

**Asaro v Michael Angelo Italian Rest.**

2007 NY Slip Op 30237(U)

March 12, 2007

Supreme Court, Suffolk County

Docket Number: 0024461

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

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FRANK ASARO,

Plaintiff,

LAZER, APTHEKER, ROSELLA & YEDID, P.C.  
Attorneys for Plaintiff  
225 Old Country Road  
Melville, New York 11747

-against-

PRUZANSKY & BESUNDER, LLP  
Attorneys for Defendants Vincenzo Passanante,  
Guiseppe Passanante, and Michaelangelo Italian  
Restaurant and Pizzeria of Eastport, Inc.  
One Suffolk Square, Suite 315  
Islandia, New York 11749

MICHAELANGELO ITALIAN RESTAURANT AND  
PIZZERIA OF EASTPORT INCORPORATED a/k/a  
MICHAELANGELO ITALIAN RESTAURANT AND  
PIZZERIA OF EASTPORT, INCORPORATED,  
GUISEPPE PASSANANTE and JOANN MANGOGNA,

Defendants.

PINKS, ARBEIT, BOYLE & NEMETH  
Attorneys for Defendant Joann Mangogna  
140 Fell Court  
Hauppauge, New York 11788

For a Judgment Dissolving Respondent Michaelangelo  
Italian Restaurant and Pizzeria of Eastport Incorporated  
pursuant to BCL Section 1104-a.

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**DECISION AFTER TRIAL**

In this action, the parties seek, among other things, a declaration from this court regarding ownership of three disputed entities (as hereinafter defined). The Disputed Entities are Eastport Italian Restaurant and Pizza, Inc., d/b/a Michaelangelo Pizzeria of Eastport ( the "Eastport Restaurant"); Eastport, Inc. ( the "Middle Island Restaurant"); and Eastport Realty, Inc. ("Eastport Realty").<sup>1</sup> The Eastport Restaurant, the Middle Island Restaurant and Eastport Realty

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<sup>1</sup> When this litigation was commenced the parties disputed the ownership of several additional entities. These included Cozy Corner Lounge, Inc., (the "Hampton Bays Restaurant")

are hereinafter referred to collectively as the “Disputed Entities.” With respect to the question of ownership, the plaintiff, Mr. Asaro, claims that he is the sole owner of all three Disputed Entities. The plaintiff seeks an injunction preventing the defendants from using certain marks, trade names, and other forms of intellectual property allegedly owned by the Eastport Restaurant. The plaintiff also makes a claim of unfair competition.

In response to the plaintiff’s claim of exclusive ownership of the Disputed Entities, the defendants argue that each of the Disputed Entities is owned by the plaintiff and one or more of the defendants. In making their claim of ownership, the defendants argue that ownership of the Disputed Entities has always been equally divided between the plaintiff, Mr. Frank Asaro, and the defendant Mr. Guiseppa Passanante and/or one or more members of Mr. Passanante’s immediate family. These have included, from time to time, the defendant Joanne Mangogna, Mr. Passanante’s daughter; the defendant Mr. Vincenzo Passanante, Mr. Passanante’s son; and Mrs. Caterina Passanante, Mr. Passanante’s wife and Mr. Asaro’s sister. While not formally constituted as such, the defendants Guiseppa Passanante and Joanne Mangogna have referred to these four individuals in their testimony as “the Passanante Group.” Accordingly, the defendants seek an order of this court determining ownership of each of the Disputed Entities in accordance with their claims and directing dissolution of the Eastport Restaurant pursuant to Business Corporation Law § 1104(a). The defendants also argue in their memorandum of law for the imposition of a constructive trust with respect to the Disputed Entities. Finally, the defendants deny that they have made any improper use of names, marks, or other forms intellectual property allegedly owned by the Eastport Restaurant.

### FACTS

This action was originally commenced by the plaintiff in the United States District Court for the Eastern District of New York as an action for false designation of origin, unfair competition, and common-law trademark infringement. After limited appearances in the Federal Court, the parties agreed to reframe their disputes to address the question of ownership and/or dissolution of the Disputed Entities and to submit this question, together with a state-law trademark claim, to this court. The parties requested and the court agreed to determine the question of ownership of the Disputed Entities and the trademark before addressing the question of dissolution and the issues related thereto.

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and Michaelangelo Italian Restaurant and Pizzeria of Eastport, Inc. (the “Manorville Restaurant”). The parties have subsequently reached an agreement as to ownership of these entities. Also, the record includes numerous references to the ownership of a parcel of real property referred to by the parties as the DeMartini parcel (the “DeMartini Parcel”). The parties do not dispute that the DeMartini Parcel was acquired and is held by the Eastport Restaurant. Accordingly, the question of ownership of the DeMartini Parcel is subsumed in the question of ownership of the Eastport Restaurant.

The court conducted a lengthy trial of the issues presented. It heard testimony from Mr. Asaro and Mr. Passanante and numerous other witnesses presented by the parties. The court also considered several hundred documents that were admitted into evidence. As is clear from the record, the facts of this case are quite complex. Accordingly, the court will not attempt to provide a detailed chronology of the events contained in the record. Instead, the decision will reference only those facts that are relevant to the findings and the decision set forth herein.

To begin, Frank Asaro and Giuseppe Passanante are brothers-in-law. Mr. Passanante is married to Mr. Asaro's sister Caterina Passanante. As previously mentioned, the defendants Joann Mangogna and Vincenzo Passanante are the children of Giuseppe and Caterina Passanante and the niece and nephew, respectively, of Frank Asaro. Ms. Mangogna and Mr. Vicente Passanante are, or at the relevant times were, the owners of a corporation known as Four Seasons General Contracting and certain other entities that have provided financing to one or more of the Disputed Entities on terms described in the record. Mr. Alphonse Formica, an original owner of the Eastport Restaurant, is also Mr. Asaro's brother in-law. Mr. Asaro is married to Mr. Formica's sister.

The origins of the dispute before the court reach back to 1980. The record reveals that, in late 1979, Mr. Formica approached Mr. Asaro about the possibility of opening a pizzeria in a newly constructed shopping center in Eastport, New York (the "Eastport Shopping Center"). Mr. Formica had been in contact with Mr. Joseph Castelli, a gentleman whom Mr. Formica had known from his childhood in Sicily. Prior to his conversation with Mr. Formica, Mr. Castelli had formed a corporation known as Eastport Italian Restaurant and Pizzeria, Inc. At the time of Mr. Castelli's conversation with Mr. Formica, such corporation's only asset was its interest as the lessee of a long-term lease of a small space in the Eastport Shopping Center. In or about May 1980, Mr. Castelli offered to sell his entire interest in the newly formed corporation, the Eastport Italian Restaurant and Pizzeria, Inc., to Mr. Asaro and Mr. Formica. The sale enabled Mr. Asaro and Mr. Formica to open the Eastport Restaurant at such site. In May 1980, Mr. Asaro, Mr. Formica, and Mr. Castelli entered into a stock purchase agreement pursuant to which Mr. Asaro and Mr. Formica purchased all 200 issued and outstanding shares of stock in Eastport Italian Restaurant and Pizzeria, Inc., which were held by Mr. Castelli on such date. Mr. Asaro and Mr. Formica made a small down payment towards the purchase price of the shares, assumed the obligations of Mr. Castelli under the lease, and agreed to pay the balance of the purchase price in monthly installments over a 10-year period. Mr. Castelli retained a pledge of such shares to secure Mr. Asaro's and Mr. Formica's obligations to him.<sup>2</sup>

The parties agree that, in May 1980, the space leased by the Eastport Restaurant was unimproved space. In fact, Mr. Asaro testified that the space had walls and a bathroom, but no finished floor or any of the fixtures and equipment that were needed to operate the Eastport Restaurant. Accordingly, Mr. Asaro acknowledged that it was necessary to obtain financing to construct and equip the space to operate the Eastport Restaurant. Mr. Asaro was questioned

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<sup>2</sup> Mr. Castelli testified that the pledge was released when the obligation was repaid in full.

extensively about the source of the financing needed to establish the Eastport Restaurant. In his direct testimony, he acknowledged that he did not have sufficient personal resources to establish the Eastport Restaurant.<sup>3</sup> Mr. Asaro testified that he invested approximately \$3,500 of his own money in the Eastport Restaurant. He acknowledged that a portion of that amount, around \$900, was paid to Mr. Castelli. Although Mr. Asaro could not remember exactly how much Mr. Formica contributed, he acknowledged that it was no more than \$1,000. Mr. Formica could not recall a specific amount.

Mr. Asaro testified that he and Mr. Formica needed a third partner to enable them to open the Eastport Restaurant. Mr. Asaro acknowledged during his testimony that he approached Mr. Passanante and asked him to become a partner in the Eastport Restaurant. Mr. Asaro testified that Mr. Passanante originally agreed to become a partner and to contribute money, materials, and labor to complete the construction of the Eastport Restaurant. Mr. Asaro acknowledged that Mr. Passanante provided some of the materials used to construct the Eastport Restaurant, possibly \$2,000 worth, but that Mr. Passanante refused to contribute any more after an argument with Mrs. Passanante. Mr. Asaro testified that, after Mr. Passanante's refusal to continue to supply labor and materials, the only contributions to the Eastport Restaurant were made by him and by Mr. Formica. Mr. Asaro acknowledged that additional sums were needed, but he insisted that he borrowed the money from family and friends. Mr. Asaro, however, was unable to provide any independent evidence of his or Mr. Formica's financial contributions. Moreover, he was unable to provide any evidence of his alleged borrowings and unable to recall how much he borrowed or from whom. His most specific testimony was that he believed his mother lent him \$10,000 from money she had in Italy and that certain of his brothers provided funds. Again, the record contains no documentary evidence of money available to Mr. Asaro; of any financing obtained by Mr. Asaro, Mr. Formica, or the Eastport Restaurant; of the use of any such money in connection with the Eastport Restaurant; or of any repayment of borrowed amounts. Finally, the record is devoid of any basic corporate documentation such as books and records, financial ledgers, statements or financial instruments such as promissory notes that would support Mr. Asaro's testimony regarding the original financing of the Eastport Restaurant.

Mr. Passanante testified to a different story regarding the initial financing for the Eastport Restaurant. Mr. Passanante claimed that he agreed to become a partner when asked by Mr. Asaro. He testified that his role was to provide money, materials, and labor to construct the Eastport Restaurant. In fact, Mr. Passanante testified that he invested \$12,000 in cash and contributed materials and men to install such materials. The court notes that, at that time, Mr. Passanante owned and operated Superb Tile, a business involved in the sale and installation of

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<sup>3</sup> During the course of the trial, Mr. Asaro was questioned extensively about his work history and his personal finances. Mr. Asaro testified that he came to this country from Sicily as a child. While attending school and for some time thereafter, he lived with his sister and her husband, Mr. Passanante. Upon leaving school at the end of the eighth grade, he went to work for Mr. Passanante in his tile and construction business as a laborer. The only other job held by Mr. Asaro prior to the creation of the Eastport Restaurant was as a pizza man in a restaurant in Queens. Mr. Formica testified that he had a similar work history.

ceramic tile. Mr. Passanante testified that he contributed the materials (i.e., tile, sheetrock, and framing lumber) and the manpower necessary to construct and equip the Eastport Restaurant. The court, however, notes that he too was unable to present documentary evidence of his contribution. He did produce several of his former employees, who testified that they performed work during the relevant time period at the Eastport Restaurant while employed by Superb Tile and with materials supplied by Superb Tile. In fact, several witnesses described in detail how and when materials were picked up at Superb Tile's premises and delivered and installed at the Eastport Restaurant. Again, the record is devoid of evidence to refute this description of events other than Mr. Asaro's sparse recollection regarding the source of the initial financing of the Eastport Restaurant.

The record demonstrates that, in 1991, Mr. Formica sold his interest in the Eastport Restaurant. Mr. Formica testified that he was paid approximately \$80,000 for his interest and that he sold his interest to Mr. Asaro. Such transaction, however, was never documented and, following its consummation, no new shares were ever issued to Mr. Asaro or to anyone else. Other than the testimony of Mr. Asaro and Mr. Formica, there is no evidence as to how and when this transaction occurred. Perhaps more importantly, the record contains little credible information regarding the source of funds needed to pay Mr. Formica for his interest. Documentary evidence such as corporate tax returns for the Eastport Restaurant and Mr. Asaro's personal tax returns show that the payments made to Mr. Formica could not have come from either the Eastport Restaurant or Mr. Asaro. Neither the Eastport Restaurant nor Mr. Asaro had assets sufficient to make the alleged payments. In fact, Mr. Asaro admitted that he did not have sufficient funds to pay Mr. Formica for his interest. Mr. Asaro claimed that he borrowed the money from Mr. Passanante and his wife and submitted copies of the promissory note executed in favor of Mrs. Passanante. The note, however, makes no reference to the use of the proceeds thereof, and the record is devoid of any documentary evidence of repayment of such note by Mr. Asaro or the Eastport Restaurant.

Again, Mr. Passanante testified to a different story. Mr. Passanante claimed that, in 1985, the three partners, Mr. Passanante, Mr. Asaro and Mr. Formica, intended to purchase and operate an additional restaurant in Center Moriches. He testified that he, Mr. Asaro, and Mr. Formica borrowed approximately \$45,000 from Mrs. Passanante to purchase such restaurant and that he and Mr. Formica signed a promissory note in that amount in her favor. Mr. Passanante further testified that, at about the same time, Mr. Asaro and Mr. Formica had a disagreement and Mr. Formica asked to be bought out. Mr. Passanante testified that, after performing a valuation of the Eastport Restaurant, they agreed to pay Mr. Formica \$80,000 for his interest therein. Mr. Passanante testified that, shortly thereafter, Mr. Formica was paid and that his interest was split evenly between the two remaining partners. At about the same time, they sold the Center Moriches restaurant that was purchased with the money borrowed from Mrs. Passanante. The record, however, is devoid of any documentation such as a purchase agreement, stock certificates, promissory notes, or other financial records that would establish many of these facts.

The record reflects and, in most cases, the parties agree that, over the next several years, Mr. Asaro and Mr. Passanante opened and operated a series of restaurants similar to the Eastport Restaurant. These included Michaelangelo's Pizzeria, d/b/a Michaelangelo's of Center Moriches; Cozy Corner Lounge, d/b/a Michaelangelo's of Hampton Bays (the "Hampton Bays Restaurant"); and Michaelangelo's Italian Restaurant of Eastport, Inc., d/b/a Michaelangelo's of Manorville or Villa Michaelangelo (the "Manorville Restaurant"). All of these restaurants did business under the name "Michaelangelo" in combination with a reference to their physical

location. Also, they all use or used at some point in time similar logos, menus and menu designs, pizza box designs, and interior decor including, without limitation, specific tile colors and patterns. It appears from the testimony given by both parties that Mr. Asaro was often responsible for the day-to-day activities of these restaurants, while Mr. Passanante provided or arranged the financing for each of these restaurants and supplied the labor and materials to construct or renovate them. Numerous witnesses testified that improvements were made at each of the restaurants with material and laborers from Superb Tile supplied by Mr. Passanante. The parties agree that, at times, some of these businesses were run by Ms. Mangogna and that Mr. Vincenzo Passanante also worked from time to time in various restaurants. The record reflects that Mr. Asaro presently acknowledges that Mr. Passanante and/or his daughter Joanne Mangogna were equity owners in some of these businesses. However, at the commencement and for some time during the course of this litigation, Mr. Asaro denied that Mr. Passanante had an ownership interest in one or more of these entities. In fact, in the Federal action, Mr. Asaro asserted that he was the sole owner of the Hampton Bays Restaurant. Prior to the date of this decision, Mr. Asaro acknowledged to this court that Mr. Passanante and/or Ms. Mangogna have an ownership interest in that entity. The parties, therefore, are in agreement with respect to ownership of these entities. In addition, they admit to operating a series of other businesses that have since closed or have been sold. For example, they agree that in the 1990's they opened a pizzeria similar to the Eastport Restaurant in Medford known as Mulberry Street in which the parties had equal ownership interests. They also were 50% owners in a café known as Café Retrivo. Finally, Mr. Passanante claims that the parties entered into several other related ventures such as a hair salon and off-premise catering at several area night clubs. Mr. Asaro denies these activities.

Before turning its attention to the remaining claims, the Court wishes to note the manner in which all of these businesses were run. The parties do not dispute, and the record is very clear, that each of these businesses lacked appropriate corporate documentation and business records. For example, despite the fact that corporations were created to operate these businesses, few if any corporate formalities were ever observed. In most cases, stock certificates were never issued and, where stock certificates do exist, they do not match the current ownership interest claimed by any of the parties. Also, when such interests were bought and sold, no documents memorializing the transactions or the payments were prepared and/or executed. For example, Mr. Asaro freely admitted that corporate records regarding the ownership of the Hampton Bays Restaurant were at odds with the actual ownership acknowledged by the parties. The same is true with respect to other important records that contain information regarding ownership, such as applications for liquor licenses, tax returns, and loan applications. Acknowledged owners are not mentioned, former owners or unrelated individuals are listed in official records, and acknowledged or agreed-to arrangements are rarely reflected in even the most basic documentation.

Moreover, few if any reliable records exist regarding the operation of the various businesses. Rather, the record reflects that revenues were co-mingled to a point where no effective accounting could be prepared, that employees moved from business to business and appeared on a variety of payrolls (when such records were maintained), that payments were made in cash and rarely segregated by business. Few, if any, accurate records or receipts of income or expenses were ever maintained. Every transaction that could be paid in cash, such as the purchasing of supplies and salaries, was paid in cash. When asked questions regarding income or expenses, witnesses often inquired as to whether they should respond with the amount "on-the-books" or "off-the-books" so as to provide the court with a precise answer. In fact, there appears to be a clear pattern

of not documenting or not fully disclosing any business transaction. The parties acknowledged that, for long periods of time, all of these businesses were operated out of one central location that was owned by Mr. Passanante, which meant that they had the same addresses and telephone numbers. This co-mingling was also demonstrated by the testimony of Ms. Bonerilli, the bookkeeper, who explained that, prior to the schism between the parties, each month she would arbitrarily decide which business would pay the expenses incurred by each of the other businesses. The same was true for salaries and distributions of profit. In essence, nothing was segregated by business. Everything was run as one business.

In addition, the record is clear that the parties received equity distributions and payments far in excess of those recorded on the corporate books, reflected on the corporate income tax returns, or on the personal income tax returns of the parties. Moreover, when ownership was delineated on the corporate tax returns, it was often at odds with the ownership interest claimed by the parties at trial. This is true for some of the entities whose ownership is disputed, as well as those whose ownership has been established to the parties mutual satisfaction or those owned by Mr. Asaro and others and in which Mr. Passanante is not claiming an interest. One clear example is the Cozy Corner Lounge or Hampton Bays Restaurant. Corporate documents represent that 100% of that entity is owned by Mr. Asaro. However, as previously mentioned, Mr. Asaro acknowledged during the course of this litigation that Mr. Passanante owns the one-third interest that he claims.

Returning for a moment to the financial information contained in the record, significant testimony was elicited from Mr. Diker, the accountant for Mr. Asaro and each of the Disputed Entities as well as many of the other restaurants described herein. Mr. Diker acknowledged that he had been the accountant for the Eastport Restaurant for at least 20 years. He also acknowledged that he had extensive experience in the restaurant industry. During his testimony, Mr. Diker admitted that throughout his time as the corporate accountant for the Eastport Restaurant, he lacked the information necessary to prepare credible financial statements or tax returns. He admitted that information was simply delivered to him by Mr. Asaro or his bookkeeper, Ms. Bonarelli. In certain situations, he acknowledged that he would simply make assumptions or estimates. He acknowledged that he could not independently confirm important information such as revenue, expenses, salary, or ownership interests because documentary evidence was never created or maintained. In each case, he merely used the information provided by Mr. Asaro or adjusted such information as he deemed appropriate or as directed. In fact, many times during his testimony, Mr. Diker stated that he made no attempt to verify any of the financial information he received. Moreover, he clearly stated that he took no steps to confirm ownership of any of the restaurants. This is critical because Mr. Asaro repeatedly testified that he had used his salary and savings to open various restaurants and that he had not received any contribution from Mr. Passanante. However, the court notes that the amounts reflected on Mr. Asaro's personal income tax returns are grossly inadequate to support such testimony. Mr. Diker's testimony makes it clear that all financial information regarding these restaurants lack any veracity.

Turning to the acquisition of the real property at issue in this case, the parties do not dispute the fact that title to the DeMartini Parcel is held by the Eastport Restaurant. They also do not dispute the fact that title to the Lettieri Parcel and the Panuccio Parcel is held by Eastport Realty, a New York corporation ("Eastport Realty"). The parties, however, dispute the ownership of Eastport Realty. Mr. Asaro claims that he owns 100% of Eastport Realty. Mr. Passanante

claims that while Mr. Asaro owns 50% he and/or another member of his family owns the remaining 50%. The record is devoid of any stock certificates or other appropriate corporate documentation that would independently establish ownership. Rather, to support their respective claims of ownership, the parties offered a myriad of witnesses who, for the most part, either described their involvement in the acquisition of the real property or their personal belief or understanding as to the ownership of the parcels or Eastport Realty. The parties attempted to address the sources of the funds used to acquire these parcels. For example, Mr. Asaro testified that he identified the opportunities to purchase the properties and that, although he discussed their purchase with Mr. Passanante, he was the sole owner. Regarding the sources of the funds, Mr. Asaro admitted that certain monies had come from members of the Passanante family. He insisted however, that they had no claim of ownership to the parcels. The court notes that, at least in this case, the sources of the funds is confirmed by certain documentary evidence contained in the record. For example, closing statements and cancelled checks show money coming from companies owned by members of the Passanante family. Financial records do not show sufficient funds coming from Mr. Asaro. In addition, Mr. Asaro presented the testimony of Mr. DeVerna, an attorney involved in some of the acquisitions, who testified that he believed Eastport Realty was owned by Mr. Asaro.

Mr. Passanante presented similar testimony, but came to a different conclusion. For example, Mr. Passanante detailed the sources of the funds for the acquisitions which, as mentioned above, included substantial sums from one or more entities controlled by the Passanante family. He also presented witnesses, such as Mr. Prudenti, who testified that he believed Mr. Passanante and Mr. Asaro each owned 50% of certain Disputed Entities including Eastport Realty.

The final issue raised by the plaintiff in this action involves the intellectual property allegedly owned by the Eastport Restaurant. The plaintiff originally raised the trademark issue in its federal complaint, alleging violations of both federal and state law. The plaintiff has pared these claims down by acknowledging that no registered trademark is at issue here. The remaining claims, in essence, involve the plaintiff's claims that he is the sole owner of the Eastport Restaurant, that the Eastport Restaurant owns a common-law service mark, and the use of the trade name "Michaelangelo" in connection with a pizza restaurant in a certain geographic area. Further, Mr. Asaro claims that Mr. Passanante and/or the restaurant owned by Mr. Passanante have violated the trade dress owned by the Eastport Restaurant. This trade dress includes the representation of Michaelangelo's "Creation of Adam" on pizza boxes and menus and the use of black and red tiles in and around the various restaurants.

#### DECISION

Preliminarily, the court notes that Mr. Asaro is making the state-law trademark claim in his individual capacity and not on behalf of the Eastport Restaurant. There is no evidence in the record that Mr. Asaro personally owns the Eastport Restaurant's purported common-law service mark, the purported trade name "Michaelangelo," or the purported trade dress owned by the Eastport Restaurant. The court finds that any intellectual property related to the name, design, or symbols used by the Eastport Restaurant belongs to the corporation that owns it, i.e., Eastport Italian Restaurant and Pizzeria, Inc. Thus, the question of ownership of the purported intellectual property is subsumed in the question of ownership of the Eastport Restaurant, and the court makes no determination as to whether the claimed service mark, trade name, and trade dress constitute intellectual property.

Turning to the question of ownership, it is well settled that, while stock ownership is an indicium of corporate ownership by the holder of the stock, it is not conclusive on the issue of ownership (**Matter of Steward**, 229 AD2d 500, 501). Accordingly, when no stock certificates are issued by the corporation to a party claiming an interest in that corporation, the court may look to other evidence to determine the validity of the claimed interest (**Hunt v Hunt**, 222 AD2d 759, 760). Ownership rights “will be found to have vested if there was an agreement to transfer the shares, the agreed upon consideration was paid and any conditions precedent to the issuance of the shares have been satisfied” (**Serdaroglu v Serdaroglu**, 209 AD2d 600, 602-603). In some cases, the conduct of the parties reflecting their status as equal shareholders has been held to be sufficient to warrant the recognition of shareholders’ rights, even when stock certificates were not issued (**Matter of the Estate of Purnall v LH Radiologists**, 90 NY2d 524).

With respect to the critical question of ownership of the Disputed Entities, this case comes down to the totality of the record, the credibility of the testimony presented by the witnesses, and the quality of the documentary evidence. Although the parties produced copious amounts of testimony and several hundred documents during the many days of trial, much of this information is inherently unreliable and/or without merit. The court, in reaching its decision, has very carefully sifted through the conflicting evidence, disregarded the evidence it found unworthy of belief, and only relied on the evidence that it could reasonable credit. When the record is considered in its entirety and the foregoing principles are applied, a clear result emerges.

While it is clear that Mr. Asaro has made a vital contribution to the success of the various entities at issue, and may well be considered the driving force behind them, his claim of sole ownership lacks merit. His reliance on the paltry and incomplete corporate records produced is misplaced. It is difficult to summarize in this decision the amount of information that is missing, misstated, or fabricated in the various corporate records. The degree to which this is true makes it difficult to believe that these errors and omissions were not done with intent by the parties to obscure the issue of formal ownership. Accordingly, the court cannot and does not rely on those documents that would ordinarily form the basis of the court’s opinion.

Mr. Passanante argues that Mr. Asaro’s failure to produce documents in support of his claim that he contributed to the acquisition of the properties held by Eastport Realty warrants the drawing of a negative inference. As in the case of a missing witness, a fact finder may draw a negative inference when “a party fails to produce evidence which is within its control and which it is naturally expected to produce” (**Seward Park Housing Corp. v Cohen**, 287 AD2d 157, 168; *see*, **Gryphon Domestic VI, LLC v APP Intern. Finance Co., B.V.**, 18 AD3d 286). Since Mr. Asaro claims exclusive ownership of the Disputed Entities, the court would expect him to produce evidence within his control in support thereof. The court finds that his failure to produce evidence that he provided the financing for the acquisition of the parcels held by Eastport Realty and the financing for the Eastport and Middle Island Restaurants without any financing from Mr. Passanante warrants a negative inference that such documents do not exist and that Mr. Asaro is, therefore, not the sole owner of Eastport Realty and its assets.

Turning to Mr. Asaro’s testimony, the court notes that, at several critical points in this proceeding, as well as in the limited proceeding conducted by the federal court, which is a proper part of this record, Mr. Asaro made claims that he later recounted when confronted with certain facts. Foremost among these are his claims of ownership with respect to the restaurants that

are no longer in dispute. Moreover, the court has considered his lack of veracity regarding ownership, earnings, and income on corporate and personal tax returns and loan applications in reaching its conclusion. The court has also considered Mr. Asaro's detailed explanation regarding the sources of financing to open, operate, and expand each of the restaurants and businesses discussed in this proceeding. Such explanation was not credible and was often materially at odds with corporate records and testimony from independent witnesses who testified in this proceeding. While Ms. Bonerilli tried to support Mr. Asaro's claims, her testimony often lacked credibility and was often colored by her loyalty to Mr. Asaro, her current employer.

Before turning to the credible evidence, the court notes that Mr. Passanante and his witnesses were not able to supply independent credible evidence for their explanation of events either.

Again, relying on the totality of the record, the credible evidence establishes that Mr. Asaro owns 50% of the shares of the Eastport Restaurant. The court finds that the only other person who has a credible claim to the remaining 50% is Mr. Passanante. The court finds that the preponderance of the credible evidence demonstrates that the conduct of the parties is sufficient to establish their status as equal shareholders of the Eastport Restaurant. There was a pattern of opening and operating restaurants, as well as other businesses, with the plaintiff and Mr. Passanante (or one or more of his children) as equal shareholders. It appears that the parties agreed to leave the day-to-day operations to Mr. Asaro, with Mr. Passanante participating in decision making. It also appears that Mr. Passanante routinely provided the financing and the labor and materials required to establish many of the businesses. It is impossible to ignore the fact that the parties established not one business, but numerous businesses together, and Mr. Asaro acknowledged that they were both shareholders in a number of those businesses including, without limitation, Cozy Corner Lounge, the Manorville Restaurant, Café Retrivo, and Mulberry Street Café.

Likewise, relying on the totality of the record, the credible evidence establishes that Mr. Passanante owns 50% of the shares of Eastport Realty. The independent witnesses, the documentary evidence, and the credible testimony regarding the financing of the purchase of the real property owned by Eastport Realty support the conclusion that Eastport Realty is owned by the plaintiff and one or more of the defendants. Since the defendants are not claiming more than a 50% share of Eastport Realty, the court finds that Mr. Asaro's share is limited to the remaining 50%.

With respect to some of the arguments raised by each of the parties, Mr. Asaro argues that the Statute of Frauds bars recovery by defendants because there is no writing evidencing the purchase of the shares in the Eastport Restaurant, as required by Business Corporation Law § 503(b), which provides that an oral subscription agreement is invalid. According to Mr. Asaro, any agreement between himself and Mr. Passanante for the acquisition of shares in the Eastport Restaurant is void since it should have been in writing.

Pursuant to Business Corporation Law § 503(b), "[a] subscription, whether made before or after the formation of a corporation, shall not be enforceable unless in writing and signed by the subscriber." "[A] subscription for shares is essentially an offer to buy shares of a corporation once they are issued." (**Matter of Estate of Purnell v LH Radiologists**, 90 NY2d at 531). This action is not an action to enforce a contract to transfer stock or a subscription agreement. Moreover, Business Corporation Law § 503 (b) applies only to prevent enforcement of

an oral subscription by the corporation against the subscriber (**Matter of Estate of Purnell v LH Radiologists**, 228 AD2d 360, 361, *affd* 90 NY2d 524). Since Business Corporation Law § 503(b) establishes a defense to the enforcement of an oral subscription agreement by the corporation against a subscriber, it has no application to the facts of this case (**Matter of Estate of Purnell v LH Radiologists**, 90 NY2d at 531).

The defendants claim that their relationship with Mr. Asaro resulted in a joint venture. It is well settled that the law of partnerships is applicable to joint ventures (**Eskenazi v Schapiro**, 27 AD3d 312, *citing Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565). “[I]ndividuals may not, as a matter of law, operate a business entity as a partnership for the purposes of defining their rights vis-a-vis each other while concurrently holding the entity out to the general public as a corporation” (**Zahr v Wingate Creek Acquisition Corp.**, 827 F Supp 1061, 1068, *quoting Weisman v Awnair Corp. of America*, 3 NY2d 444, 449). “A partnership and a corporation are mutually exclusive entities and cannot coexist” (**D’Orazio v Mainetti**, 24 AD3d 915, 916). Consequently, the defendants cannot claim the existence of a joint venture when, as here, the record establishes that the different enterprises of the parties were corporations registered with the New York State Department of State.

Mr. Asaro argues that the doctrine of *falsus in uno, falsus in omnibus* should be applied to the evidence presented by the defendants. The doctrine of *falsus in uno, falsus in omnibus* is a common-law doctrine that permits the fact finder “to disregard in its entirety the testimony of a witness who has willfully given false testimony on a material matter” (NY PJI 1:22). The doctrine results in a permissible inference that the fact finder may or may not draw (**Duncan v Duncan**, 25 AD2d 834). The doctrine is merely an aid in the interpretation of evidence (*see*, 98 CJS Witnesses § 570).

The court has carefully weighed and considered the evidence in this case. As previously noted, much of the evidence presented by both sides was not credible and full of contradictions. Were the court to apply the doctrine of *falsus in uno, falsus in omnibus* to the evidence submitted by the defendants, the court would have to apply it the plaintiff’s evidence as well, leaving the court with no evidence to make a decision. Accordingly, the court declines to apply the doctrine to either party.

Mr. Asaro argues that Ms. Mangogna’s and Vincenzo Passanante’s failure to testify at trial warrants the drawing of an adverse inference. Under New York law a negative inference may be drawn from the failure of a party to call a witness to testify at trial who is under his or her control and who is in a position to give substantial, not merely cumulative, evidence (**Chandler v Flynn**, 101 AD2d 300, 301; **Leahy v Allen**, 221 AD2d 88, 92). One person’s testimony may properly be considered cumulative of another’s only when both individuals are testifying in favor of the same party (**Leahy v Allen**, *supra* at 92). The same negative inference may be drawn by the fact-finder against a party who fails to testify (**Iqbal v Rotondi**, 8 Misc3d 1009[A]).

The court finds that Ms. Mangogna’s and Vincenzo Passanante’s failure to testify does not warrant a negative inference. Both provided deposition testimony that Mr. Asaro used at

trial and in his post-trial brief. In addition, since Ms. Mangogna and Vincenzo Passanante are members of the Passanante Group, any testimony they could have provided regarding the Passanante Group's interests in the Disputed Entities was presumably covered by the examination of Mr. Passanante. Their testimony would, therefore, have been cumulative.

Finally, Mr. Asaro raises the issue of a \$175,000 promissory note signed by Mr. Passanante and Mr. Asaro that called for monthly payments to Four Seasons General Contracting, over a 10-year period beginning on February 6, 1999. Mr. Asaro claims that payments have been made in the amount of \$38,220 and that the total amount due on the note should, therefore, reflect these payments. At trial, Mr. Asaro introduced a ledger evidencing payments in the amount of \$38,220. The court finds that this evidence is sufficient to support Mr. Asaro's claim that partial payments were made. Moreover, the defendants' failure to introduce any evidence that these payments were not made supports an inference that the payments were made as claimed by Mr. Asaro (see, **Seward Park Housing Corp. v Cohen**, 287 AD2d at 168; **Gryphon Domestic VI, LLC v APP Intern. Finance Co., B.V.**, 18 AD3d 286 *supra*). Accordingly, the court finds that Mr. Asaro made payments in the amount of \$38,220, which amount shall be deducted from the principal and interest due on the note.

### CONCLUSION

Mr. Asaro and the defendants seek a declaration regarding the ownership of the Disputed Entities. While it is clear that Mr. Asaro has played a significant role in the formation, acquisition, and day-to-day operations of the Disputed Entities, the court finds that the record, taken as a whole, supports the conclusion that Mr. Asaro was no more than a 50% owner of the Disputed Entities. The court notes that the defendants collectively are not claiming more than a 50% share thereof. These two facts, together with the totality of the record including, without limitation, the manner in which each business described herein was created, financed, and operated by the parties, leads to only one logical conclusion. Accordingly, the court finds that Mr. Asaro and the defendants are 50/50 owners of the Disputed Entities.

In view of the foregoing, Mr. Asaro is not entitled to injunctive relief. As previously noted, Mr. Asaro's intellectual property claims are subsumed in the question of ownership of the Eastport Restaurant. Since the Eastport Restaurant is equally owned by Mr. Asaro and one or more of the defendants, the court finds that the defendants' use of the Eastport Restaurant's trade dress, trade name, and common-law service mark is permissive. Likewise, it is not necessary to reach the issue of a constructive trust.

The court reserves decision on the defendants' petition for judicial dissolution of the Eastport Restaurant and refers the matter to further proceedings.

The parties are directed to appear for a conference on this remaining matter on May 16, 2007 at 11:00 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

HON. ELIZABETH HAZLITT EMERSON

DATED: March 12, 2007

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J. S.C.