

Fortunatas Grex Intl. Inc. v Bakhshi

2013 NY Slip Op 31552(U)

July 11, 2013

Supreme Court, New York County

Docket Number: 153337/2012

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 153337/2012
FORTUNATAS GREX
vs.
BAKHSHI, JON
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

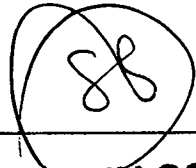
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 7/11/13
which disposes of motion sequence(s) no. 001

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

Dated: 7/11/13


_____, J.S.C.
SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
FORTUNATAS GREX INTERNATIONAL INC.,
individually and as a shareholder of and in the right
of 539 JB ENTERPRISES LTD.,

Index No.:153337/12
Submission Date: 3/13/13

Plaintiff,

DECISION AND ORDER

- against-

JON BAKHSHI, FRANK PORCO,
ENTERTAINMENT ENTERPRISES LTD., A1
ENTERTAINMENT, LLC, METRO BUILDERS, LLC,
JTMF CORP., 150 RFT VARICK CORP., BARRY
MULLINEAUX, and PERK HOSPITALITY CORP.
d/b/a PERK MARKETING GROUP, ERIC
ROTTENBERG, and LESLIE ROTTENBERG,

Defendants.

----- X

For Plaintiff:
Mound Cotton Wollan & Greengrass
One Battery Park Plaza
New York, New York 10004

For Defendants Jon Bakshi, Entertainment Enterprises, A1
Entertainment, 150 RFT Varick Corp., Barry Mullineax, Perk
Hospitality Corp. d/b/a Perk Marketing Group:
The Aboushi Law Firm, PLLC
501 Fifth Avenue, Third Floor
New York, New York 10017

Papers considered in review of this motion to dismiss (motion seq. no. 001):

Notice of Motion 1
Aff in Support 2
Aff in Opp 3
Mem of Law in Opp 4

HON. SALIANN SCARPULLA, J.:

In this action stemming from the construction and operation of a nightclub known as the Juliet Supper Club, defendants Jon Bakhshi (“Bakhshi”), Entertainment Enterprises Ltd. (“Entertainment Enterprises”), A1 Entertainment, LLC (“A1”), 150 RFT Varick Corp. (“150 RFT”), Barry Mullineaux (“Mullineaux”), and Perk Hospitality Corp. d/b/a Perk Marketing Group (“Perk”) (collectively, the “Bakhshi defendants”) move pursuant to CPLR § 3211(a)(7) to dismiss the complaint for failure to state a claim.

Plaintiff Fortunatas Grex International, Inc., individually and as a shareholder of and in the right of 539 JB Enterprises Ltd. (“Plaintiff” or “Fortunatas”) commenced this action asserting seven claims: (1) breach of contract; (2) conversion; (3) fraud; (4) accounting; (5) breach of fiduciary duties; (6) breach of the duty of loyalty; and (7) breach of contract related to a transaction involving another nightclub, WIP.^{1 2}

As alleged in the complaint, Plaintiff invested \$1.3 million dollars in a new venture, the Juliet Supper Club (the “club”), located at 539 West 21st Street, New York, NY. Plaintiff alleges that its principals Dmitry Sheykhametov and Vincent Miceli were approached by Frank Porco (“Porco”) and Bakhshi to invest in the club.

¹ Plaintiff asserts the fourth, fifth, and sixth causes of action as both direct and derivative claims.

² In my prior decision dated April 15, 2013, I dismissed several causes of action as against defendants Frank Porco, Metro Builders LLC, and JTMF Corp.

Plaintiff alleges that Bakhshi and Porco made a series of representations to induce its investment in the club. According to Plaintiff, Bakhshi represented that he possessed the requisite expertise and contacts from his experience running other successful nightclubs. Bakhshi and Porco also represented that Porco and MetroBuilders LLC could obtain all necessary regulatory approvals at or near cost and on an expedited basis.

Plaintiff further alleges that Bakhshi took its principals through a walkthrough of the proposed space for the club, and that Bakhshi represented that the space included a fully functional kitchen and HVAC system. Bakhshi and Porco also allegedly represented that Plaintiff would recover the principal of its investment in 1.5 years.

Upon deciding to invest in the club, Plaintiff entered into a shareholder agreement with Bakhshi on January 14, 2008 (“the agreement”). Under the agreement, Plaintiff purchased 49% of 539 JB Enterprises Ltd. (“the Corporation”) in exchange for \$1.3 million dollars (\$600,000 to be used for the renovation of the nightclub and \$700,000 to be paid to Bakhshi). Plaintiff attaches a copy of the agreement to the complaint.

The agreement also states that if the renovation costs exceed \$600,000, then Bakhshi will “contribute all sums necessary to complete the renovation of the club.” The agreement further states the “budget and all monies expended on the renovation of the nightclub must be approved by Jon B [Bakhshi]” and that the “day to day management of the company will vest in Jon B [Bakhshi].”

The agreement further states that the first \$2,600,000.00 in profits of the Corporation will be distributed: "Fifty (50%) percent to Jon B [Bakhshi], and Fifty (50%) percent to Fortunatas Grex International, Inc. [Plaintiff]."

Plaintiff alleges that the construction of the club began in May 2009. In August 2009, Bakhshi informed Plaintiff that all of the construction funds were expended, and that he could not contribute any funds to complete the construction. Bakhshi and Porco allegedly told Plaintiff that it would lose its investment unless Plaintiff provided an additional \$400,000 to the Corporation to complete construction of the club. Bakhshi allegedly represented to Plaintiff that the kitchen required additional renovations to satisfy the club's chef Todd English. Plaintiff claims that the kitchen was completely unusable and the HVAC system was inadequate.

Subsequently, on or about September 14, 2009, Plaintiff provided \$400,000 to continue the construction of the club in exchange for an increase to a 50% share of the Corporation.

On October 15, 2009, the club opened. However, Plaintiff alleges that the landlord shut off the gas during opening weekend because Bakhshi and Porco failed to procure the proper gas permit. The gas permit was not approved until December 2, 2009. Plaintiff claims that due to the delay, the club's reputation was irretrievably damaged which ensured that the food portion of the club's business would never be profitable.

Plaintiff alleges that the club was popular, and that the club's revenue ranged from \$5,000 to \$75,000 per night from late 2009 to 2010. Plaintiff also alleges that the tax

returns from late 2009 to 2010 show that the club took in \$9,300,000 in revenue.

However, Plaintiff alleges that Bakhshi listed himself as the sole owner of the club and took all of the tax deductions belonging to the Corporation. Plaintiff further alleges that the Corporation had unpaid construction and operating debts in the amount of \$300,000.

Plaintiff alleges that in 2010, it became apparent that Bakhshi would not devote the time necessary to make the club successful. Plaintiff further alleges that, in October 2010, Bakhshi demanded that Plaintiff buy all of his shares in the Corporation for \$675,000, and that Bakhshi threatened to give up the club's liquor license. Plaintiff demanded that it receive its shares and to be added to the liquor license. Bakhshi's attorney then issued the shares to Plaintiff.

On November 19, 2010, the board allegedly removed Bakhshi as president of the Corporation, and removed his signatory authority over the bank accounts. One of Plaintiff's directors was then elected president of the Corporation.

On November 14, 2011, a homicide was committed at the club. The club eventually closed on January 1, 2012. Plaintiff alleges that it never received any money from the Corporation, even though the Corporation took in \$9,300,000 in revenue from late 2009 to 2010.

The Bakhshi defendants now move to dismiss the complaint. Plaintiff opposes the motion, and requests attorneys' fees, costs, disbursements and interest. Plaintiff also requests leave to amend the complaint if this motion is granted.

1. Breach of Contract

In the first cause of action for breach of contract, Plaintiff claims that Bakhshi breached the shareholder agreement by using \$600,000 in construction money for other purposes, failing to oversee the construction and operation of the club, failing to oversee the budget, and failing to contribute the necessary funds to complete the renovation as required by the shareholder agreement.

In the current motion, Bakhshi argues that the breach of contract claim should be dismissed because the club was successful and Plaintiff did not suffer any damages. Bakhshi also argues that Plaintiff purchased his entire interest in the Corporation, which demonstrates that the company was successful.

2. Conversion

In the second cause of action for conversion, Plaintiff alleges that the Bakhshi defendants diverted \$1,000,000 in construction funds for their own personal use.

In the current motion, Bakhshi argues that the conversion claim should be dismissed because Plaintiff fails to allege that it owned the converted funds, and failed to specify which monies were converted.

Defendants Entertainment Enterprises, A1, and 150 RFT also argue that the conversion claim should be dismissed because they never controlled or possessed any assets of the Corporation, and that Plaintiff failed to allege a relationship to any of these entities.

3. Fraud

In the third cause of action for fraud, Plaintiff alleges that Bakhshi misrepresented his financial status, his ability to contribute the sums necessary to complete the club construction, his experience in running a successful business, his ability to obtain approvals for construction, and the state of the kitchen and HVAC facilities.

Bakhshi argues that the fraud claim should be dismissed because Plaintiff fails to allege any specific details regarding the alleged misrepresentations. Bakhshi also argues the club itself was successful, and that Plaintiff received 50% ownership of the Corporation and \$78,000 in salary in exchange for its additional investment of \$400,000.

4. Accounting

In the fourth cause of action, Plaintiff claims that it is entitled to an accounting of Bakhshi, Entertainment Enterprises, A1, 150 RFT, and the Corporation's tax returns, bank accounts, receipts, disbursements, profits and losses in the "discharge of their duties as officers and employees of and in their relationships with the Corporation."

The Bakhshi defendants argue that the accounting claim should be dismissed because Plaintiff fails to allege any fiduciary or other relationship, or any wrongdoing to form the basis of an accounting claim.

5. Breach of Fiduciary Duty

In the fifth and sixth causes of action for breach of fiduciary duty and breach of the duty of loyalty, respectively, Plaintiff claims that Bakhshi breached his fiduciary duties to

the Corporation and to Plaintiff by failing to devote sufficient time to the club, failing to respond to requests for approval of construction items, causing the corporation to pay contractors without proper invoices, and paying \$610,000 to Metro Builders without invoices.

Plaintiff also alleges that Bakhshi breached his fiduciary duties by directing customers to pay him in cash instead of paying the Corporation, and that Bakhshi caused the Corporation to purchase alcohol from his other companies at inflated prices. Plaintiff also claims that Mullineaux and Perk aided and abetted Bakhshi's breach of his fiduciary duties by diverting the club's money to Bakhshi's other club, Greenhouse.

In the current motion, Bakhshi argues that the fifth and sixth causes of action should be dismissed because Plaintiff fails to specify a time frame for the alleged breaches, and fails to specify what funds were removed.

Bakhshi further argues that he did not breach any fiduciary duties, which is evidenced by Plaintiff's purchase of his entire interest in the Corporation. Bakhshi argues that Plaintiff purchased 100% of the Corporation in January 2011, and that any accounting issues arose thereafter.

In support of their motion, the Bakhshi defendants submit several affidavits and documents, including a copy of a contract of sale dated December 16, 2010, as evidence of the sale of Bakhshi's entire interest to Plaintiff. Bakhshi also submits an affidavit from

accountant Arnold Hyman to demonstrate that the Corporation's accounting was done properly when Bakhshi was involved with the Corporation.³

Discussion

CPLR § 3211(a)(7) provides that a defendant may move for judgment dismissing the complaint on the grounds that “the pleading fails to state a cause of action.” In determining whether to grant a motion to dismiss under CPLR § 3211(a)(7), the “court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep't 2002).

1. Breach of Contract

To prove a breach of contract claim, a plaintiff must demonstrate: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) defendant's breach; and (4) damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

Based on the allegations in the complaint, I find that Plaintiff sufficiently stated a breach of contract claim against Bakhshi. Plaintiff alleges that it entered into a contract

³ The Bakhshi defendants also move to dismiss the seventh cause of action. However, the complaint does not assert the seventh cause of action against any of the Bakhshi defendants. The seventh cause of action was dismissed in its entirety against JTMF Corp in my April 15, 2013 decision.

with Bakhshi – the shareholder agreement – and that it performed under the agreement by paying \$1.3 million in exchange for a 49% interest in the Corporation.

Plaintiff also alleges that Bakhshi breached the agreement. Under the contract, Bakhshi was required to contribute “all sums necessary to complete the renovation of the club” if the renovation costs exceeded \$600,000, and to provide the “day to day management” of the club, including managing the budget. Plaintiff alleges that Bakhshi did not contribute the necessary funds to complete construction, which required Plaintiff to invest an additional \$400,000. Plaintiff also claims that Bakhshi did not devote the time necessary to manage the club and the budget as required under the contract.

Plaintiff further alleges sufficient facts to support a claim for damages. Plaintiff claims that it was required to invest an additional \$400,000 as a result of Bakhshi’s breach of the agreement. Plaintiff also alleges damages in the form of lost profits from the Corporation. Plaintiff claims that it never received any share of the profits even though the club took in \$9,300,000 in revenue in its first year, and the agreement provided for Plaintiff to receive 50% of the first \$2,600,000 in profits of the Corporation.

Bakhshi appears to argue that the breach of contract claim should be dismissed because Plaintiff received an additional 1% share of the Corporation and a \$78,000 payment in exchange for its \$400,000 additional investment.⁴ However, any issue as to

⁴ In his affidavit, Bakhshi states that Fortunatas was due to receive the \$78,000 payment as a salary. This \$78,000 payment appears to be mistakenly characterized as a corporation cannot receive a salary.

whether Plaintiff waived its rights under the agreement involves questions of fact that cannot be determined on this motion to dismiss. *Team Marketing USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 941 (3rd Dep't 2007).

In sum, I find that Plaintiff sufficiently stated a breach of contract claim. Therefore, I deny the motion to dismiss the first cause of action for breach of contract against Bakhshi.

2. Conversion

To establish a conversion claim, a plaintiff must demonstrate: (1) legal ownership or an immediate superior right of possession to a specific identifiable thing; and (2) that the defendant exercised an unauthorized dominion over that property to the exclusion of plaintiff's rights. *Lemle v. Lemle*, 92 A.D.3d 494, 497 (1st Dep't 2012); *Meese v. Miller*, 79 A.D.2d 237, 243 (4th Dep't 1981).

Here, I grant the Bakhshi defendants' motion to dismiss the second cause of action for conversion. Plaintiff fails to allege that it maintained legal ownership or an immediate superior right of possession to the \$1,000,000 that was allegedly converted. Once Plaintiff invested money into the Corporation, the money became the property of the Corporation. In addition, Plaintiff fails to specifically identify what portion of the funds were converted. "Where the property [alleged to have been converted] is money, it must be specifically identifiable and be subject to an obligation to be returned or to be

otherwise treated in a particular manner.” *Lemle*, 49 A.D.3d at 497 (quotations omitted).

3. Fraud

CPLR § 3016(b) provides that where a cause of action is based on fraud, “the circumstances constituting the wrong shall be stated in detail.” To establish a fraud claim, a “plaintiff must show a material representation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages.” *Lemle v. Lemle*, 92 A.D.3d at 496.

In a fraud action, a plaintiff must allege a misrepresentation of fact. *Id.* An opinion or prediction of something which is hoped or expected to occur in the future does not constitute a misrepresentation of fact. *Marx v. Mack Affiliates*, 265 A.D.2d 202, 203 (1st Dep’t 1999); *Chase Investments, Ltd. v. Kent III*, 256 A.D.2d 298, 299 (2d Dep’t 1998).

In the complaint, Plaintiff claims that Bakhshi committed fraud through misrepresentations concerning: (a) his financial status and ability to contribute funds necessary to complete the club renovation; (b) his experience in running a business; (c) his ability to obtain construction approvals; and (d) the state of the kitchen and the HVAC facilities.

I find here that Plaintiff’s fraud claim against Bakhshi must be dismissed. Plaintiff fails to allege that Bakhshi made any of the alleged misrepresentations with knowledge

that the misrepresentations were false.

In addition, Bakhshi's alleged statement that he could obtain construction approvals on an expedited basis is an opinion and a statement of hope that cannot form the basis of a fraud claim. Further, the claim that Bakhshi misrepresented his ability to contribute funds to the club renovation is duplicative of the breach of contract claim, and must also be dismissed for this reason. *Berger v. Roosevelt Investment Group, Inc.*, 28 A.D.3d 345, 345 (1st Dep't 2006).

Accordingly, I grant the Bakhshi defendants' motion to dismiss the third cause of action for fraud against Bakhshi.

4. Accounting

To establish a right to an accounting, a plaintiff must demonstrate the existence of a fiduciary or confidential relationship and a breach of the duty imposed by that relationship respecting property in which the plaintiff has an interest. *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234, 242 (1st Dep't 1997). In an action for accounting, the defendant bears "the burden of proof in justifying the charges and showing that he has derived no unfair advantage." *Vinlis Const. Co. v. Roreck*, 30 A.D.2d 668, 668 (2d Dep't 1968).

Plaintiff asserts a right of accounting against Bakhshi in connection with the Corporation's property. I find that Plaintiff adequately pleads a right of accounting

against Bakhshi. Plaintiff alleges that Bakhshi and Plaintiff were both shareholders in a closely held corporation, which gives rise to the existence of a fiduciary duty to support an accounting claim. *Unitel Telecard Distribution Corp.*, 90 A.D.3d 568, 569 (1st Dep't 2011).

Although Bakhshi argues that the accounting claim should be dismissed because Plaintiff fails to allege any wrongdoing, an "allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties." *Adam v. Cutner & Rathkopf*, 238 A.D.2d at 242. Moreover, Plaintiff does claim wrongdoing in its allegation that Bakhshi breached his fiduciary duties to the Corporation.

As to defendants Entertainment Enterprises, A1, and 150 RFT, I grant the motion to dismiss the accounting claim against these entities. Plaintiff fails to allege that it has a confidential or fiduciary relationship with any of these entities as required to state an accounting claim. Plaintiff merely asserts that Bakhshi controlled these entities, and that they may have received a substantial portion of Plaintiff's initial investment. However, a conventional business relationship between parties dealing at arm's length does not give rise to fiduciary duties unless the plaintiff shows that the defendant has superior expertise or knowledge about a particular subject and misled plaintiff by false representations concerning that subject. *Roni LLC v. Arfa*, 74 A.D.3d 442, 444 (1st Dep't 2010).

Accordingly, I grant the Bakhshi defendants' motion to dismiss as to Entertainment Enterprises, A1, and 150 RFT, but deny the motion as to Bakhshi.

5. Breach of Fiduciary Duties

A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR § 3016(b). *Armentano v. Paraco Gas Corp.*, 90 A.D.3d 683, 684 (2d Dep't 2011). The elements of a cause of action to recover damages for breach of fiduciary duty are: (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep't 2011).

Directors and officers of a corporation have a fiduciary obligation to act on behalf of the corporation in good faith and with reasonable care to protect and advance the interests of the corporation. *People ex rel. Spitzer v. Grasso*, 50 A.D.3d 535, 546 (1st Dep't 2008); *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 569 (1984).

In addition, directors and officers are bound by a "duty of undivided and unqualified loyalty to their corporations, a duty which encompasses good faith efforts to insure that their personal profit is not at the expense of their corporations." *Limmer v. Medallion Grp., Inc.*, 75 A.D.2d 299, 303 (1st Dep't 1980).

A. Breach of Fiduciary Duty as to Bakhshi

In the fifth and sixth causes of action, Plaintiff claims that Bakhshi breached his fiduciary duties, including the duty of loyalty, that he owed to the Corporation and to Plaintiff as minority shareholder.

Based on the allegations in the complaint, I find that Plaintiff sufficiently stated a cause of action against Bakhshi for breach of fiduciary duty (fifth cause of action) and breach of the duty of loyalty (sixth cause of action). First, Plaintiff alleges the existence of a fiduciary relationship between Bakhshi and the Corporation. In the complaint, Plaintiff claims that Bakhshi is an officer and a director of the Corporation. In addition, Plaintiff alleges that Bakhshi, as a majority shareholder, owes fiduciary duties to Plaintiff. Indeed, a majority shareholder in a close corporation has a fiduciary obligation to a minority shareholder. *Richbell Information Services, Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 300 (1st Dep't 2003).

Plaintiff also alleges that Bakhshi breached his fiduciary duties by failing to devote sufficient time to the club, by failing to respond to requests for approval of construction items, and by causing the Corporation to pay contractors without proper invoices, including a payment to Metro Builders in the amount of \$610,000, without invoices.

Plaintiff also alleges that Bakhshi breached his duty of loyalty by directing customers to pay him in cash rather than the Corporation, by causing the Corporation to purchase alcohol from his other businesses at inflated prices, and by diverting the

Corporation's money to his other club, Greenhouse.

Further, Plaintiff sufficiently alleges damages resulting from Bakhshi's purported breach of fiduciary duties. However, I find that Plaintiff only states derivative claims on behalf of the Corporation for the fifth and sixth causes of action, not any direct claims. Plaintiff alleges that it suffered damages in the form of lost profits from the Corporation, which is a derivative claim because the alleged loss derives solely from harm to the Corporation. *Yudell v. Gilbert*, 99 A.D.3d 108, 113 (1st Dep't 2012) (finding that a plaintiff's claim for breach of fiduciary duty is derivative when plaintiff's pecuniary loss is derived from a breach of duty and harm to the business entity).

Bakhshi argues that Plaintiff failed to particularize the time frame for its claims, but I find that Plaintiff alleged sufficient facts to set forth its claims for the time period that Bakhshi maintained a fiduciary relationship with the Corporation as an officer, director, or majority shareholder. Plaintiff alleges that Bakhshi was an officer of the Corporation until he was removed as president in November 2010, and questions of fact exist as to when Bakhshi's fiduciary duties to the Corporation ceased. At this early stage of litigation, "plaintiffs need only set forth sufficient information to apprise defendants of the alleged wrongs" to satisfy CPLR § 3016(b). *DDJ Management, LLC v. Rhone Group L.L.C.*, 78 A.D.3d 442, 443 (1st Dep't 2010).

Therefore, I grant defendants' motion to dismiss the fifth and sixth causes of action against Bakhshi as to the direct claims, and otherwise deny the motion as to the derivative claims against Bakhshi.

B. Breach of Fiduciary Duty as to Mullineaux and Perk

To state a cause of action for aiding and abetting the breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty; that the defendant knowingly induced or participated in the breach; and damages resulting therefrom. *Bullmore v. Ernst & Young Cayman Islands*, 45 A.D.3d 461, 464 (1st Dep't 2007). A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator. *Bullmore v. Ernst & Young Cayman Islands*, 45 A.D.3d at 464.

In the fifth and sixth causes of action, Plaintiff alleges that Mullineaux and Perk aided and abetted Bakhshi's breach of his fiduciary duties, including his duty of loyalty, by diverting the club's monies to Bakhshi's other club, Greenhouse. However, Plaintiff fails to allege that Mullineaux and Perk knowingly induced or provided substantial assistance to Bakhshi in the diversion of the club's money to Greenhouse. Therefore, I grant the motion to dismiss the fifth and sixth causes of action for aiding and abetting the breach of fiduciary duty as against Mullineaux and Perk.

In accordance with the foregoing, it is

ORDERED that defendants Jon Bakhshi, Entertainment Enterprises Ltd., A1 Entertainment, LLC, 150 RFT Varick Corp., Barry Mullineaux, and Perk Hospitality Corp. d/b/a Perk Marketing Group's motion to dismiss plaintiff Fortunatas Grex International, Inc., individually and as a shareholder of and in the right of 539 JB Enterprises Ltd.'s verified complaint pursuant to CPLR § 3211(a)(7) is granted as to the second cause of action, third cause of action, fourth cause of action as to Entertainment Enterprises Ltd., A1 Entertainment, LLC, 150 RFT Varick Corp.; and fifth and sixth causes of action as to the direct claim against Bakhshi, and as to Mullineaux and Perk, and otherwise denied; and it is further

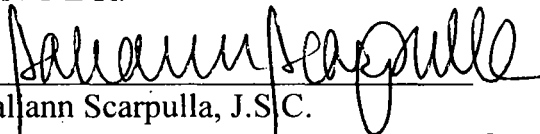
ORDERED that the first cause of action, the fourth cause of action against Bakhshi, and the fifth and sixth causes of action against Bakhshi as derivative claims are severed and continued; and it is further

ORDERED that plaintiff's request for attorneys' fees, costs, disbursements and interest is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: New York, New York
July 11, 2013

ENTER:


Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA