

**Oldfield Realty Group, Inc. v Passions Rest.  
Group, LLC**

2007 NY Slip Op 31620(U)

June 6, 2007

Supreme Court, New York County

Docket Number: 0105058/2006

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_  
*Justice*

PART \_\_\_\_\_

Index Number : 105058/2006  
OLDFIELD REALTY GROUP  
vs  
PASSIONS RESTAURANT  
Sequence Number : 002  
AMEND SUPPLEMENT PLEADINGS

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

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUN 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: June 6, 2007

HON. JUDITH J. GISCHE, J.S.C.

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: Part 10

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Oldfield Realty Group, Inc.

Plaintiff,

Decision/Order

-against-

Index# 105058/2006

The Passions Restaurant Group, LLC  
d/b/a Ida Mae Kitchens Lounge, and  
Equity Financial Services, Inc.

Defendant.

Mot. Seq. # 002

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Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Notice of Motion, affirm., exhibits.....	1
MJG Affirm.....	2
AL Reply affd., exhibits.....	3

**FILED**  
JUN 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, The Passions Restaurant Group, LLC ("Passions") moves for permission to amend its answer to interpose additional affirmative defenses and counterclaims. As part of its proposed pleading it has also included third party claims against an individual, John Farrell ("Farrell") and claims that it can assert the third party claims as of right. A copy of the proposed pleading which includes affirmative defenses, counterclaims and third party claims is part of the moving papers.

Plaintiff, Oldfield Realty Group, Inc., ("Oldfield") does not oppose the new affirmative defenses. It does, however, object to the counterclaims. In addition, it objects to the third party complaint being served on Farrell. Oldfield argues that the

counterclaims and the third party claims plainly lack merit.

At the outset, the court declines to address the legal sufficiency of the third party complaint given the current procedural posture of the case. CPLR § 1007 permits a defendant to commence a third party action any time after the service of an answer in the main action. In a plenary action a defendant need not make a motion for permission to implead a third party. Health-Chem Corp. v Adler, 201 AD2d 326 (1<sup>st</sup> dept. 1994). See also: McKinney's Practice Commentary, C1007:7. The third party complaint has not yet been filed or served. Consequently it is not yet considered as commenced. Although both parties have addressed whether the proposed third party complaint is legally sufficient, the court does not reach the substantive issues at this time because they are premature. Defendant must first file and serve the third party complaint before either Oldfield or Farrell may ask the court to address the legal sufficiency of the causes of action asserted.

Thus, the only issue for the court's consideration on this motion is whether the answer may be amended to assert counterclaims against Oldfield. Leave to amend a pleading is freely granted absent prejudice to the other side resulting directly from the delay. CPLR §3025(b); McCaskey, Davies & Associates, Inc. v. NYCH&H, 59 NY2d 755 (1983). Where, however, the claim utterly lacks merit, the court should deny leave. Peach Parking Corp. V. 346 West 40<sup>th</sup> Street, LLC, \_\_ AD2d \_\_; 2007 WL 1289420 (1<sup>st</sup> dept. 2007)(nor).

The proposed counterclaims asserted against Oldfield are as follows<sup>1</sup>: breach of

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<sup>1</sup>The claims asserted against Farrell as part of the third party action are: breach of fiduciary duty; piercing the corporate veil; and fraud.

fiduciary duty (first counterclaim); breach of contract (second counterclaim); unjust enrichment (third counterclaim); and conversion (fourth counterclaim). They arise out of a common, albeit convoluted, set of alleged facts. Although Oldfield denies the facts as "fiction", it argues that even were the facts accepted as true, the claims asserted utterly lack merit and should not be allowed.

The following facts are alleged by Passions: Passions is organized as a Limited Liability Company under the laws of New York State. It claims that in February 2003 it was considering obtaining an lease and opening a restaurant known as "Ida Mae Kitchen Lounge" ("Ida Mae"). In furtherance thereof, its members wanted chef and restaurateur, Kenneth Collins, to be a part of the enterprise. Passions was also involved with John Farrell, principal of Oldfield, in connection with leasing space at 1400 Broadway in Manhattan to operate Ida Mae. The existing members of Passions claim that Farrell (either in his own capacity or as principal of Oldfield) told them that they needed \$50,000 as "key money" to enter into the lease. Collins agreed to pay the key money as his financial investment in the enterprise, in addition to his being a managing member of Passions and chef. The existing members of Passions claim that they relied upon Collins making a personal financial investment in the enterprise in order for them to do likewise and have Passions lease the restaurant space necessary to open Ida Mae. They claim they would not have invested in the Ida Mae enterprise had they known that Collins did not have a financial investment at stake as well. They refer to this as having "skin in the game".

The existing members of Passions claim that Farrell and/or Collins told them that Collins did not have the key money. Consequently, they claim that Farrell and/or

Oldfield represented that he/it paid the \$50,000 as key money and that it was treated as a loan by Farrell and/or Oldfield to Collins. Passions alleges that as a consequence of these events it went forward to rent the space at 1400 Broadway in March 2003 and open Ida Mae.

Passions claims that unknown to it at that time and thereafter, no such key money was required; no such key money was paid and no loan was made by Oldfield and/or Farrell to Collins. It was all a ruse by which Oldfield and/or Farrell intended to collect \$50,000 to keep for itself and/or himself and others acting in concert with him.

The members of Passions claim that as a result of Collins having no financial stake in Ida Mae, the restaurant got off to a rocky financial start and Collins had no incentive to make it succeed. With Passions consent, after about 2 years, Collins left his position as managing partner and chef. Ida Mae fell into further financial distress, including accruing substantial rental arrears.

Passions claims that while its business was failing, Farrell became employed by the landlord. They claim that Farrell used his position with the landlord to further insinuate himself into Passions' business.

On August 26, 2004, Passions and Oldfield entered into an agreement to pay Oldfield an 11.5% commission upon the consummation of a sale of Ida Mae to a ready, willing and able purchaser.

On April 1, 2005 Oldfield was made a "partner" of Passions with an 11.5% ownership interest. Although Passions is a Limited Liability Company, which does not, by definition and operation of law, consist of partners, Oldfield was nonetheless designated as such. Although the agreement recites that it is for good and valuable

consideration, the consideration given by Oldfield is also not recited. Passions claims that the consideration was that Farrell would use his position as an employee of the landlord to forebear against eviction and that he would forgive the \$50,000 debt owed by Collins. The members of Passions claim they still did not know at this point that there was no such debt; that no loan had been made and that no key money was ever required to secure the lease.

After Oldfield was made an owner of Passions, it is alleged that the membership voted to provide additional investment capital to pay its outstanding obligations. Passions alleges that Oldfield was notified about meetings but refused to attend and that it failed to contribute to pay the outstanding debts as the other members had done.

At some point, Oldfield procured co-defendant EFS as the potential buyer and is seeking a commission in the case in chief. Passions claims that on May 12, 2005 it entered into an agreement with EFS, but that the sale was never consummated because EFS failed to fully pay the amounts due. Passions also claims that during the negotiations, Oldfield tried unsuccessfully to have EFS make a direct deal with the landlord for the leased space.

### **Breach of Fiduciary Duty**

Oldfield argues that since it did not become an owner in Passions until after April 1, 2005, no allegations regarding events preceding that time can be asserted for breach of fiduciary duty. It further argues that under Limited Liability Company Law ("LLC Law") § 609, its personal liability is limited only to what it agreed to contribute under the operating agreement. Since Oldfield never agreed in writing to make additional financial contributions to Passions, its failure to do so was not a breach of any fiduciary

obligations. It further argues that this claim merely duplicates the breach of contract claim, and should be dismissed on that basis.

Passions claims that members of a LLC have fiduciary obligations to one another and that Oldfield breached those obligations by: obtaining a ownership interest upon the false representation that it had paid key money to the landlord in order for Passions to get a lease; by trying to induce EFS to enter into an agreement other than buying the restaurant from Passions and by filing to make the required contributions and/or payments to Passions.

The court rejects at the outset the argument that solely because this claim duplicates the breach of contract action, it must be dismissed. Passions is entitled to plead alternate theories of liability. EBC I, Inc. v. Goldman Sachs & Co., 7 AD3d 418 (1<sup>st</sup> dept. 2004). Issues of duplication, however, are reserved for consideration prior to any final adjudication.

Members of Limited Liability Companies owe each other a fiduciary duty of loyalty. Lio v. Zhong, 10 Misc. 3rd 1068(A); 2006 WL 37044 (Sup. Ct. NY Co.; Gische, J)(and cases cited therein). At bar, is alleged that Oldfield became an owner of Passions on April 1, 2005. Claims based upon events preceding such date are not supported by allegations of a relationship of trust and confidence which is a necessary predicate for a claim of breach of fiduciary duty. Finkelstein v. Warner Music Group, Inc., 14 AD3d 415 (1<sup>st</sup> dept. 2005). Thus, although Passions claims Farrell lied about facts that induced Passions into giving Oldfield a membership interest, any such misrepresentations preceded the formation of any fiduciary relationship between Passions and Oldfield.

Passions claims that after April 1, 2005 when it was negotiating with EFS to sell the restaurant, Oldfield was negotiating with EFS on its own behalf to lease the same premises and thereby circumvent Passions' participation. Passions admits that such collateral deal did not come to fruition. While the court has concerns about whether any damages could ever be proven in such event, that argument is not raised as a basis to deny this motion. As it is alleged in the proposed amended answer, claims about a diverted business opportunity allege a valid cause of action for breach of fiduciary duty. Wolff v. Wolff, 67 NY2d 638 (1986).

With respect to the claims based on failure to make further financial contributions, Oldfield relies on LLC Law § 609 which provides in pertinent part:

“(a) Neither a member of a limited liability company, a manager of a limited liability company ....nor an agent of a limited liability company...is liable for any debts, obligations or liabilities of the limited liability company or each other, arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or ...acting in such capacities or participating ... in the conduct of the business of the limited liability company.

(b) Notwithstanding the provisions of subdivision (a) of this section, all or specified members of a limited liability company may be liable for all or specified debts, obligations or liabilities of a limited liability company if (1) a statement to such effect is specifically contained in the articles of organization of the limited liability company and (2) any such member so liable shall have (i) specifically consented in writing (A) to the adoption of such provisions or (B) to be bound by such provision or (ii) specifically voted for such provision.”

Oldfield argues there is no allegation that there is any written consent or a vote by which Oldfield agreed to be bound to be responsible for Passions' debts. In opposition, Passions contends that it did allege that the parties entered into an agreement which granted a 11.5% membership interest in Passions and that such

interest encompassed an obligation and responsibility to pay Passions' debts. It makes no claim that Oldfield voted to be responsible for Passions debts.

One of the reasons for the enactment Limited Liability Company Law was to provide a business structure that was neither a partnership nor a trust and which could limit the personal liability of the owners for the contractual obligations and other liabilities of the business. McKinneys, Chapter 34, Practice Commentaries, 2006 (*Rich, B.*). Retopolis, Inc. v. 14<sup>th</sup> Street Development, LLC, 17 AD3d 209 (1<sup>st</sup> dept. 2005).

LLC Law § 609 expressly provides that liability of the individual members is limited to what they consent to either in a writing or by a vote. A member of a limited liability company is not liable for the obligations of the LLC merely by virtue of his or her status as member. Retopolis, Inc. v. 14<sup>th</sup> Street Development Corp., *supra*. Passions' allegations do not meet the legal standard necessary to hold Oldfield responsible for contribution to Passions' debts. LLC § 609. There is no claim that Oldfield voted to be responsible for Passions' debts. The only writing referred to, a copy of which is provided on this motion, is the April 1, 2005 agreement between the parties giving Oldfield an 11.5% interest in Passions. There is no reference whatsoever in that agreement to any obligation by Oldfield to pay any of Passions' liabilities. The court, therefore, will not permit Passions to interpose counterclaim for breach of fiduciary obligation premised on Oldfield's alleged failure to pay Passions' liabilities. The court is mindful that one of the proposed affirmative defenses seeks reformation of the April 1, 2005 contract to include obligations for liabilities.<sup>2</sup> This determination is, therefore,

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<sup>2</sup>It is unclear why Passions has only asserted this as an affirmative defense and not also as a counterclaim.

without prejudice to renewal if Passions succeeds in having such agreement reformed and /or there is such other and further writings between the parties that support the factual allegations necessary pursuant to LLC Law § 609.

### **Breach of Contract**

Passions' claim for breach of contract is based upon its allegations that Oldfield failed to live up to its agreement to pay a share of Passions' liabilities. This claim suffers from the same infirmity as the one for breach of fiduciary duty, i.e. Oldfield's obligation to pay Passions' debts must be in a subscribed writing. There are no allegations satisfying the writing requirement and the April 1, 2005 written agreement provided to the court contains no such express obligation. The court, therefore, finds that the breach of contract counterclaim as framed in the proposed amended answer lacks merit and will not permit Passions to interpose it. This is without prejudice to renewal in the event Passions succeeds on its affirmative defense of reformation and/or there is some other or further writing that comports with LLC Law §609.

### **Unjust Enrichment**

Unjust enrichment is a claim in equity that defendants have been bestowed a benefit by plaintiff without adequately compensating plaintiff's therefore. Sergeants Benevolent Assn Annuity Fund v. Renck, 19 AD3d 107 (1<sup>st</sup> dept. 2005). Oldfield argues that Passions cannot prevail on a claim for unjust enrichment because it has alleged and is asserting the existence of a valid contract. While a cause of action for unjust enrichment cannot be maintained if there is a valid contract, at this stage in the case there can be alternative theories of liability. If a contract is ultimately proven, the claim for unjust enrichment will fall. At this stage it is too early for the court to make

such a substantive determination. This claim may go forward.

### **Conversion**

"Conversion" is the wrongful interference with the property of another. Republic of Haiti v. Duvalier, 211 AD2d 379 (1<sup>st</sup> dept. 1995). In order to assert a cause of action for conversion, a plaintiff must demonstrate an ownership interest in the property alleged to have been converted. State v. Seventh Regiment Fund, Inc., 98 NY2d 249 (2002). Passions' allegations of conversion are based upon the transfer of an ownership interest in it pursuant to the April 1, 2005 agreement. While Passions may have been led to make the agreement under false pretenses, there is no dispute that Oldfield's exercise of rights over the property is pursuant to the agreement. This is not a claim for conversion. The court, therefore, will not permit any counterclaim based on conversion.

### **Conclusion**

In accordance herewith it is hereby:

ORDERED that the motion by Passions to amend the answer to interpose counterclaims is granted only to the extent provided herein, to wit: the cause action for breach of fiduciary duty against Oldfield may be interposed on the claim of diversion of business opportunity only and the claim for unjust enrichment may be interposed, and it further

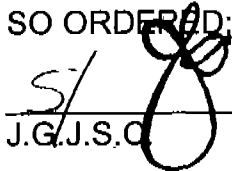
ORDERED that leave to amend the answer to interpose any of the other proposed counterclaims asserted against Oldfield is denied, and it further

ORDERED that the court does not address the bona fides of the third party action at this time, and it further

ORDERED that an amended answer in accordance with this decision shall be served upon plaintiff's counsel within 15 days of the date of this decision and that reply to the counterclaims shall thereafter be interposed in accordance with the CPLR, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
June 6, 2007

SO ORDERED:  
  
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J.G.J.S.C.

**FILED**  
JUN 14 2007  
NEW YORK  
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