

**Chassier v Brasserie Julien Corp.**

2007 NY Slip Op 32526(U)

August 14, 2007

Supreme Court, New York County

Docket Number: 0100774/2004

Judge: Jane S. Solomon

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SCANNED ON 8/16/2007

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

PRESENT: SOLOMON  
Index Number : 100774/2004  
CHASSIER, CLAUDE  
vs  
BRASSERIE JULIEN  
Sequence Number : 001  
SUMMARY JUDGMENT

PART 55

INDEX NO. 100774/2004  
MOTION DATE 7-16-07  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 10 were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-6</u>
Answering Affidavits — Exhibits _____	<u>7-9</u>
Replying Affidavits _____	<u>9-10</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

NB. Counsel to appear at pretrial conference Monday 8/24/07 at 2:00 PM in Part 55.

**FILED**  
AUG 16 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/14/07

JANE S. SOLOMON s.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 55

-----X  
CLAUDE CHASSIER,

Index No. 100774/04

Plaintiff,

-against-

BRASSERIE JULIEN CORP., D/B/A BRASSERIE  
JULIEN AND TRIPLE B INCORPORATED, D/B/A  
BRASSERIE ACACIA, PHILIP FERET, AND  
CECILIA PINEDA FERET

DECISION and ORDER

Defendants.

**FILED**  
AUG 16 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
JANE SOLOMON, J:

In this action seeking unpaid wages, defendants move pursuant to CPLR § 3212 for summary judgment dismissing the complaint and for judgment in their favor on their counterclaim for \$16,000, allegedly due from plaintiff as the result of a capital call.

**BACKGROUND**

The nature of the business relationship between plaintiff, Claude Chassier ("Claude") and defendants Philip<sup>1</sup> Feret ("Philippe") and Cecilia Pineda Feret (Cecilia) is a question of fact that lies at the heart of this lawsuit. Unfortunately, the affidavits of the parties and the documentary evidence do little to clarify this relationship.

In the complaint, Claude alleges that from December 1998 through August 2001, he was employed by the corporate defendants, Triple B Corp. ("Triple B") and Brasserie Julien Corp. to manage two upscale Manhattan restaurants, Acacia and Brasserie Julien, at a weekly salary of \$1,050.00, and that despite his demands, the bulk of the salary he earned during that

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<sup>1</sup> Defendants assert that Mr. Feret's first name is properly spelled, "Philippe."

period has not been paid. In addition Claude demands an inspection of the books and records of the corporations.

In support of their motion for summary judgment dismissing the complaint, Philippe and Claudia allege that in 1998, and again in 1999, they entered into business arrangements with Claude to form the two corporations, Triple B, the entity that operated Acacia, and Brasserie Julien Corp., the corporation that operated Julien. Philippe and Claudia allege that they, and Claude, were all shareholders in these enterprises and that they did not have an agreement to pay Claude a salary for his managerial work in the restaurants. In fact, Philippe and Claudia contend that the only agreement they had about wages was that none of them would take salaries. Moreover, they allege that Claude failed to meet a \$16,000 capital call for Julien and that that money is currently due and owing the corporation.

In opposition to the motion for summary judgment, Claude alleges that his father, Jean Claude Chassier ("Jean"), a resident of France, is, along with Philippe and Claudia, a shareholder in Brasserie Julien, Corp. and Triple B. He claims that Philippe and Claudia knew that Jean was making the initial capital contribution for Triple B/Acacia; that Philippe and Claudia knew that Claude was acting on his father's behalf and that Jean's name, and not Claude's, appears on the corporate documents. Claude states that he was merely an employee of the corporations and manager of the restaurants, albeit one who had check writing powers.

#### **THE DOCUMENTARY EVIDENCE**

It is well settled that, "[t]he proponent of a summary judgment motion must make

a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact.” *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 . In this case, defendants have failed to establish their prima facie case.

In support of their motion for summary judgment, the defendants submit documentary evidence that they contend is dispositive of their claim that Claude was a shareholder in *Brasserie Julien Corp.* and *Triple B*. However, the evidence reveals that there are material questions regarding Claude’s roles, if any, in both of these corporations. Exhibit A to the March 27, 2007 Ornest Affirmation<sup>3</sup> is a corporate banking resolution that identifies Jean Claude Chassier as *Triple B*’s vice president. In Exhibit B, paragraph 45(D) of the rider to *Acacia*’s lease lists Jean Claude Chasier (sic) as owner of 42% of *Triple B*’s stock. Exhibit C demonstrates that on February 2, 1999, \$185,000 was transferred from a French bank account owned by M. Chassier to *Triple B* and Exhibit E is a business card that lists Jean-Claude Chassier as a co-owner of *Acacia*. Exhibit G lists Jean Claude Chassier as a “buyer” of the lease for the premises that would house *Julien* and in Exhibit L, Jean Claude Chassier, individually, signed an indemnity agreement, in favor of *Acacia*’s landlord, regarding the assignment of *Acacia*’s lease. Exhibit N is a August 23, 2001, FAX from J. Claude Chassier in France wherein Jean acknowledges prior conversations and business dealings with Philippe and protests Philippe and Claudia’s assessment of his son. Jean also states that since the opening of *Julien* in 1998, his son “should receive a manager’s salary” of \$1,050 per week.

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<sup>3</sup> All the Exhibits that will be discussed are attached to the March 27, 2007 Ornest affirmation.

In contrast, Exhibit M, a document that was prepared “for negotiation purposes only”, and titled “An Analysis of the Proceeds from Acacia”, lists, at page 6, “Claude share of Assets at 43% equaling \$9,533.85” and, on page 7 under the heading “Debt of Brasserie Julien”, it states “Claude Debt at 33 1/3% ownership equaling \$80,678.89”. Page 9 of Exhibit M is titled “Payroll Issues”. Although the parties have failed to explain this document, it appears that there was unpaid salary due and owing to Philippe, Claudia and Claude for their work in the restaurants. Exhibit N(a) contains 2001 earnings statements for Claude Chassier from Triple B from February, 2001 through September, 2001, which show weekly, net earnings of approximately \$463. Exhibit O is a September 8, 2001 letter signed by Claude Chassier attesting to the fact that Philippe and Claudia fired him as restaurant manager as of September 4, 2001. Exhibit X, the Minutes of July 30, 2003 Special Meeting of Shareholders of Brasserie Julien names Claude Chassier as shareholder and indicates that he owns 33 1/3% of the voting shares. However, the certificate of mailing attached to that exhibit shows that notice of the meeting was sent to J. Claude Chassier (and signed for by J. Chassier) at a New York address. Exhibit X also contains the minutes of September 21, 2001 Board meeting wherein the Board voted on and passed a proposal that stated, “[t]hat the services of Claude Chassier, a/k/a Jean Claude Chassier in connection with the management of **Brasserie Julien** are no longer desired and that the President is instructed to terminate Mr. Chassier’s services.”

In Exhibits T and V, letters from Claude to Philippe and Claudia requesting various corporate documents, Claude refers to himself as “partner”.

Exhibits Z through FF are copies of unsigned corporate tax returns for 1999 through 2002 for Acacia and Julien. Each one of those tax returns states that Philippe is owner of 100% of the shares in each of the subject corporations.

Finally, Philippe and Claudia admit that in October, 2000, pursuant to an agreement annexed as Exhibit JJ, they transferred 51% of the stock in Triple B to Jean in exchange for \$183,000. The agreement obligated Jean to assign the shares to Claude who thereafter agreed that, no later than December 31, 2000, he would assign the shares to Philippe. Although Philippe states that neither Claude nor Jean returned the stock certificate, he does not state whether, in fact, the actual reassignment of the shares of stock took place. (P. Ferret Aff., Paras. 27, 28, 29)

### DISCUSSION

The documentary evidence establishes that Philippe and Claudia corresponded with Jean in France and spoke to him telephonically about the business of the subject corporations and that Philippe and Claudia knew that Jean Claude Chassier, the father, and Claude Chassier, the son, were not the same person. However, the remainder of the documentary evidence is contradictory in that it indicates that, at some time between 1998 and 2001, Jean and/or Claude and/or Philippe and/or Claudia, alone, or in combination, were shareholders in Triple B and/or Brasserie Julien Corp.

Defendants have not produced written shareholders agreements or other corporate documents (other than banking resolutions) for either of the corporations that might provide a definitive answer regarding Claude's status as a shareholder.

If Claude was a shareholder in the corporations, he would enjoy a statutory right to examine the corporate books and records (Business Corporation Law § 624[b]). However, as a mere employee, Claude would have to establish special circumstances that would permit such inspection (*Chaudhry v. Abadir*, 261 A.D.2d 497 [2<sup>nd</sup> Dept 1999]; *LoVerde v. Interex Design &*

*Equipment Corp.*, 54 A.D.2d 1090 [4<sup>th</sup> Dept 1976]). Accordingly, because Claude's status as employee or shareholder cannot be determined based on the papers before the court, defendant's motion to dismiss the first cause of action is denied.

However, Claude's demand for unpaid wages does not depend on his status as either shareholder or employee. It is well established that a corporation may pay a corporate officer or shareholder a salary for his/her services to the corporation. (*See. e.g., Powell v. Bernstein*, 262 A.D.2d 221 [1<sup>st</sup> Dept 1999]; *Lerner v. Kelling*, 266 A.D.2d 434 [2<sup>nd</sup> Dept 1999]; *Weber v. Sidney*, 19 A.D.2d 494 [1<sup>st</sup> Dept 1963]). The issue here is whether plaintiff had a verbal agreement with the defendants to receive a salary, and if so, what the terms of the agreement were. The defendants' own evidence, (see, Exhibit M, p. 9) indicates that, at the time defendants prepared that document, there were outstanding issues regarding salary. Accordingly, based on the documentary evidence, there are questions of fact about whether plaintiff and defendants had a verbal agreement regarding Claude's salary for his work at Acacia and Brasserie Julien, and if so, what the terms of the agreement were. Accordingly, defendant's motion to dismiss the second cause of action for unpaid wages is denied.

As to defendants' counterclaim, if Claude was an employee, rather than a shareholder, he would not be liable to defendant Brasserie Julien, Corp. for the \$16,000 capital call. Plaintiff argues that since the defendants have taken the position, in their 1999 through 2002 tax returns, that Philippe is the 100% owner of Brasserie Julien Corp. and Triple B, they may not now claim that Claude is a shareholder for the purpose of the capital call. However, the documentary evidence also demonstrates that Claude, himself, has taken the position, in his correspondence with Philippe and Claudia that he is a "partner" and therefore entitled to examine

the books and records. Moreover, several notarized documents, signed by Philippe, Claudia and Jean Claude identify Jean Claude Chassier as an officer of the corporations and other documents identify Claude as a shareholder.

Summary judgment “deprives the litigant of his day in court it is a drastic remedy and should only be employed when there is no doubt as to the absence of triable issues.” (*Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). The documentary evidence in this case raises a sufficient factual dispute to warrant denial of summary judgment, notwithstanding defendants’ statements in the corporate tax returns.<sup>3</sup> (See, e.g., *West 157<sup>th</sup> Street Assoc. v. Sassoonian*, 156 A.D.2d 137 [1<sup>st</sup> Dept 1989]; *Collins v. Glenwood Management Corp.*, 25 A.D.3d 447 [1<sup>st</sup> Dept 2006]; *Out of the Box Promotions, L.L.C. v Koschitzki*, 2007 WL 1374501 [Sup. Ct. Kings County].)

Accordingly, it hereby is

ORDERED that defendants’ motion for summary judgment dismissing the complaint and for judgment in their favor on the counterclaim is denied.

ORDERED that counsel for all parties shall appear at a pre-trial conference in Part 55 on September 24, 2007 at 2:00 P.M.

DATE 8/14/07

**FILED**  
AUG 16 2007  
NEW YORK COUNTY CLERK  
JANE S. SOLOMON

<sup>3</sup> The doctrine of “quasi estoppel” or “estoppel against inconsistent positions” prevents a party from adopting a position in court that is contrary to the position previously stated in a “quasi-judicial” or administrative proceeding and courts in this state have found that quasi estoppel bars an individual from adopting a factual position in court that is contrary to a position previously taken on his or her tax return. For instance, in *Zemel v. Horowitz*, 2006 WL 516798, \*5 (Sup. Ct. N.Y. County) the court held that plaintiffs were estopped from asserting, in the legal proceeding, that they sold securities in order to loan the proceeds to the defendant when, on their tax return, they reported that they short sold the securities. However, in *Zemel*, unlike the circumstances in this cases, the court found that plaintiffs failed to come forward with documentary evidence sufficient to raise a question of fact regarding the assertion in their tax return that the transaction was a short sale.