide the court with a copy of this agreement. Therefore, the issue of whether or not this qualifies as Private Work must be resolved at trial.

Fukumitsuya Sake Agreement

Plaintiff alleges that he negotiated a deal whereby Fukumitsuya Sake would be sold utilizing defendant's name. Defendant alleges that Fukumitsuya Sake supplies sake to the Morimoto restaurants without involvement of or income accruing to Moridon, Morimoto, Inc., or defendant himself. Defendant alleges that he directed and conducted discussions with Fukumitsuya without involvement by plaintiff. There is no written agreement governing this arrangement. An issue of fact exists as to whether this qualifies as Private Work, which must be resolved at trial.

Mishima Foods Agreement

Plaintiff also alleges that he was involved in the negotiations with Mishima Foods to produce a line of Morimoto sauces. Defendant alleges that plaintiff was not involved in this venture. However, defendant does state that Mishima Foods asked plaintiff about the use of the Iron Chef trademark. There was no written agreement. Based on these allegations, whether plaintiff cooperated in this deal, so as to negate defendant's claim that such venture was Private Work, is an issue of fact to be resolved at trial.

The Morimoto NY Restaurant

In July 2000, Starr Restaurant Organization, defendant, individually, and Moridon entered into the Moridon-Starr Agreement, which specifically stated that Starr Restaurant

Organization and Moridon “agreed to cause the formation of two limited liability entities, to establish and operate one restaurant in the Philadelphia metropolitan area and a second restaurant in the New York City metropolitan area.” Defendant’s Compendium of Exhibits, Exhibit 8. On February 27, 2004, defendant, on behalf of Moridon, individually, and as President of Morimoto, Inc., entered into the Moridon-Starr Agreement Amendment, excluding Moridon from any interest in Morimoto, Inc., the Morimoto NY restaurant, and future restaurants co-developed or owned by defendant and Starr.

Plaintiff argues that defendant did not have the authority to execute the Moridon-Starr Agreement Amendment under ¶ 5.2.4 of the Operating Agreement. Defendant asserts that, under the Addendum, the Morimoto NY restaurant venture was Private Work, because the Starr restaurant deals came directly to defendant through a headhunter, and that the Morimoto NY restaurant did not require the framework of Moridon or plaintiff’s involvement.

Defendant’s argument is without merit. The original Moridon-Starr Agreement unambiguously states that Moridon and Starr Restaurant Organization agree to establish two restaurants, one in Philadelphia and one in New York City. It is irrelevant whether a headhunter introduced defendant directly to Starr, because the parties agreed to establish these two restaurants before the execution of the Addendum. Therefore, the Morimoto NY restaurant venture cannot be considered Private Work.

Further, defendant’s testimony that he and Starr were only contemplating the New York restaurant when the Moridon-Starr Agreement was entered into is negated by the clear and unambiguous language of the Moridon-Starr Agreement. *Excel Graphics Techs., Inc.*, 1 AD3d at 69.

Under the plain language of the Operating Agreement, defendant did not have the power

to enter into the Amendment, on behalf of Moridon, withdrawing Moridon from the Morimoto NY restaurant venture. The Operating Agreement ¶ 5.2.4 clearly requires that the affirmative vote of members holding 80% or more of the percentages held by the members is required with respect to all major decisions and/or actions pertaining to the management of Moridon and its business, such as disposition of a major portion of the company's assets, the starting of, or withdrawal from, a major business venture, accepting of new members, or other matters of similar scope and effect. Here, defendant withdrew Moridon from a major business venture without the affirmative vote of members holding at least 80% of the percentages, which would have required plaintiff's approval. Defendant cannot simply exclude the plaintiff from this major decision.

Although ¶ 5.2.4 does provide that, if there is a disagreement, deadlock, or dispute between the members, defendant's position shall prevail under certain circumstances, this portion of the provision is inapplicable here, as the provision unambiguously requires the 80% affirmative vote "with respect to all major decisions and/or actions pertaining to the management of Moridon and its business, such as ... withdrawal from, a major business venture ..." Operating Agreement ¶ 5.2.4. Defendant breached the Operating Agreement when he entered into the Amendment.

Based on the foregoing, defendant's motion for summary judgment on the eighth counterclaim for declaratory relief is denied.

2. Plaintiff's Alleged Breach of the Operating Agreement and Misappropriation

Defendant also argues that plaintiff breached his obligations under the Operating Agreement and is not entitled to anything on his causes of action. Defendant alleges that plaintiff failed to maintain and make available Moridon's books and financial records, failed to

bring financing to Moridon, failed to keep track of Moridon's finances and pay distributions, paid himself monies actually owed to defendant, failed to pay salaries to the Morimoto PA restaurant's chefs, misappropriated monies to himself, and refused to attend Moridon member meetings.

Plaintiff disputes these allegations, and has produced proof, mainly in the form of affidavits, sufficient to establish the existence of material issues of fact that require a trial. *Winegrad*, 64 NY2d at 853. The remainder of defendant's motion for summary judgment, is denied.

Plaintiff's Cross Motion for Partial Summary Judgment

Plaintiff cross-moves for partial summary judgment on the issue of liability with respect to the first, second, and third causes of action of the complaint, i.e. for breach of contract, breach of fiduciary duty, and promissory estoppel, respectively, and requests that the issue of damages be referred to a referee.

In light of the foregoing analysis, plaintiff's motion is granted, in part, on the first cause of action for breach of contract. Defendant breached the Operating Agreement by entering into the Amendment. Further, the court finds that plaintiff is entitled to a 45% share of the profits of the following business ventures of Moridon: the Morimoto PA restaurant, the Indian restaurant, Nenohi knives, Iron Chef USA television program Season 2, the Food Network merchandising agreement, the Rogue Breweries agreement, and the Morimoto NY Restaurant, as they do not qualify as Private Work under the Addendum. All remaining causes of action and issues, including damages, will be resolved at trial.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment is granted, in part, as to plaintiff's first cause of action, with damages to be determined at trial; and it is further

ORDERED that the action shall continue as to plaintiff's second through sixth causes of action and defendant's counterclaims.

Dated: January 16, 2008

E N T E R:

_____ /s/ _____
_____ J.S.C.