SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SANDRA G. MANZELLA, both individually and derivatively on behalf of KESTE GROUP, LLC,

Plaintiff,

-against-

ROBERTO CAPORUSCIO, SANDRO PATTERNO AND KESTE GROUP, LLC,

Defendants,

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Index No.: 651484/2013
Motion Sequence No.: 004

DECISION AND ORDER

O. PETER SHERWOOD, J.:

I. Background

Plaintiff Sandra Manzella and defendant Roberto Caporuscio are partners in Keste Group, LLC (Keste), which owns the restaurant Keste Pizza and Vino. Manzella owns 45%. Caporuscio, the pizza chef, owns 55%. Keste is governed by an operating agreement dated February 10, 2012 ("Operating Agreement") (NYSCEF Doc. No. 300). Despite the Operating Agreement, the parties dispute how the business should be run. Manzella initiated this suit on her own behalf and on behalf of Keste.[1] During the course of the litigation, the parties entered into a Consent Order dated November 22, 2013, to better allocate responsibilities among Caporuscio, Manzella and Keste's General Manager, Michele Vianello during the pendency of the case (NYSCEF Doc. No. 296).

In April 2015, defendants Caporuscio and Keste moved for a finding of contempt against Manzella for, among other things, taking money from Keste to pay her attorneys in connection with this matter in breach of the terms of the Consent Order. This court held Manzella conditionally in contempt "for assuming authority that is inconsistent with the allocation of authority set forth in the Consent Order and for making an unauthorized withdrawal of the sum of $17,500 from Keste's checking account with Chase Bank . . . and using those funds to pay certain personal legal expenses" (Order dated April 9, 2015, NYSCEF Doc. No. 297) ("Contempt Order"). The Contempt Order further allowed Manzella seven days to repay Keste, at which event the Contempt Order would

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[1]Defendant Sandro Paterno is no longer a party to this litigation.

dissolve, vacating the conditional contempt (*id.*). As to the other arguments regarding contempt, the court "determined that the additional remedies being sought . . . are best addressed through motions for summary judgment as to Plaintiff's Eight[th] Cause of Action and Defendant's Third . . . counterclaim" (*id.*).

Now, defendants move for summary judgment on the first, second, and third counterclaims, for Breach of Contract, Breach of Fiduciary Duty, and Breach of the Covenant of Good Faith, respectively. Defendants also seek a modification of the Consent Order allowing Keste to terminate Manzella's employment with Keste and to restrict her to "read-only" access to Keste's books.

II. The Facts

The facts are taken from defendants' Statement of Undisputed Material Facts ("SUMF" or "Rule 19-a Stmt"). As plaintiff failed to file an opposing statement, the facts stated by defendant are deemed admitted for the purpose of this motion (*see* Commercial Division Rule 19-a[c]). Opposing facts stated in the plaintiff's papers will be referenced as necessary.

Operational control of the restaurant lies at the heart of this case. Manzella argues correctly that the Operating Agreement gives her shared responsibility for Keste's "day to day" operations. She adds, incorrectly, that the Operating Agreement also gives her equal authority with Caporuscio in running the restaurant (SUMF, ¶ 29). Caporuscio argues that, as majority shareholder, the Operating Agreement gives him the deciding vote. The Operating Agreement states:

> "The Company shall be managed and controlled by its Members by the affirmative vote of a majority in interest of the Members (unless otherwise provided herein) and shall not have any managers within the meaning of the Act. Notwithstanding anything to the contrary contained in the provisions of the Agreement, the Members agree that Caporuscio and Manzella shall have primary responsibility for running the day-to-day operations of the Company"

(Operating Agreement, ¶ 4.1, NYSCEF Doc. No. 313). Additionally, the Operating Agreement provides:

> "The Members may exercise all powers of the Company to the extent authorized by a majority of the interests which vote of the Company, and do all such lawful acts and things as they may determine to be necessary or appropriate in the ordinary course of the trade or business of the Company"

(*id.*, ¶ 4.4[a]). Caporuscio also emphasizes that a majority of the interest in Keste Group (i.e., his vote) is required to make decisions requiring a vote of the Members, unless a greater percentage is specifically required (*id.*, ¶ 4.4 [c]).

According to their arrangement under the Operating Agreement, Manzella was to perform certain bookkeeping functions for Keste. In March of 2013, Manzella took control of the restaurant's checkbook (SUMF, ¶ 31). She then refused to pay certain vendors, disrupting Keste's relationship with those suppliers, ruining Keste's credit with those suppliers, and causing Keste to have to pay for supplies COD (*id.*, ¶ 32). Manzella accused the vendor of Keste's point of sale (POS) system of helping Caporuscio get a kickback (*id.*, ¶ 36). Caporuscio fired Manzella for cause on April 19, 2013 (*id.*, ¶ 38). This litigation commenced a few days later. Manzella was reinstated in November of 2013, as provided for under the terms of the Consent Order.

On September 2, 2014, Manzella's attorney proposed a work schedule for her bookkeeping duties (*id.*, ¶ 48; e-mail attached as exhibit D to Carvelli Aff.). She was to work Tuesday, Wednesday, and Thursday from 9-12am (*id.*). Caporuscio states that she agreed to the schedule (*id.*, ¶ 49). Manzella now states that she never agreed to a "set weekly work-schedule" and "[m]ore to the point" she was never bound to a set schedule for *"an indefinite duration"* (emphasis in original) (Manzella Aff, ¶ 20). According to Caporuscio, when Manzella came in to work, her work was fraught with problems. For example, she intentionally reduced the hours worked of certain managerial employees (NYSCEF Doc. No. 229, ¶ 37; SUMF ¶47, NYSCEF Doc. No. 307). He explains that all employee time is tracked by the electronic POS system into which all employees clock in and out for every shift. Accordingly, hours worked at the establishment are not subject to subjective adjustment (*id.*). He states that Manzella incorrectly credited certain managerial employees for fewer hours than reflected in the POS system (*id.*). Manzella explains that she used a different setting in the POS system for entering employee time (hours and minutes) than that used by Maria Sessa (decimal) who according to Manzella, had "final submission authority" (Manzella Aff. ¶ 21). She adds that she was only allowed to make "draft" entries into the payroll system and that the entries she made were accurate. She maintains that any errors were the fault of others (*id.*, ¶¶ 21-24). Manzella does not explain why it was necessary for her to make any entries in the POS system given that all employees are required to login and logout on it. She adds that payroll for

managers is handled exclusively by Ms. Sessa (*id.*, ¶ 21). However, elsewhere she intimates that she altered entries to reduce hours worked when employees appeared to be stealing by "wrongfully increasing the number of hours they worked" (*id.*, ¶ 48).

Manzella also made public accusations that Keste's General Manager, Michele Vianello, stole cash, wine, and bicycles from Keste (SUMF., ¶¶ 53- 66). Caporuscio states that Manzella disapproved of him hiring Vianello and harassed and disparaged Vianello in an effort to force him out (NYSCEF Doc. No. 299 ¶ 43). Vianello denies Manzella's allegations (*see* NYSCEF Doc. No. 303, ¶¶ 9-14). Regarding the allegation of theft of cash and wine, Caporusio asked Manzella to provide him with evidence to support the charges. Manzella did not respond (SUMF ¶¶ 58-59). In this litigation, Manzella states that she acted within her authority (NYSCEF Doc. No. 310 ¶¶ 48-49). As to the allegation of theft of the bicycles, on or about March 9, 2015, Manzella accused Vianello of stealing Keste bicycles (SUMF ¶ 60). Manzella asserted that the bicycles were used to make deliveries for Don Antonio one evening, treated such use as a theft (Manzella Aff., ¶ 36), called the police, and had Vianello removed from the premises (SUMF ¶ 61). Caporuscio states that the bicycles were not stolen and that, as a result of Manzella's actions, he had to accompany "an angry Vianello" to the police station, where he explained that Keste is the subject of this litigation, that Manzella had no authority to fire management level employees, and that nothing was stolen (NYSCEF ¶ 47).

In November of 2014, Manzella started taking cash from Keste to make deposits, despite assignment of that responsibility to Vianello under the terms of the Consent Order (SUMF ¶¶ 44-45). On December 8, 2014, Manzella made an unauthorized withdrawal of $17,000 from Keste's operating account and used that money to pay her attorneys in this action (*id.*, ¶ 41- 42).

Caporuscio also asserts that Manzella paid herself a full salary but "failed and refused to adhere to [her three days per week] work schedule". Under the terms of the Consent Order, Manzella is "entitled to a gross salary of $280.00 per day, not to exceed $840.00 per week, for her services as an employee of Keste" (NYSCEF Doc. No. 296, ¶ 10). Caporuscio states that since at least December 2014, "there has not been a single week . . . in which Manzella put in three days of work - - and most often, she put in none" (NYSCEF Doc. No. 299, ¶ 49). Manzella does not dispute that she routinely took the maximum allowed salary while failing to invest the time. She states

simply that the Consent Order allowed her to be paid "$280.00 per day not to exceed $840.00 per week" and that she never "exceeded these permissible bounds" (NYSCEF Doc. No. 310, ¶ 50).

On February 10, 2015, Caporuscio loaned Keste money and deferred his salary in order to help Keste cover expenses (NYSCEF Doc. No. 299, ¶ 69- 70). He instructed Manzella to also defer her salary, but she declined and instead withdrew $1,680 on February 12 as compensation (*id.*, ¶¶ 71- 72). Caporuscio later designated his loan a capital contribution to Keste, and required Manzella to make a proportional capital contribution, pursuant to the terms of the Operating Agreement. She elected not to do so (*id.*, ¶¶ 74- 77).

In a supplemental affidavit dated July 8, 2015, Caporuscio recites events that he states occurred subsequent to the filing of this motion for summary judgment. He states that Manzella (1) has not appeared for work since April 22, 2015, but continues to withdraw money from the Keste bank account as compensation, (2) made surprise visits to the restaurant during which she berated employees and rearranged the artwork on Keste walls and (3) "verbally assaulted" Caporuscio in front of the staff, including accusing him of being a "thief" (NYSCEF Doc. No. 325). Manzella has not responded to these assertions. At oral argument, her counsel urged that these claims not be considered because they involve events that are alleged to have occurred after the motion for summary judgment was filed on May 5, 2015.

III. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "'[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

IV. The Arguments and Discussion

A. Manzella's Argument that Additional Discovery is Needed

Manzella argues that the motion should be denied as discovery was not complete and depositions had not been taken (as of June 2, 2015). However, she fails to state what, if any, facts remain unavailable to her so as to justify denial of the motion under CPLR 3212(f). In any event, the defense is moot because the Note of Issue was filed on September 4, 2015 (*see* NYSCEF Doc. No. 329).

B. First Counterclaim - Breach of Contract

The elements of a breach of contract claim "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Defendants claim Manzella breached the Operating Agreement by: (1) making an unauthorized withdrawal of $17,500 from Keste and using that money to pay her personal legal expenses; (2) taking cash from the Keste register to make the daily deposits, despite Caporuscio's

instructions to the contrary; (3) under-reporting employee hours into the payroll system; (4) failing to stick to the negotiated work schedule; (5) taking a salary for days not worked; (6) harassing and attempting to fire Vianello; and (7) failing to make the required capital contribution (Memo at 23, NYSCEF Doc No. 293, p. 23). Defendants claim that each of those actions is a breach of paragraphs 4.1, 4.4(a), and 4.4(c) of the Operating Agreement. Defendants also maintain that the April 9, 2014, Contempt Order is evidence that the court has already determined Manzella's actions to be inappropriate.

Manzella responds that the Contempt Order found only conditional contempt, which was cured, and therefore there is no finding of contempt (Opp at 2; NYSCEF Doc. No. 323). She adds that Caporuscio fails to show that he suffered damages as a result of the alleged breaches (*id.* at 3). She also disputes "that her actions [related to Keste] extended beyond her permissible capacity" (*id.*). Manzella maintains that she "has supplied overwhelming amounts of evidentary proof throughout this litigation, which is also reproduced herein and in the annexed documents that ultimately are sufficient in defeating Defendant's summary judgment motion" (*id.* at 4). She has not identified any specific facts to support her position.

It is undisputed that the Operating Agreement is a binding contract between the parties. As to the second element, Manzella argues that Caporuscio failed "to demonstrate . . . how Defendant has performed in accordance with the Consent Order or the Operating Agreement himself" (*id.* at 3). However, the Rule 19-a Statement describes actions taken by Caporuscio in managing Keste, apparently in compliance with the Operating Agreement.

Although the issue is not before the court on this motion, Manzella asserts that Caporucio, breached the terms of the Operating Agreement. Any purported breach of contract by Caporucio will not excuse Manzella's breach. In any event, Manzella has not identified evidence sufficient to create a disputed issue of material fact as to whether Caporuscio performed in accordance with the Operating Agreement. While Manzella claims Caporuscio misappropriated funds and improperly intermingled the funds and employees from Keste and his other restaurant, Don Antonio, the only evidence she provides is certain invoices for transportation by taxi between Don Antonio and Keste including transportation of dough, bread, and prosciutto to Keste (Manzella Aff, ¶ 57-58; NYSCEF Doc. No. 310). This appears to be evidence of Caporuscio using available resources to help Keste,

not to divert resources from it. It does not support a conclusion that Caporuscio failed to perform under the terms of the Operating Agreement. Nor is it evidence that "Caporuscio continues to intermingle . . . funds and employees" (*id.* ¶ 58). Manzella also claims that Caporuscio edited the work hours and raised the pay of his daughter who works at both Keste and Don Antonio (*id.*, ¶ 62-65). As evidence, Manzella provides marginally legible payroll reports which she alleges show that Georgia Caporuscio worked approximately 36.54 hours over the represented period and received gross pay of $3,645 for that time (approximately $100/hour, when her pay was $21/hour) (NYSCEF Doc. No. 318). Manzella interprets this as evidence someone fraudulently altered the payroll (Manzella Aff., ¶ 67; NYSCEF Doc. No. 310). Manzella does not, however, explain how this is proof of a deception or would constitute a breach of the terms of the Operating Agreement.

As to damages, defendants allege (and Manzella does not dispute) that, due to Manzella's actions in dealing with vendors, Keste was no longer able to purchase certain supplies on credit. Caporuscio has shown that Manzella took pay for days she did not work and refused to return the funds to Keste (SUMF ¶¶ 72-73). These facts are sufficient to show damages.

Defendants argue, in conclusory fashion, that Manzella's actions breached sections 4.1, 4.4(a) and 4.4(c) of the Operating Agreement (Memo at 23). Section 4.1 describes how Keste will be controlled and prohibits Members, acting in their capacity as Members, from binding the company. The parties share responsibility for day-to-day operations. Other issues, as well as disputes between them, are to be decided by the vote of a majority of the interest. Section 4.4(a) of the Operating Agreement provides that on matters requiring the consent of the Members, a majority vote of the Members is needed. The section further states that any violation makes the acting Member responsible for any loss suffered by Keste, and obligates the Member to indemnify Keste for that injury. In any event, none of the actions complained of were taken by Manzella solely in her capacity as a Member of Keste. The actions taken by Manzella were taken in her capacity as a manager. Moreover, there is no claim that Manzella refused a demand by Keste that she indemnify it for damages caused by any unauthorized action taken as a Member. Section 4.4(c) merely states that a vote of the majority interest is required to act on matters requiring consent of the Members, unless the Operating Agreement requires a higher percentage of the membership interest. The conduct alleged by defendants does not breach any of these sections of the Operating Agreement.

Defendants also argue that Manzella's failure to make a capital contribution violates paragraphs 3.3 and 4.2(a) of the Operating Agreement (Reply at 13). Those paragraphs provide the majority Members of Keste with the authority to make a capital call (paragraph 4.2[a]), and prohibit the making of a contribution without the consent of a majority of the Members (paragraph 3.3). None of the remedies defendants seek here flow from a breach of this obligation.

The motion for summary judgment as to the first counterclaim (for breach of contract) must be denied.

C. Counterclaim Two- Breach of Fiduciary Duty

In order to establish a breach of fiduciary duty, plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Pokoik v Pokoik,* 115 AD3d 428 [1st Dept 2014]). A fiduciary relationship is grounded in a higher level of trust than exists between those engaged in arms-length transactions in the marketplace (*Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584 [2012]). A fiduciary is "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v Salmon*, 249 NY 458 [1928]). The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]). The parties do not dispute that they shared a fiduciary relationship. Additionally, as an employee, Manzella owes a fiduciary duty and a duty of loyalty to Keste (*see Duane Jones Co. v Burke*, 306 N.Y. 172 [1954]).

Defendants argue that Manzella breached her fiduciary duty by (1) taking money from Keste without authorization for her personal expenses; (2) paying herself a salary for work she did not perform; (3) publicly and falsely accusing Caporuscio of fraud and of obtaining illegal kickbacks; (4) improperly lowering employees' reported work hours; (5) removing cash from Keste which was needed for petty expenses and to tip out the staff; (6) overdrawing Keste's accounts and leaving Caporuscio to provide the money to cover her errors; (7) refusing to make a required capital contribution; and (8) making reckless accusations of criminal conduct against Keste's manager, Vianello, and trying to fire him (Memo at 26).

It is undisputed that Manzella took $17,500 from Keste and used those funds for a personal purpose. She subsequently repaid the money after being directed to do so by the court. The court determined that the withdrawal was unauthorized and that Manzella had "assum[ed] authority that is inconsistent with the allocation of authority set forth in the Consent Order" (Order at 1). Taking money to which one is not entitled from ones principal is a breach of fiduciary duty.

Manzella also withdrew funds from Keste to pay herself for work she did not perform (SUMF ¶¶ 72-73; NYSCEF Doc. No. 307). Specifically, the Consent Order provides for Manzella to be paid "a gross salary of $280.00 a day, not to exceed $840.00 gross per week, *for her services as an employee*" (emphasis added) (Consent Order, NYSCEF Doc. No. 296, ¶ 10). Thus, she is entitled to be paid at the rate of $280.00 per day for services performed. She is not entitled to take $840.00 per week in compensation when she elects not to show up for work. If, in any given week, she works one day, she would be entitled to be paid $280.00 for that days work, not $840.00. It is undisputed that Manzella paid herself the maximum permitted salary per week over substantial periods during which she performed no work (NYSCEF Doc. No. 299 ¶¶ 48-51; and 310 ¶ 50).

Manzella also engaged in other self-interested conduct that, while negligent or even reckless, does not rise to a level sufficient to support a breach of fiduciary duty finding as to Keste, but may constitute "cause" for termination of employment. Such conduct includes (1) slanderous accusations, (2) verbal abuse of employees, (3) refusal to follow reasonable directions of Caporuscio and (4) failure to properly execute bookkeeping responsibilities.[2]

That branch of defendant's motion addressed to the second counterclaim (for breach of fiduciary duty) will be granted.

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[2] There is no claim for breach of fiduciary duty when it is based on the same facts and theories as a breach of contract claim (*see William Kaufman Org. Ltd. v Graham & James LLP*, 269 AD2d 171 [1st Dept 2000]). The conduct described in this section of the Decision and Order clearly constitute a breach of Manzella's oral contract of employment with Keste. However, defendant Keste neither pleaded nor argued the point. Accordingly, the motion is being decided on the basis of the second counterclaim for breach of fiduciary duty to Keste (*see Littman v Magee*, 54 AD3d 14 [1st Dept 2008]). As majority unit holder, Caporuscio is authorized to act on behalf of the company consistent with his fiduciary responsibilities to his partner.

D. Counterclaim Three- Breach of Covenant of Good Faith and Fair Dealing

As to the third counterclaim, for breach of the implied covenant of good faith and fair dealing, defendants assert that "[f]or all of the reasons that supports defendant's breach of contract claims, and because there exists a valid and enforceable contract . . . , Caporuscio is entitled to summary judgment on the . . . conterclaim for breach of the covenant of good faith and fair dealing against plaintiff as a matter of law" (Memo at 24; NYSCEF Doc. No. 293). The assertion itself establishes that the motion for summary judgment as to the third counterclaim must be denied and that claim dismissed (*see Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588 [1st Dept 2011][dismissing claim for breach of implied covenant of good faith and fair dealing which arose from the same facts and sought identical damages, as duplicative of the contract claim]; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]["claim that defendant breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach of contract claim, as both arise from the same facts"]).

IV. Remedy

Manzella maintains that Caporuscio refuses to share responsibilities in the operations of the restaurant with her "despite the unambiguous directives of the Consent Order" and of section 4.1 of the Operating Agreement. She asserts that he has effectively stripped her of all responsibilities, including bookkeeping responsibilities, by hiring outside consultants to perform the bookkeeping function, and that the charges against her are false and are intended to freeze her out of her ownership role in the company.

The provision of the Consent Order that gives her identified "non-exclusive responsibilities with respect to Keste's day-to-day operations" (NYSCEF Doc. No. 296, ¶ 8) is not a license for Manzella assume executive authority to police the enterprise, to withdraw funds for private purposes or to discharge employees. The Consent Order states clearly that as the holder of the majority interest of the members of Kreste, Caporuscio is vested with the "management and control of Kreste" (*id.*, ¶ 2). Although the two Members "share primary responsibility for the day-to-day operations of Kreste" and are expected to "cooperate with one another and act in good faith in executing their joint responsibilities for Kreste's day-to-day operations . . . should Caporuscio and Manzella be unable to agree, . . . then . . . Caporuscio's majority interest *shall control* . . ." (emphasis added) *(id.)*.

The present record does not support a conclusion that Manzella is being frozen out of her responsibilities. In any event, no freeze-out claim is before the court on this motion.

Manzella's unwillingness to accept Caporuscio as the person clothe with management and control of the enterprise, including authority to set reasonable work-schedules for all employees, lies at the base of this dispute. His authority to make employment decisions in the best interest of the company should be recognized.

Because defendant's second counterclaim must be granted, Caporuscio's request that the Consent Order be modified and that Keste be allowed to terminate Manzella's employment, remove her as the bookkeeper, and that she be restricted to "read-only" access to Keste's books will be granted. The Operating Agreement gives Caporuscio, as majority Member, the power to terminate employees, including Manzella, for cause. It is undisputed that Manzella draws a salary over Caporuscio's objection without performing her bookkeeping duties. Additionally, she has been found to have misappropriated Keste funds. Further, she has repeatedly engaged in seriously disruptive activity at the restaurant, activity which is harmful to the business.

On such evidence, Keste, through its majority Member, has ample ground to discharge Manzella from her employment. Nothing in either the Operating Agreement, or arguably the Consent Order, prohibits the company from terminating an employee for cause. The Consent Order will be amended to make this clear. However, termination of employment does not oust Manzella of her rights as a Member of Keste, including rights to distributions and information concerning company affairs.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is GRANTED to the extent that the second counterclaim, for breach of fiduciary duty is granted, and is DENIED as to the first counterclaim for breach of contract and the third counterclaim for breach of the implied covenant of good faith and fair dealing; and it is further

ORDERED that the preliminary injunction dated November 22, 2013 (also referred to herein as the "Consent Order" is hereby MODIFIED

A. to add to ¶ 3 at the end the words "except that nothing herein shall bar Keste from terminating any employee for cause";

B. to insert at ¶ 8 following the phrase "For purposes of this Consent Order" the words "and for so long as Manzella is employed by Keste"; and

C. to add to ¶ 15 at the end the words "except that if either party shall cease to be an employee of Keste, access of said former employee shall be limited to the company's financial books and records and shall be on a "read-only" basis; and it is further

ORDERED that within ten days of the date of this Decision and Order, Caporuscio shall present a proposed amended Consent Order which incorporates the indicated modifications; and it is further

ORDERED that counsel shall appear at a status conference to schedule further procedures for resolution of the case at Part 49 on Tuesday, November 10, 2015 at 9:30 am.

This constitutes the decision and order of the court.

DATED: October 6, 2015

E N T E R,

O. PETER SHERWOOD
J.S.C.