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

PRESENT: BERNARD J. FRIED J.S.C. Justice PART 60

FBEM

Index Number : 601843/2006

BJ AND BOYZ INC.

vs

VANTAGE 2 CORP.

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

FILED

JUL 31 2007

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 7/30/07

BERNARD J. FRIED J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

----------x

BJ and BOYZ, INC., BORUCH LICTENSTEIN, and ABRAHAM DEUTCH,

Plaintiffs,

Index No. 601843/06

-against-

VANTAGE 2 CORP. and DOUGLAS SOCLOF,

Defendants.

----------x

VANTAGE 3 CORP.,

Counterclaim Plaintiff,

-against-

BJ and BOYZ, INC., BORUCH LICTENSTEIN, and ABRAHAM DEUTCH,

Counterclaim Defendants.

----------x

APPEARANCES:

For Plaintiffs:

Kerry Gotlib, Esq.
80 Fifth Ave.
New York, NY 10011

For Defendants:

Feder, Kaszovitz, Isaacson, Weber,
Skala, Bass & Rhine, LLP
750 Lexington Ave.
New York, NY 10022-1200
(David Sack, Esq.)

FRIED, J.:

Plaintiffs move, pursuant to CPLR 3212 (e), for an order granting partial summary judgment on their first cause of action. Plaintiff Boruch Lictenstein (Lictenstein) is a

shareholder and officer of plaintiff BJ and Boyz, Inc. (BJ). Lictenstein and plaintiff Abraham Deutch (Deutch) attempted to buy a Dougie's BBQ Restaurant (Dougie's) located at 247 West 72 Street, New York, New York (the Restaurant). Plaintiffs state that Dougie's is a well-known chain of kosher barbeque restaurants with locations in New York City, Long Island, Florida and other states.

According to plaintiffs, defendant Douglas Soclof (Soclof) is the sole owner and shareholder of the Dougie's franchise rights and was, at all relevant times, the person who managed and operated the Restaurant. Defendant Vantage 2 Corp. (Vantage) was, according to plaintiffs, the corporate vehicle through which Soclof owned and operated the Restaurant.

Plaintiffs state that, in the spring of 2005, Lictenstein met with Deutch, who was then employed by Vantage. Deutch informed Lictenstein that Soclof was interested in selling the Restaurant. According to plaintiffs, they ultimately entered into a contract of sale (the Contract) with Vantage as the seller, BJ as the buyer, and Lictenstein and Deutch named as BJ's shareholders. The purchase price in the contract was $246,000, comprised of a $50,000 deposit, $150,000 at the closing, and a $46,000 24-month promissory note to be executed at the closing.

Plaintiffs allege that they paid the $50,000 deposit pursuant to the Contract. They assert that Soclof then requested that the $150,000 be paid prior to closing, rather than at the closing, which the plaintiffs agreed to. According to plaintiffs the money was to be held by Soclof in trust, pursuant to the Contract. Plaintiffs state that, in October 2005, Soclof asked Deutch and Lictenstein to join him in operating the Restaurant, prior to the closing of the Contract, which they did. Plaintiffs state that, at all times, Soclof remained in the Restaurant

and managed the operation thereof. Deutch and Lictenstein were there to learn about the business from Soclof.

Plaintiffs state that, in the weeks and months that followed, the Restaurant ran at a significant loss. The transaction contemplated in the Contract never closed, due to the refusal of the Restaurant's landlord to consent to the assignment of the lease to BJ, a condition precedent to closing, pursuant to section 6.2 (iv) of the Contract.

In the first cause of action, plaintiffs seek return of the Contract deposit of $50,000 and the Contract payment of $150,000, due to the failure to close. The other causes of action in the complaint are not at issue in the instant motion.

In their answer and counterclaims, defendants admit that, in or about the summer of 2005, Vantage received a check of $50,000 to be applied toward the purchase of the Restaurant. They state that plaintiffs gave Vantage a total of $150,000 toward the sale price over the summer of 2005. Defendants assert that, under the Contract, plaintiffs were required to operate the Restaurant and to bear all expenses relating thereto as of September 1, 2005. Defendants maintain that the Restaurant's landlord failed to consent to the assignment of the lease of the Restaurant's premises from Vantage to the plaintiffs, and that the premises were surrendered to the landlord in January 2006. According to defendants, however, this was a result of plaintiffs' failure to pay rent.

Defendants assert that plaintiffs badly mismanaged the Restaurant by, among other things, failing to fulfill orders in a timely or professional manner, failing to pay rent for the months of November 2005 through February 2006, failing to pay invoices from vendors, and failing to pay to Vantage agreed-upon royalty fees from revenues.

According to defendants, Vantage began to receive complaints from customers and vendors as a result of plaintiffs' mismanagement. As a result of plaintiffs' failure to pay rent, the Restaurant's landlord threatened to begin eviction proceedings against the Restaurant. Thus, Soclof claims that he sought to mitigate his damages and he closed the Restaurant in early 2006. According to the answer and counterclaims, Vantage incurred expenses of not less than $120,800 in payments to vendors and payment of back rent. Defendants argue that, pursuant to the Contract, these expenses should have been paid by plaintiffs. Defendants further assert that plaintiffs owe Vantage $20,000 in back royalties for sales made from September 2005 through January 2006.

It is undisputed that the sale of the Restaurant was to be finalized, among other conditions, upon the execution of a franchise agreement and assignment of the lease of the Restaurant's premises from Vantage to BJ. Plaintiffs admit that they began to participate in the operations of the Restaurant on or about September 1, 2005 and that they paid certain liabilities of the Restaurant. They assert that their operating activities took place under the supervision and management of Soclof, who retained ultimate control over the Restaurant's operations.

Plaintiffs deny that they participated in management of the Restaurant or that they assumed all of its liabilities. Plaintiffs further deny that they agreed to pay the Restaurant's rent or the wages of its employees. They state that, because the closing of the sale of the Restaurant never occurred, they did not enter into the contemplated franchise agreement, such that they did not assume any obligations under such a franchise agreement.

In Soclof's affidavit in opposition to the instant motion, he points out that the Contract plaintiffs submitted with their original motion papers was not signed by him or by Vantage. He argues that that is because the terms of the parties' agreement were modified by an oral agreement in September 2005 to provide that, in exchange for the purchase price, plaintiffs would operate the Restaurant, retain all revenues and assume all liabilities without regard to the closing of the Contract. He states that Vantage performed all of its obligations pursuant to the parties' modified agreement, and that plaintiffs operated the restaurant from September 2005 through early February 2006, and kept all of the revenues associated therewith.

Soclof states that the Restaurant failed to generate a profit in late 2005 and early 2006 due to plaintiffs' mismanagement of the Restaurant, for which they bear full responsibility. Soclof argues that, pursuant to the parties' oral agreement, defendants do not have any obligation to return plaintiffs' money, because plaintiffs were to benefit from all revenues generated by the Restaurant for the period of time that they operated it. Defendants argue that the instant motion should be denied because there are issues of material fact relating to the relief the plaintiffs seek.

In their reply papers, plaintiffs submit a fully executed Contract, signed by Soclof on behalf of Vantage. Plaintiffs state that the Contract was received by their attorney from defendants as part of their response to discovery requests. Plaintiffs maintain that, because the transaction contemplated in the Contract did not close, they are entitled to the return of the $200,000 paid to defendants under the Contract.

Plaintiffs assert that defendants retained ownership of the Restaurant and sold it to another party after this deal failed. Plaintiffs maintain that there was no modification of the Contract. Rather, there was a term sheet, dated September 5, 2005, which plaintiffs also submit with their reply papers.

Plaintiffs deny that defendants permitted them to operate the Restaurant prior to their purchase thereof. They assert, however, that even if that is an issue of fact, it is irrelevant to the instant motion in which they seek the return of moneys paid to defendants pursuant to a contract to purchase the Restaurant.

The instant motion is granted and plaintiffs are entitled to the return of the monies they gave to defendants. On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to judgment as a matter of law. In order to defeat the motion, the party opposing it must show, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v City of New York, 49 NY2d 557 (1980).

In is undisputed that the deal contemplated in the Contract never closed, due to the refusal of the Restaurant's landlord to agree to the assignment of the lease from defendants to plaintiffs. Plaintiffs submitted a fully executed Contract with their reply papers. Defendants did not request permission to submit a sur-reply. Two months later, at oral argument, defendants sought to argue that the fully executed Contract existed only in their own files, and had not been given to plaintiffs prior to the document request plaintiff filed in this action. Thus, according to defendants, the Contract did not reflect the terms of the agreement between the parties. Rather, according to defendants, an alleged oral agreement

between the parties was in effect.

At oral argument, I refused to consider defendants' explanation, given that they had not sought permission to submit a sur-reply during the two months between their receiving of plaintiffs' reply papers and the date of oral argument. Thus, based on the Contract submitted to this court, and the undisputed fact that the deal did not close, plaintiffs are entitled to partial summary judgment on their first cause of action, and defendants must return the $200,000 plaintiffs paid to defendants.

Accordingly, it is

ORDERED that the motion for partial summary judgment is granted in favor of plaintiffs and against defendants as follows:

1. Plaintiffs are granted judgment on the first cause of action in the amount of $200,000, together with interest as prayed for allowable by law, until the entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the first cause of action is severed, and the Clerk is directed to enter judgment accordingly;

2. The action shall continue as to the remaining causes of action.

Dated: 7/30/07

ENTER:

J.S.C.

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

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Defendants.

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Counterclaim Plaintiff,

-against-

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J.S.C.

BERNARD J. FRIED
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