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

PRESENT: _____ PART 7

Justice

Index Number : 602964/2004
HIRSCH, EMAMUEL
VS
FOOD RESOURCES
Sequence Number : 005
SUMMARYJUDGMENT

INDEX NO. _____
MOTION DATE 12/5/08
MOTION SEQ. NO. _____
MOTION CAL. NO. 49

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-Z	1-3
Answering Affidavits — Exhibits 1-47	4
Replying Affidavits A-F	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion for summary judgment is determined in accordance with the annexed Memorandum Decision and Order.

FILED
JAN 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 1/15/08

_____ 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 7

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EMANUEL HIRSCH, THE ESTATE OF ARTHUR HIRSCH and THE ESTATE OF SEYMOUR HIRSCH,

Plaintiffs,

v.

FOOD RESOURCES, INC. d/b/a/ EASTERN MEATS, 450 WEST 14TH STREET CORP., GERALD HIRSCH, LAWRENCE HIRSCH and CECELIA HIRSCH GEDINSKY,

Defendants.

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Index. No. 602964/04

Decision and Order

FILED
JAN 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.S.C.

In this breach of contract action, defendants Food Resources, Inc. d/b/a Eastern Meats ("Food Resources"), 450 West 14th Corp.("450 Corp."), Gerald Hirsch ("Gerald"), Lawrence Hirsch ("Lawrence") and Cecelia Hirsch Gedinsky ("Cecelia") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint or, alternatively, for partial summary judgment pursuant to CPLR 3212(e)[1].

BACKGROUND[2]

The Hirsch brothers, Sol, Emanuel ("Manny"), Arthur ("Archie") and Seymour[3], owned and operated Eastern Meats (n/k/a Food Resources), a wholesale meat business located in New York

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[1] Defendants request, to the extent that any causes of action are not dismissed, that the Court make a finding, pursuant to CPLR Rule 3212(e) that the claims set forth in any remaining cause of action be limited to the factual matters that the Court finds to be in dispute and that the Court grant summary judgment as to the parts of the causes of action that are not in dispute, including, making a finding that the purported agreements relate solely to a sales transaction and not a lease transaction. For the reasons stated below, the Court declines to grant summary judgment dismissing any portions of the second, third, fourth or fifth causes of action.

[2] The facts of this case were discussed in detail in Judge Faviola Soto's decision dated February 23, 2005 and in the decision of the Appellate Division, First Department dated December 22, 2005. Accordingly, a detailed recitation of the facts will not be repeated here.

[3] Sol died on August 24, 1992, Seymour died in 2003 and Arthur died in December, 2006 while this action was pending. Emanuel, who is 85 years old, is the last surviving brother.

City. In 1955, Food Resources moved from its location in the Bronx to Manhattan and rented space in a building located at 450 West 14th Street ("405 West"). In 1977, through its subsidiary 450 Corp., Food Resources purchased 450 West. The brothers used the 450 West building as their base of operations until 1996, when they moved the business next door to 446 West 14th Street.

Originally, Sol was the was the sole shareholder of all 75 shares of Eastern Meats. However, after World War II, his brothers joined him in the business and in 1957, Sol entered into a shareholders' agreement with Manny, Archie and Seymour. Pursuant to that agreement Manny, Archie and Seymour each received twelve (12) shares of capital stock and Sol retained the remaining shares. As president and chief operating officer of Eastern Meats, Sol was unquestionably in charge of the business; however, the brothers worked together and built the business "as family". (Pl. Ex. 5 at p. 108) Both Archie and Manny testified that Sol told them many times that, while he was alive, he would always take care of them. (Pl. Ex. 5 at 114 and Pl. Ex. 7 at 39)

The plaintiffs claim that in the late 1980's, Sol became increasingly concerned about his own failing health and his brothers' welfare and that he entered into a verbal agreement with his brothers that established that Archie, Seymour and Manny would each receive 12 ½ percent from the proceeds of any sale or other disposition of 450 West and that he, Sol, would receive 62 ½ percent. (Pl. Memo in Opp., p. 13)

In or about April, 1992, Sol, who had been diagnosed with cancer, had his attorney prepare a series of agreements relating to the family business. The first corporate agreement ("April 1992 agreement") is undated, but it was accompanied by a cover letter dated April 22, 1992, to Sol from his attorney. (Pl. Ex. 23) Manny testified that he received this April, 1992 agreement already signed by Sol and, at Sol's direction, Manny took the document to Florida where Archie and Seymour

signed it. (Pl. Ex. 5, pp. 257-261) That agreement states in pertinent part:

> 3. DEFERRED COMPENSATION: Upon the sale of the real estate known as 450 West 14th Street by the Corporation, the Corporation shall pay, within 30 days after closing as deferred compensation, an amount equal to twelve and one-half (12 ½ %) percent of the net proceeds of the sale of said real estate to EMANUEL HIRSCH, SEYMOUR HIRSCH AND ARTHUR HIRSCH, each, or their estates.

(Def. Ex. D)

In June, 1992, Sol executed a trust agreement, as grantor, naming himself, his wife Charlotte Hirsch and their son, defendant Gerald, as trustees. Pursuant to the trust agreement, Sol transferred his stock in Food Resources to the trust. Exhibit A to the trust agreement describes the stock transfer as:

> Shares of stock in Food Resources, Inc., DBA Eastern Meats representing the entire ownership of the grantor exclusive of the value of real estate known as 450 W. 14th Street, the subject of a separate agreement as regards its sale and the disposition of proceeds of the sale. (Emphasis added) (Def. Ex. E)

Thus, in the June, 1992 trust agreement, Sol acknowledged that there was a separate agreement regarding the disposition of the proceeds of the 450 West building.

It appears that on August 19, 1992, shortly before Sol died, the Hirsch brothers executed another written agreement that referenced the trust and, in pertinent part, restated that Manny, Archie and Seymour, or their estates, would each receive twelve and one-half (12 ½ %) percent of the net proceeds of the sale of 450 West.

Thereafter, in 1999, Gerald met with a real estate developer to explore development options with respect to 450 West. The real estate developer testified that, in their meetings, Gerald

acknowledged that each of his uncles would be entitled to 12 ½ percent of the proceeds of a sale, lease, refinance or development of 450 West. (Pl. Ex. 26, paras 4-6). Moreover, in a letter to Manny dated October 30, 2001, Gerald, then president of Food Resources, referenced the deferred compensation arrangement and made a conditional offer to purchase Manny's 12 ½ percent interest in 450 West for $230,000 stating:

> Please be advised that there is no pending transaction regarding the sale or leasing of the building. At this time, however, due to your circumstances, I have agreed to advance to you . . . weekly amounts in anticipation of a future transaction . . . . The weekly payments shall end upon your early death and the balance of two hundred thirty thousand ($230,000) shall be paid to your estate at such time as a sale or leasing of the building has occurred. (Pl. Ex. 27)

In addition, Gerald testified that he went down to Florida and met with his uncles to attempt to buy out their interests in 450 West for approximately $200,000 each. (Pl. Ex. 4 at 320-324)

Also in 1999, without his uncles' knowledge, Gerald caused Food Resources to transfer all of its ownership interest in 450 Corp. out of Food Resources, a C Corporation, into an S Corporation owned by Gerald, and his siblings Lawrence and Cecelia. (See, e.g., Pl. Ex. 30)

In 2002 Gerald began negotiations with Charles Blaichman for the sale or development of 450 West. Gerald ultimately rejected Blaichman's offer to purchase 450 West for approximately $10 million because, "the tax bite on the 450 Building would have been substantial and it didn't make sense to sell the building for that price." (Pl Ex. 4, pp. 447-448) Eventually, after many months of negotiation, Gerald leased 450 West to Blaichman for a term of 49 years with the right of first refusal.

PROCEDURAL HISTORY

Plaintiffs served the original complaint in this action in September, 2004 naming Gerald and Food Resources as defendants. In that pleading, plaintiffs took the position that defendants' obligation to pay them their 12 ½ % interests arose from a sale, lease or other disposition of the 450 West building. The first three causes of action in the original complaint stated claims for breach of oral and written contracts against Food Resources based its failure to pay the plaintiffs their pro rata share of the net proceeds of the lease agreement with Blaichman; the fourth cause of action stated a tortious interference with contract claim against Gerald and the fifth cause of action charged both defendants with unjust enrichment.

In November, 2004, defendants moved pursuant to CPLR 3211 to dismiss the complaint on the ground, *inter alia*, that, pursuant to the 1992 agreement, plaintiffs' rights in the proceeds of 450 West would be triggered only by an actual sale of the building. The motion court granted the dismissal motion in its entirety on the ground that, "the terms of the unambiguous Agreement provide that plaintiffs receive the 12 ½ % upon the 'sale' of the property" and "[t]here has been no sale here." (Def. Ex. 7 at p. 7) The court further held that plaintiffs could not "rely upon an alleged prior oral agreement, or on parol evidence, to contradict the clear terms of the agreement and that "[t]he complaint does not state a valid separate cause of action for breach of the covenant of good faith and fair dealing." (Id at p. 7-8) The court dismissed the tortious interference and unjust enrichment claims for failure to state a cause of action.

On appeal, the First Department modified the trial court's decision and reinstated all causes of action except the tortious interference with contract claim. (Def. Ex. W) The First Department stated that, "the motion court erred in finding that the [April] 1992 agreement is unambiguous, that

evidence of the alleged prior oral agreement is barred as contradicting its terms, that it is not required that the 450 East 14th Street property be sold or otherwise disposed of, and that plaintiffs are entitled to shares of the proceeds if and only if the property is sold." (Id. at 102) The Appellate Court found that, "[a]lthough the agreement does not in so many words require that defendant corporation sell the building, there is an issue of fact, not presently resolvable, as to whether such requirement was either an implied contractual assumption or intended as an express requirement." The First Department also found that the 2001 letter from Gerald to Manny, on Food Resources stationery, that referred "to a leasing of the property, presents an alternate theory" that the parties modified the 1992 agreement so that plaintiffs' rights were triggered upon a sale or a lease. The First Department also found that there was a question of fact as to whether "sale" was also intended to mean "lease". (*Hirsch v. Food Resources, Inc.*, 24 A.D.3d 293, 295-296 [1st Dept. 2005])

The Appellate Court held that the cause of action based on the alleged oral agreement was viable because the April 1992 agreement barred only prior inconsistent agreements, and here the terms of the alleged oral agreement are consonant with the terms of the April 1992 agreement. The First Department also found that there was also a question of fact as to whether Gerald breached his obligation of good faith and fair dealing by leasing, rather than selling the building. (*Hirsch v. Food Resources, Inc.*, 24 A.D.3d at 295)

In September 2006, plaintiffs amended the complaint to add 450 Corp, Lawrence Hirsch and Cecelia Hirsch as named defendants and to add them to the fourth cause of action alleging unjust enrichment. The amended complaint states a new fifth cause of action, a constructive trust claim, against all the defendants and it deletes the tortious interference claim. That pleading also restates causes of action against Food Resources for breach of the alleged oral agreement (first cause of

action); breach of the April 1992 (second cause of action) agreement and it adds a claim for breach of the August 1992 agreement (third cause of action).

CONTENTIONS

In support of summary judgment dismissing the complaint, defendants argue that Arthur and Manny's testimony about Sol's promises to take care of them are too vague to constitute an enforceable oral contract; that the August, 1992 agreement is not enforceable because at the time it was signed, Sol Hirsch no longer owned any shares in Food Resources and did not have the authority to enter into such an extraordinary agreement[4]. Finally, defendants question the validity of the April 1992 agreement and argue that the agreement is unenforceable because the adverse tax consequences arising from a sale of 450 West, gave 450 Corp. gave defendants a good faith basis for their decision to lease the building rather than sell it.

In opposition to summary judgment dismissing the complaint, plaintiffs contend that the testimony of Arthur, Manny and Morris Zackheim ("Zackheim"), Food Resources's former accountant, establishes that the brothers entered into an oral agreement regarding the disposition of the net proceeds of a sale of 450 West; that Sol was authorized to enter into the August 1992 agreement or, alternatively, there is a question of fact about his authority. Moreover, they argue that defendants have failed to submit evidence to resolve the triable issues of fact, identified by the First Department, about whether the term "sale" in the April, 1992 agreement, also means lease; whether the 49 year Blaichman lease constitutes a sale within the meaning of the agreement; that if the Blaichman transaction did not constitute a sale, whether the agreement required a sale; and that if

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[4] Defendants also contend that there is a substantial likelihood that Sol's signature on the August 1992 and/or the April 1992 documents was forged. However, for the reasons stated infra, the court need not address that contention here.

the lease did not constitute a sale and a sale was not expressly required, whether Gerald breached his obligation of good faith and fair dealing by purposely entering into a long term lease in order to frustrate plaintiff's rights under the April 1992 agreement.

DISCUSSION

A. Summary Judgment

"Where there is no genuine issue to be resolved at trial, the case should be summarily decided, ..." (*Andre v. Pomeroy,* 35 N.Y.2d 361[1974]) The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." (*JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 [2005]) The movant's failure to make a prima facie showing requires denial of the motion irrespective of the sufficiency of the opposing papers. (*JMD Holdings Corp.*, 4 N.Y.2d at 384). However, if the movant makes such a showing, the burden shifts to the non-movant to demonstrate the existence of factual issues requiring trial. (*Dallas-Stephenson v. Waisman,* 39 A.D.3d 303, 306 [1st Dept 2007]) The drastic remedy of summary judgment should not be granted if there is any doubt as to the existence of a triable issue of fact. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404; *see also, Sheehan v. Gong,* 2 A.D.3d 166,168 [1st Dept. 2003]["If there is any doubt as to the existence of a triable issue, the motion should be denied."])

For the reasons stated below, that branch of defendants' motion seeking summary judgment dismissing the first cause of action(breach of an oral contract) is granted and the motion is otherwise denied.

B. Oral Contract

Plaintiffs have failed to make a prima facie showing that, in or about 1977, Sol, Manny, Archie and Seymour entered into an oral contract wherein they "agreed that when the 450 Property was no longer needed for business operations and could be sold or otherwise disposed of, it would be sold and/or otherwise disposed of and each plaintiff would receive 12.5% of the proceeds, ..." (Def. Ex. A, Amended Complnt, paras 17, 18 and 42).

In order to be enforceable, an oral contract must arise by mutual consent and its terms must be sufficiently certain or definite. (*Rupert v. Long Island R.R. Co.*, 281 A.D.2d 466, 467 [2nd Dept 2001]) Omission of contractual terms may render an agreement unenforceable. (*Express Indus. & Terminal Corp. v. New York State DOT*, 93 N.Y.2d 584, 590-591 (1999), *rearg. denied* 93 N.Y.2d 1042 [1999]). "Moreover, summary judgment [dismissing an oral contract claim] is appropriate where movant demonstrates fatal insufficiency of an oral contract's terms and the opposing party fails to raise a triable issue of fact to the contrary." (*Polly Esther's South, Inc. v. Setnor Byer Bogdanoff*, 10 Misc. 3d 375, 395 [Sup. Ct. N.Y. County 2005])

Archie, who retired from Eastern Meats in 1979, testified that before he retired, he did not have any discussions with Sol about the building. (Def. Reply Aff, Ex. A, p. 39; see also p. 82-83) In fact, Archie testified that the only thing that Sol ever told him was, "As long as I will be living, you boys will not have to worry." (Id.) In addition, at his deposition, Manny denied discussing any agreement about the building with Sol. (Def. Ex. L, p. 198) Manny, essentially repeated Archie's statement that all Sol ever said was "Don't worry fellas, I'll take care of things." (Id at 192). While at one point in his testimony Manny claimed that there was some talk about plaintiffs receiving a percentage of the building, he conceded that no specific amount was agreed upon prior to the

execution of the written agreement. (Id at 195) Finally, in light of the testimony of Manny and Archie, Zackheim's testimony about his discussions with Sol regarding Sol's wish to take care of his brothers and Zackheim's assertion that Sol discussed the percentage distribution with him, does not raise a triable issue of fact about whether, in or about 1977, the brothers entered into an oral agreement because the record is devoid of any evidence that Sol had a similar discussion with his brothers regarding the specific terms of the distribution of the net proceeds derived from the sale or other disposition of 450 West. Neither Arthur nor Manny was able to recall that the brothers even discussed the sale of the building, let alone agreed on the terms of a future distribution. (*See, Azoulay v. Cassin,* 128 A.D.2d 660 [2nd Dept 1987][court dismissed oral contract claim for conveyance of interest in property where essential elements "were either lacking or too indefinite".]; *see also, Mainline Electric Corp. v. Pav-Lak Industries, Inc.,* 40 A.D.3d 939 [2nd Dept 2007])

C. Breach of the April, 1992 Food Resources Agreement

"Whether a contract is ambiguous is a matter of law for the court." (*Hirsch v. Food Resources,* 24 A.D.3d 293, 295 [1st Dept 2005]) In *Hirsch*, the Appellate Division found that the April, 1992 agreement was ambiguous because it was unclear whether plaintiffs' right to compensation arose only upon a sale of the building or whether the term "sale" as used in the agreement was intended to include a long-term lease. The Court also found that it was unclear whether the contract required a sale of the building . In addition, the First Department stated that if the term "sale" did not include "long term lease", there was a question about whether the parties modified their agreement and also that there was a question of fact as to whether the Blaichman transaction constituted a sale.

Not only have defendants failed to submit evidence to resolve the questions of fact identified by the Appellate Division[5], now defendants have added a new question of fact: If the April 1992 agreement did require a sale, whether defendants had a good faith economic basis for their decision not to sell the premises based on their claim that they would have lost a considerable tax advantage if they sold 450 West within the 10 years immediately following the conversion of 450 Corp. to an "S" corporation.

Under New York law, all contracts contain an implied "covenant of good faith and fair dealing in the course of contract performance." (*Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 [1995]) The implied covenant requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87 [1933]) Plaintiff has alleged that Gerald, "in a misguided attempt to defeat the right of the Plaintiffs and the long-time agreements and understandings of the Hirsch brothers, . . ." negotiated a 49 year lease of the building rather than an outright sale[6]. (Amended Complaint, para. 35; see also, paras. 36, 38 and 39) Moreover, plaintiffs have presented evidence that from 1990 going forward, Gerald had unsuccessfully attempted to sell 450 West, apparently without regard to the tax consequences, but that in 2002 he declined Blaichman's offer to buy the building allegedly because of the tax consequences. (Ex. 4 Gerald Hirsch Trans., at pp. 289 -290, 447-448). This raises a triable issue of fact as to the "good faith" of

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[5] See, *People v. Taylor*, 87 A.D.2d 771, 773 (1st Dept 1982), ("It is the general rule that a determination by an appellate court becomes law of the case, so that upon a subsequent trial or appeal, if the facts appear substantially the same, the prior determination should be followed).

[6] To state a claim for breach of the implied covenant of good faith and fair dealing "the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." (*Aventine Inv. Mgmt., Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 514 [2nd Dept. 1999])

defendants in entering into the lease transaction and whether defendants took deliberate steps to deprive plaintiffs of their rights and benefits under the April 1992 Food Resources agreement.

Accordingly, that branch of the motion that seeks summary judgment dismissing the second cause of action is denied.

D. Breach of the August, 1992 Food Resources Agreement

There are questions of fact as to whether Sol had the authority or the capacity to enter into the August, 1992 agreement. It is undisputed that although Sol transferred all of his stock to the June 17, 1992 Trust, he remained president and CEO of Food Resources until the day he died.(Pl. Ex. 4, pp. 212-213). The August, 1992 agreement appears to have been signed by Sol as president of Food Resources but defendants have submitted hospital records (Reply Aff., Ex. E) and excerpts from defendant Cecelia's deposition in an attempt to prove that on August 19, a few days before Sol's death from cancer, Sol was heavily sedated and did not have the mental capacity to sign or understand the document at that time.[7] Whether or not Sol had the mental capacity to sign the August 19 agreement presents a question of fact that cannot be decided on these papers.

However, assuming that Sol had the mental capacity and that his signature is authentic, there is a further question as to whether he had the express or implied authority to enter into the August 19th agreement without the consent of the shareholders and/or directors. Defendants argue that it is well settled that the president of a corporation does not have apparent authority to undertake acts outside the ordinary course of business without the approval of the shareholders/directors. (*Noyes v. Irving Trust,* 250 A.D.274 [1st Dept. 1937]) However, whether approval of the deferred

[7] Defendants previously submitted expert testimony that opines that Sol's signature on the August 19th agreement was forged. Whether or not Sol's signature was authentic is another question of fact that need not be addressed at this time.

compensation agreement was outside the ordinary course of business is also a question for the jury to decide. As a general matter, the president of a corporation has implied authority to enter into contracts, including employee compensation agreements, in the ordinary course of the company's business. (See, 2-7 White, New York Business Entities, PB 715.07; *see also, Hardin v. Morgan Lithograph Co.*, 247 N.Y. 332, 338-339 [1929]; *Odell v. 704 Broadway Condominium*, 284 A.D.2d 52 [1st Dept 2001])

Here, there is evidence that the Hirsch brothers had already agreed, in April, 1992, that Manny, Seymour and Archie would each receive, as deferred compensation, 12 ½ percent of the net profits resulting from a disposition of 450 West. The August agreement, in pertinent part, merely reaffirmed this understanding and added that Sol would receive the remaining 62 ½ per cent of the net proceeds. Paragraph eight (8) of the August, 1992 agreement states that the August, 1992 agreement will only supersede prior agreements between the parties if any of the terms of the August, 1992 agreement conflict with the terms of any prior agreements[8]. Here, the terms of the August, 1992 agreement were consonant with the April, 1992 agreement. Accordingly, there is a question about whether the deferred compensation portion of the August, 1992 agreement was ordinary or extraordinary because the record reveals that the August, 1992 agreement was just one

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[8] Paragraph 8 of the agreement states:

> CONSTRUCTION: In the event that any terms of prior agreements between the parties conflict with the terms of this Agreement, then this Agreement shall be construed as controlling the intention of the parties and shall supersede such other agreement and revoke any other agreement which may be contrary to this agreement.

of several deferred compensation agreements that the brothers executed [9]. (White New York Business Entities, 715.07[2] at 178 [the issue of whether a contract is ordinary or extraordinary is usually one of fact.])[10]

Accordingly, that branch of the motion seeking summary judgment dismissing the third cause of action is denied.

Because the fourth cause of action alleging unjust enrichment and the fifth cause of action for a constructive trust emanate from the contract claims, and because the Court has found that there are issues of fact precluding summary judgment dismissing the contract claims in the second and third causes of action, that branch of the summary judgment motion seeking to dismiss the fourth and fifth causes of action is denied.

Accordingly, it is ORDERED that defendants' motion for summary judgment dismissing the complaint is granted to the extent of dismissing the first cause of action based on an oral agreement, and the motion is otherwise denied.

Date: January 15, 2008
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

[9] The brothers also entered into a May 1, 1969 deferred compensation agreement (Pl Ex. 14)

[10] The Court will not address defendants' argument that the August 1992 agreement is not binding because it is not in compliance with Business Corporation Law (BCL) Section 909 because defendants did not allege noncompliance with BCL 909 as an affirmative defense in their answer and therefore waived the defense. (*See,* CPLR 3108[b])