

Ganzi v Ganzi

2016 NY Slip Op 33099(U)

February 11, 2016

Supreme Court, New York County

Docket Number: 653074/2012

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JEFFREY K. OING
J.S.C.

PART 48

Index Number : 653074/2012
GANZI, GARY C
vs
GANZI, JR., WALTER
Sequence Number : 005
PARTIAL SUMMARY JUDGEMENT

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). _____

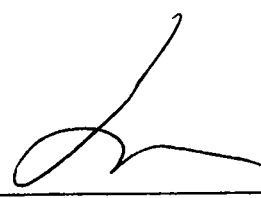
Replying Affidavits _____ | No(s). _____

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

"This motion is decided in accordance with the annexed decision and order of the Court."

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

Dated: 2/15/16


_____, J.S.C.
JEFFREY K. OING
J.S.C.

- 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: COMMERCIAL PART 48

-----x

GARY GANZI, CLAIRE BREEN, and GARY GANZI
and CLAIRE BREEN, as Attorneys-in-Fact
for the ESTATE OF CHARLES COOK,
Individually and Derivatively on Behalf
of Nominal Defendants JUST ONE MORE
RESTAURANT CORPORATION and JUST MORE
HOLDING CORPORATION,

Plaintiffs,

-against-

WALTER GANZI, JR. and BRUCE BOZZI, SR.,

Defendants,
and

JUST ONE MORE RESTAURANT
CORPORATION, a New York corporation,
and JUST ONE MORE HOLDING CORPORATION,
a New York corporation,

Nominal Defendants.

-----x

JEFFREY K. OING, J.:

Mtn Seq. No. 005

Defendants Walter Ganzi, Jr. ("Wally") and Bruce E. Bozzi, Sr. ("Bruce") move, pursuant to CPLR 3212, for summary judgment against plaintiffs Gary Ganzi ("Gary"), Claire Breen ("Claire"), and Gary Ganzi and Claire Breen on behalf of the Estate of Charles Cook ("Cook Estate") as to the first, fourth, fifth, eighth, and tenth causes of action.

Mtn Seq. No. 006

Wally and Bruce move, pursuant to CPLR 3025(b) and 3211, for leave to amend their answer, and for dismissal of the first and fourth causes of action.

Index No. 653074/2012

Mtn Seq. Nos. 005 & 006

DECISION AND ORDER

Motion sequence numbers 005 and 006 are consolidated for disposition.

Background

Plaintiffs bring this action individually and derivatively for the benefit of nominal defendants Just One More Restaurant Corporation ("JOMR") and Just One More Holding Corporation ("JOMH") against Wally and Bruce, the majority shareholders and managers of JOMR and JOMH (Complaint, ¶ 1).

Plaintiffs and defendants -- shareholders of JOMR and JOMH -- inherited, were gifted, or purchased their respective shares from family members. Gary and Claire share ownership of 10% of the shares of capital stock of JOMR and 16 2/3% of the shares of capital stock of JOMH. The Cook Estate owns the same amounts (Id., ¶¶ 11-12). Wally owns 30% of the shares of JOMR and 16 2/3% of the shares of JOMH. Bruce owns 50% of the shares of JOMR and 50% of the shares of JOMH. Wally and Bruce are co-chairmen and co-owners of Palm Management Corporation ("PMC") (Id., ¶¶ 13-14).

JOMR owns the world-famous Palm Restaurant ("Palm Restaurant" or "Palm"), founded in 1926 by Pio Bozzi, Bruce's grandfather, and John Ganzi, the grandfather of Wally, Gary, Claire, and the late Charles Cook (Id., ¶ 18). JOMR owns all of the intellectual property for the Palm Restaurant, consisting of a series of trademarks and service marks, design elements of the Palm Restaurant, such as its menu, food quality choices and

methods of preparation, and its decor, the display of certain photographs, artistic caricatures, sketches, cartoons, and other elements (collectively, "Palm IP") (Id., ¶ 3).

Defendants own and operate corporate entities throughout the United States established to operate Palm restaurants ("Secondary Palm Corporations") (Id., ¶ 20). Assisted by Palm chief financial officer James Longo ("Longo"), defendants have, on behalf of JOMR, allegedly entered into self-dealing licensing agreements with these Secondary Palm Corporations, by licensing the Palm IP for well below fair market value (Id., ¶ 21). This purported diversion of revenue has been occurring to some degree for four decades (Id., ¶ 23).

In managing the original Palm Restaurant, plaintiffs claim that defendants have established a pattern of neglect, justified only by their intent to divert revenue away from JOMR and plaintiffs (Id., ¶ 29). Also, defendants have allegedly diverted revenue away from JOMR and plaintiffs, by reducing the operating hours of the Palm Restaurant in favor of Palm Too, a Secondary Palm Restaurant that defendants own, located across the street from the Palm Restaurant (Id., ¶ 30).

Defendants executed a license agreement on January 1, 2007 between JOMR and PMC, owned by defendants, granting PMC the right to exploit the Palm IP for retail sales, at a flat-rate annual license fee priced far below the fair market value for these famous marks (Id., ¶ 31). PMC licensed the Palm IP for retail

goods to the "TJX Companies" for the manufacture, distribution, and sale of retail merchandise in "Home Goods" and "Marshalls" stores at licensing rates purportedly below fair market value (Id., ¶ 33). Plaintiffs assert that flat rate license agreements are well outside the standard practice in the restaurant industry, particularly in the case of famous marks, such as the Palm IP. According to plaintiffs' allegations, industry custom has licensees pay at least 4-6% of gross sales revenues for the use of famous restaurant intellectual property, including trademarks, service marks, menu, and concept (Id., ¶ 24).

JOMH owns real property at 837 Second Avenue in Manhattan, which includes space for a restaurant and offices. JOMH leases the premises to JOMR for the operation of the Palm Restaurant. The lease, arranged by defendants, allegedly undervalues the usage of the premises, causing less than fair market rental income to flow to JOMH (Id., ¶ 38).

Plaintiffs allege further that they brought their complaints to defendants' attention, and attempted to remedy these problems, but their demands have gone unheeded. Any further demand would be futile, because the boards of JOMR and JOMH, controlled by defendants, are incapable of making independent and disinterested decisions to prosecute this action, and because defendants have not meaningfully addressed plaintiffs' previous demands (Id., ¶ 43).

The complaint contains 10 causes of action, brought in an individual capacity unless noted otherwise, for: (1) breach of fiduciary duty by executing self-dealing agreements with Secondary Palm Restaurants, derivatively on behalf of JOMR; (2) breach of fiduciary duty by charging the TJX Companies and other third parties below market value royalty rates, derivatively on behalf of JOMR; (3) breach of fiduciary duty by undervaluing real estate, derivatively on behalf of JOMH; (4) diversion of corporate opportunity, derivatively on behalf of JOMR; (5) breach of fiduciary duty, by executing self-dealing agreements with Secondary Palm Restaurants; (6) breach of fiduciary duty, by charging third parties below market value royalty rates; (7) breach of fiduciary duty, by undervaluing real estate; (8) oppression of minority shareholders of JOMR; (9) oppression of minority shareholders of JOMH; and (10) unjust enrichment.

Plaintiffs seek monetary damages; reformation of all complained about license agreements; disgorgement by defendants and distribution to JOMR of all monies received as a result of the diversion of corporate opportunity, abuse of the Palm IP, and mismanagement of the Palm Restaurant; dissolution of JOMR; and a fair distribution of JOMR's assets.

In support of their motions, defendants argue that: (1) plaintiffs lack standing to challenge the restaurant licenses as direct claims; (2) plaintiffs' derivative claims relating to the restaurant licenses are barred by the statute of limitations and

laches; (3) the court should grant them leave to file a second amended answer; and (4) the court should dismiss plaintiffs' first and fourth causes of action for lack of derivative standing insofar as they are based on the license agreements between JOMR and the pre-1995 "New Palms." Defendants define the New Palms as the restaurants that Bruce and Wally began to open throughout the United States in the early 1970's (defendants' Mem. in Support at 1).

Discussion

Mtn Seq. No. 005

1. Individual v Derivative Capacity

Defendants argue that the fifth, eighth, and tenth causes of action should be dismissed because they were brought individually when they should have been brought derivatively.

The fifth cause of action alleges that defendants -- majority and controlling shareholders in, and managers of, JOMR -- breached their fiduciary duties to plaintiffs by engaging in self-dealing to license the Palm IP to corporations that they control for below fair market value. Although this cause of action purports to allege that plaintiffs were directly harmed, in effect, the harm is alleged to be directly to the corporation, and indirectly to plaintiffs. It alleges that plaintiffs "have been damaged by the diversion of revenues from JOMR as a result of JOMR's receiving a fraction of the fair market value of the

revenues generated by the Individual Defendants' exploitation of the Palm IP" (Complaint, ¶ 80).

"A plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to him or herself individually" (Yudell v Gilbert, 99 AD3d 108, 113 [1st Dept 2012]). In Yudell, the First Department stated that "[s]ometimes whether the nature of the claim is direct or derivative is not readily apparent" and that "New York does not have a clearly articulated test" (Id.). Nevertheless, the First Department provided an example of a derivative claim where "shareholders suffer solely through depreciation in the value of their stock ... even if the diminution in value derives from a breach of fiduciary duty" (Id. at 113-114, citing Hahn v Stewart, 5 AD3d 285, 286 [1st Dept 2004]). As described, supra, this situation is analogous to the alleged harm to plaintiffs set forth in the fifth cause of action.

The eighth cause of action alleges that defendants "exercise complete control over JOMR, to the exclusion of minority shareholders" (Complaint, ¶ 102). It alleges further that defendants defeated plaintiffs' expectations that they would share in the corporate earnings. Allegedly, defendants did so through "below fair market value transactions with corporations that the Individual Defendants own and operate to deprive JOMR of

reasonable royalty revenue from the exploitation of the Palm IP, thus depressing corporate earnings depriving Plaintiffs, the minority shareholders of JOMR, of the reasonable value of their shares in JOMR" (Id., ¶¶ 103-104). "[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (Abrams v Donati, 66 NY2d 951, 953 [1985], rearg denied 67 NY2d 758 [1986]).

As with the fifth cause of action, this cause of action alleges a direct wrong to the corporation, and indirect wrong to plaintiffs. This point is demonstrated by the assertion that plaintiffs "have been damaged by the depression of the value of their ownership interests in JOMR and by the failure of JOMR to realize reasonable revenue from the exploitation of the Palm IP" (Id., ¶ 105). Although plaintiffs also use terms such as "excluded" and "abuse of minority shareholders of JOMR," there are no specific allegations as to direct wrongs to plaintiffs that would otherwise make an individual claim, rather than a derivative claim, viable (cf. Gjuraj v Uplift El. Corp., 110 AD3d 540, 540 [1st Dept 2013] [the plaintiff, a 15% minority shareholder, had standing to bring his breach of fiduciary duty claims as direct causes of action because the "defendants' freezing him out of the corporation and failing to pay him his

share of the profits harmed him individually, and he would receive the benefit of any recovery"])).

The same is true for the tenth cause of action. It alleges that defendants "constructed transactions and agreements by and between JOMR and third-parties purposely to exclude Plaintiffs from their rightful share of the proceeds from the exploitation of the Palm IP" (Complaint, ¶ 115). Allegedly, defendants used "PMC to license the Palm IP, after executing the flat royalty agreement between JOMR and PMC," thereby enriching themselves" (Id.). Use of the terms "at the direct expense of Plaintiffs" does not alter the clear, derivative nature of the cause of action. Although plaintiffs allege that defendants "executed flat fee license agreements ... to exploit the Palm IP without paying Plaintiffs their fair share of the proceeds from such exploitation," the complaint does not allege that defendants did not pay monies to which plaintiffs were entitled; only that if the corporation earned more from the licenses, plaintiffs, in turn, as shareholders, would have received more than they had received.

Accordingly, that branch of defendants' motion for summary judgment dismissing the fifth, eighth, and tenth causes of action on the ground that they are derivative and not individual claims is granted and they are hereby dismissed.

2. Statute of Limitations

Defendants seek dismissal of the first and fourth causes of action on the ground of the statute of limitations, and dismissal of the first and fifth causes of action on the ground of laches. As for the fifth cause of action, the issue is academic because it is dismissed on another ground, supra. For the reasons that follow, that branch of the motion is denied.

To begin, there is a plethora of factual issues as to when the licensing agreements complained of were entered into, as well as prejudice pertaining to the defense of laches.

Turning to the first cause of action, brought derivatively on behalf of JOMR, it alleges that defendants have breached their fiduciary duties owed to JOMR by engaging in self-dealing to license the Palm IP to corporations that defendants control for below fair market value (Complaint, ¶ 48). Allegedly, JOMR has been damaged by receiving less than its fair share of royalties arising from the exploitation of the Palm IP, since January 1, 2010, when these self-dealing license agreements went into effect, and likely received even less in royalties prior to the execution of these agreements (Id., ¶ 52).

The fourth cause of action alleges that by executing the "Master License Agreement" between PMC and JOMR for a flat annual royalty defendants diverted opportunity and revenue away from JOMR for their own benefit (Id., ¶ 71). Similarly, defendants

allegedly diverted opportunity and revenue away from JOMR by creating the Secondary Palm Corporations, and executing flat rate license agreements between them and JOMR for the use of the Palm IP, and by reducing the operating hours of the Palm Restaurant in favor of the Palm Too, a Secondary Palm Restaurant owned and operated by defendants across the street from the Palm Restaurant (Id., ¶ 74).

"New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks" (IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139, rearg denied 12 NY3d 889 [2009]). "Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214(4), which has a three-year limitations period" (Id.). "Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies" (Id.). A derivative action based on breach of fiduciary duty that is "equitable in nature" has a six-year statute of limitations (Otto v Otto, 110 AD3d 620, 621 [1st Dept 2013]).

The parties agree that a six-year statute of limitations applies. This Court concurs. As noted, supra, for "breach of fiduciary duty claims, the choice of the applicable limitations

period depends on the substantive remedy that the plaintiff seeks" (Access Point Med., LLC v Mandell, 106 AD3d 40, 43 [1st Dept 2013] [internal quotation marks and citation omitted]).

Here, plaintiffs seek hybrid relief -- monetary damages and equitable relief such as: reformation of all complained about license agreements; disgorgement by defendants and distribution to JOMR of all monies received as a result of the alleged diversion of corporate opportunity, abuse of the Palm IP, and mismanagement of the Palm Restaurant; dissolution of JOMR; and a fair distribution of JOMR's assets. Thus, the primary relief sought is equitable because there are as of yet no monetary damages. Equitable relief is required (e.g., reformation) to ascertain the monetary liability, if any.

This action is based on licenses that were allegedly entered into at various periods of time. As for the license agreements allegedly entered into in 2010, if, indeed, they were entered into at that time, the action as to them, commenced in 2012, would be timely. Whether they were actually entered into in 2010 remains a material issue of fact. On this basis alone, the motion to dismiss on the ground of the statute of limitations is denied.

Plaintiffs argue that every Palm restaurant that defendants personally owned executed a signed license agreement with JOMR (Joshua D. Rievman Affirm., dated August 29, 2014 [Rievman

Affirm.], Ex. A). They aver that there are 25 new, fully-executed licenses, dated as of July 1, 2010. In each, defendants' personally owned restaurant agreed to pay JOMR at the 1972 flat rate of \$6,000 per year for use of JOMR's intellectual property, including the Palm name and trademarks (See e.g. id. at PALM_00000072). They aver further that each of the 2010 licenses renewed, updated, and replaced a nearly-identical earlier license. Moreover, each license agreement acknowledges that "Licensor and Licensee ... desire to enter into a new License Agreement under the terms and conditions herein set forth" (See e.g. id. at PALM_00000070). Furthermore, each 2010 license has a merger clause, stipulating that "this Agreement contains all of the terms and conditions agreed upon by the parties hereto and no promises or representations have been made other than as herein set shall be valid unless made in writing executed by an authorized officer of the Licensee and Licensor" (See e.g. id. at PALM_00000077).

Defendants contend that these purported 2010 license agreements are irrelevant, because, they claim, there is no dispute that these writings were never intended to be new, valid agreements. Defendants contend that, in discovery, the parties learned that these writings were created in 2011 by PMC's chief financial officer, James Longo, "in a misguided attempt to respond to a request by Plaintiffs' counsel for copies of the

Restaurant Licenses. ... Mr. Longo never intended for either JOMR or the New Palms to enter into new license agreements ... nor was he authorized to do so" (Defendants' Mem. in Support at 19-20). Defendants contend further that plaintiffs expressly declined to contend that these writings are valid agreements, citing "Kenter Declaration," exhibit 94 (Plaintiffs' responses and objections to defendants' first set of interrogatories and requests for admissions, at pp. 4-5).

Plaintiffs dispute the assertion that the licenses are not valid agreements entered into in 2010. They contend that, in 2011, Longo represented in writing to counsel for Charles Ganzi's estate that the challenged documents are the applicable license agreements for each of defendants' personally owned Palm restaurants (Rievman Affirm., Ex. A, at PALM_00000069 [cover letter accompanying licenses]). Although the cover letter cited does not expressly state this point, it does indicate that these are valid agreements. Plaintiffs also aver that the 2010 licenses are business records of JOMR and defendants' personally owned restaurants, and they were produced in discovery in this litigation.

Plaintiffs' assertion is meritorious, and not convincingly controverted. The argument by defendants -- that the purported 2010 license agreements are not enforceable -- raises material issues of fact. The reference to Kenter Declaration, exhibit 94

is unavailing, in that it does not establish that plaintiffs concede that the 2010 agreements are ineffective. Moreover, the assertion that no new alleged harm is alleged (see defendants' Reply Mem. at 7-8) is without merit. If the alleged 2010 agreements are indeed valid, then the alleged harm results from the agreements entered into at that time, albeit it mirrors the alleged harm resulting from earlier agreements.

Defendants also assert that the licenses for the New Palms opened before 1990 are reflected in written agreements between JOMR and that each of them, executed between 1972 and 1990, is more than six years before the filing of this action in August 2012. As for these license agreements, entered beyond the six-year statute of limitations period, plaintiffs' rely, in part, on the continuing wrong doctrine to toll the running of the statute. Plaintiffs' reliance is unavailing.

Plaintiffs argue that defendants' conduct in continuing to pay JOMR the "unfair and unreasonable" flat-fee royalty constitutes a continuing violation of their fiduciary duty so that a new cause of action accrues each time their personally owned restaurants pay the low flat-fee royalty. Plaintiffs cite Butler v Gibbons (173 AD2d 352, 353 [1st Dept 1991]) in support of this assertion.

In Butler, the plaintiff sought an accounting and appointment of a receiver based on allegations that the

defendant, a co-joint venturer and manager of the properties that the joint venture purchased, collected rents on the properties, but never accounted to the plaintiff for his share of the proceeds. The First Department found that the action was not time barred because defendant's "repeated and continuing failure to account and turn over proceeds earned from renting the properties since 1979" resulted in a "new cause of action ... accru[ing] each time defendant collected the rents and kept them to himself" (Id. at 353). Plaintiffs also cite Knobel v Shaw (90 AD3d 493 [1st Dept 2011]), which is similar, in that the defendant "had a 'recurring obligation' to pay plaintiff his 31% share of the profits generated by the properties at issue" (Id. at 494).

Plaintiffs' reliance on these cases is misplaced. In contrast, here the alleged wrong is the entering into the license agreements, not the payments made thereunder. The payments represent the consequences of the alleged wrongful act of entering into the license agreements, not the wrong itself (see Pike v New York Life Ins. Co., 72 AD3d 1043, 1048 [2d Dept 2010] [continuing wrong doctrine does not apply to toll the statutes of limitations; although the plaintiffs alleged that they were induced to purchase unsuitable policies, they did not show the occurrence of any specific wrong each time they paid a premium,

other than having to pay it. Any wrong accrued at the time of purchase of the policies, not upon payment of each premium]).

Plaintiffs also argue that the statute of limitations "on claims against a fiduciary for breach of its duty is tolled until such time as the fiduciary openly repudiates the role." They contend that as officers and controlling shareholders of JOMR defendants owe fiduciary duties to JOMR and the plaintiffs. They allege further that defendants have abused the fiduciary relationship, but they have not repudiated that relationship. As such, plaintiffs argue, the statute of limitations remains tolled.

Under the "fiduciary tolling rule, or open repudiation rule ... the statute of limitations on claims against a fiduciary for breach of its duty is tolled until such time as the fiduciary openly repudiates the role" (Access Point Med., LLC v Mandell, 106 AD3d at 44-45). The rationale for the rule is "to protect beneficiaries in the event of breaches of duty by fiduciaries," including corporate officers, "in circumstances in which the beneficiaries would otherwise have no reason to know that the fiduciary was no longer acting in that capacity. In those circumstances, it is appropriate to toll the limitations period until the beneficiary has reason to know that the fiduciary relationship has unequivocally ended" (Id. at 45). The doctrine applies to equitable claims, not to claims for money damages (Id.).

Defendants do not dispute that the tolling provision is applicable to the first and fourth causes of action to the extent that they do not seek monetary relief (see defendants' Reply Mem. at 4-5). On the first and fourth causes of action, plaintiffs seek, in addition to damages, reformation of all license agreements between JOMR and the Secondary Palm Corporations to reflect a proper, fair market royalty rate as a percentage of revenue.

As for the New Palms opened after 1990, defendants argue that the licenses do not appear to have been memorialized in writing, but that the agreements can be implied-in-fact from the conduct of JOMR and each of them, which supports the inference of a license to use the Palm IP on the same terms as the pre-1990 New Palms. The conduct is the payment to JOMR for the use of the Palm IP, which has been reflected in the general ledger, financial statements, and tax returns of both JOMR and the post-1990 New Palms. Defendants assert that the officers and directors of JOMR and the post-1990 New Palms, and the Palm employees responsible for managing the operations and finances of both, have always understood that they were using the Palm IP pursuant to the same license in effect between JOMR and the pre-1990 New Palms. Because all, except the "Tribeca Palm" and "London Palm," were opened more than six years prior to the filing of this action, defendants contend that the court should

dismiss the first and fourth causes of action with respect to the post-1990 New Palms as time-barred.

In opposition, plaintiffs argue that, as for defendants' purported oral license agreements, they violate the statute of frauds in that there were no written licenses for any of them. They argue that they are void as oral contracts "not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime" (citing General Obligations Law § 5-701[a][1]). This argument is in error.

The statute "applies to 'those contracts only which by their very terms have absolutely no possibility in fact and law of full performance within one year'" (Lichtman v Estrin, 282 AD2d 326, 328 [1st Dept 2001], quoting D & N Boening v Kirsch Beverages, 63 NY2d 449, 454 [1984]), which has not been shown to be the case here.

Nonetheless, plaintiffs allege that there are 28 license agreements between JOMR and each of the Palm restaurants that defendants personally owned that are purported to have been executed in 2004. As to these, plaintiffs contend, there are factual disputes concerning when they were actually executed. As an example, plaintiffs state that some could not have been signed in 2004, because at least one of the restaurants did not exist then. They contend that metadata on the 2004 licenses shows that the files were either created or last changed in November 2007.

In addition, plaintiffs argue the evidence in the record suggests that the 2004 licenses were actually created in November 2007, and backdated to January 1, 2004 in connection with a possible sale of the Palm restaurants being explored by defendants and Bear Stearns.

Defendants have not addressed these assertions. Hence, because of disputed issues of fact as to when the licenses were entered into, and the effect of tolling, that branch of the motion to dismiss the first and fourth causes of action on the ground of the statute of limitations is denied.

3. Laches

Defendants argue that the first and fifth causes of action (both for breach of fiduciary duty) are barred by laches. In their reply papers, however, defendants refer to the fourth cause of action (diversion of corporate opportunity), rather than the fifth. Because laches, as asserted against the fourth cause of action is first raised in the reply papers, this Court will not consider this defense as to this cause of action.

"Laches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity" (Matter of Barabash, 31 NY2d 76, 81 [internal quotation marks and citation omitted], rearg denied 31 NY2d 963 [1972]).

The four basic elements of laches are, (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant.

(Dwyer v Mazzola, 171 AD2d 726, 727 [2d Dept 1991]). "The affirmative defense of laches requires a showing of undue delay by a party in asserting its rights, as well as prejudice to the opposing party as a consequence of the delay" (Moreschi v DiPasquale, 58 AD3d 545, 545 [1st Dept 2009]). The defendant must "affirmatively show any change of position prejudicial" to it caused by the "alleged delay in instituting suit" (Matter of Barabash, 31 NY2d at 82, supra). "Prejudice may be demonstrated by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay" (Matter of Linker, 23 AD3d 186, 189 [1st Dept 2005] [internal quotation marks and citation omitted]).

Plaintiffs argue correctly that, generally, laches as a defense is unavailable to claims at law such as breach of fiduciary duty (first and fifth causes of action). The "defense of laches is unavailable in an action at law commenced within the period of limitation" (Matter of American Druggists' Ins. Co., 15 AD3d 268, 268 [1st Dept], lv dismissed 5 NY3d 746 [2005]; Republic Ins. Co. v Real Dev. Co., 161 AD2d 189, 190 [1st Dept 1990] ["equitable defense of laches is unavailable in this action

at law, where dispositive consideration must be given to the applicable Statute of Limitations"). "[D]erivative actions[, however,] have long been recognized in New York as equitable proceedings" (Horizon Asset Mgt., LLC v Duffy, 106 AD3d 594, 595 [1st Dept 2013]; Sakow v 633 Seafood Rest., Inc., 25 AD3d 418, 419 [1st Dept], lv denied 7 NY3d 701 [2006]). Thus, the laches defense can be asserted against the first cause of action which is brought derivatively. As for the fifth, brought in an individual capacity, as discussed, supra, that cause of action is dismissed because it should have been brought derivatively.

In support of this defense, defendants argue that permitting plaintiffs, as the families' successors-in-interest, to bring a claim that their parents and grandparents chose not to bring for 40 years would be extremely prejudicial to Wally and Bruce. They contend that every member of the Bozzi and Ganzi family who has owned shares of JOMR has known that Bruce and Wally were using the Palm IP to open New Palms, and that JOMR was not participating in the New Palms' success, as reflected in the communications they received of their share of JOMR's profit or loss. Yet, they allege, none objected, citing defendants' Statement of Undisputed Facts, ¶¶ 51-87 (see also Bruce Affirm., ¶ 8). Defendants argue that the only inference that a reasonable fact finder could draw from the evidence of the knowledge and conduct of plaintiffs' father, Charles Ganzi, is that he approved of the economic arrangement between JOMR and the New Palms. They

claim that his daughter, Claire, testified that Charles Ganzi always told his children that their family had no connection to the New Palms.

Defendants argue further that Wally and Bruce spent their entire adult lives cultivating the success of the New Palms based on this understanding. Bruce and Wally reasonably made important decisions bearing on the lifestyles of themselves and their families with the expectation that they would be the sole recipients of the New Palms' profits. They aver that plaintiffs seek to change radically that expectation after 40 years in which their predecessors-in-interest never took any steps to challenge it, and at a point in Wally's and Bruce's lives when it is no longer feasible to change course. Furthermore, if Bruce and Wally had known during the last 40 years that their families objected to the restaurant licenses, they could have renegotiated the licenses on terms that reflected the value of the Palm IP at that time. Bruce and Wally aver that they are prejudiced because no member of the Bozzi and Ganzi families who owned shares in JOMR when JOMR entered into the license agreements with the New Palms is still alive.

As emotionally charged as these contentions are, the problem with defendants' argument is that it presupposes that the only issue is the propriety of the entering into licenses 40 years ago. As discussed, supra, there are issues of fact as to when subsequent licenses were entered into. There are also factual

issues as to when plaintiffs learned of the circumstances complained of. According to Gary, when his father, Charles Ganzi, died in November 2010, all of his estate was willed to Gary's mother, who had suffered a debilitating stroke in June of 2004, leaving her physically and mentally incapacitated. Gary and Claire were designated co-executors, and he led the effort to value their father's estate, including the shares of JOMR and JOMH bequeathed to their mother. As part of his effort to value the JOMR shares that were part of the estate, he visited the website of the United States Patent and Trademark Office. To his surprise, he discovered for the first time that JOMR was the owner of more than 40 registered trademarks related to Palm, including the Palm name and logo (see Gary Aff., ¶ 79 and Ex. F [a listing of JOMR's trademark registrations, attached as exhibit A to the Master License Agreement between JOMR and PMC]).

Gary states that, in late 2010 and 2011, he contacted Wally seeking copies of any company agreements. After Charles Ganzi's death, Wally and Bruce provided no information on company by-laws, shareholders' agreements, shareholders' rights, no records of meetings, no valuation help, and no stock certificates. As of the date of the affidavit, plaintiffs had not been invited to any shareholders' meeting, and have not received stock certificates (Id., ¶ 80). Gary alleges further that plaintiffs later learned through discovery that JOMR, under Wally and Bruce's management, has not held shareholders' meetings

in decades, effectively denying their father, his aunt, Charles Cook, Claire, and him from having any knowledge of or input into JOMR's business (Id., ¶ 81).

Gary further alleges that neither defendant, nor JOMR's officers or directors, volunteered that there were agreements regarding the ownership or use of trademark or intellectual property. Gary states that he learned from "Victor," in April of 2011, that he "believed" an agreement existed, but he was not told of the terms (Id., ¶ 82). Charles Cook told him that there was one year while he was a shareholder when JOMR reported a profit, and he was required to pay taxes as an owner. JOMR made no distribution until Charles Cook complained, and got JOMR's management to distribute to him an amount equal to the taxes owed (Id., ¶ 83).

Then, in June 2011, counsel for his father's estate, Jeffrey Galant, and Gary spoke to Wally and James Longo. After this call, and a letter in which Galant requested copies of the license and other agreements, such agreements were finally provided to them (Id., ¶ 84). By letter dated June 10, 2011, Longo sent Galant a package of documents (see Rievman Affirm., Ex. A) (Id., ¶ 85). According to Gary, defendants did not provide any further information. On August 18, 2011, he states he and Claire were "forced" to bring a "Petition to Discovery [sic] Property, Compel Information, and Comply with the Direction of the Court" pursuant to Surrogate's Court Procedure Act §

2103, against Wally, Bruce, JOMR, JOMH, PMC, and James Longo (SCPA 2103 Petition) (Id., ¶ 86). On September 19, 2011 after attempting to formally serve the respondents with the SCPA 2103 Petition he emailed back-up copies of the petition and all exhibits to Wally. After Wally reviewed the emails, he called both Claire and Gary threatening to have Gary jailed for exercising their right to bring the SCPA 2103 Petition. . . . Eventually, Wally agreed to provide needed information, and they agreed to dismiss the SCPA 2103 Petition in reliance on his promise (Id., ¶ 88). Not until a meeting with Wally and Longo in Boston in January 2012, did Gary finally receive enough information to file the estate tax returns. Based on this incomplete information, the value of this 10% interest in JOMR was estimated, as impaired by the below-market royalties, at \$3.6 million in the IRS filings, and it was noted that there was an unresolved dispute as to the actual value (Id., ¶ 90).

Gary alleges further that subsequent to the January 2012 meeting, and after the IRS filings for his father's estate, he engaged Wally in a dialogue about the misuse of JOMR's intellectual property, seeking to have Wally and Bruce's other Palms pay a reasonable, fair royalty to JOMR for their use of JOMR's intellectual property (Id., ¶ 91). Wally involved Victor in the conversations, which deteriorated by the beginning of the summer of 2012. In the course of those conversations, Wally and Victor told Gary that even if JOMR were to earn a

reasonable and fair royalty for the exploitation of its intellectual property, none of that money would ever reach his father's estate, Claire, Cook Estate, or him. With a only a single share owned by his father's estate, and ultimately owned jointly by Claire and him, they had no ability to influence or require JOMR's management -- Wally and Bruce -- to disburse those royalty earnings equitably (Id., ¶ 92). What is evident from the foregoing conflicting allegations is that defendants have not demonstrated on this record their entitlement to summary judgment on the ground of laches.

Accordingly, that branch of defendants' motion to dismiss the first cause of action as barred by laches is denied. As to the motion's application to the fifth cause of action, it is rendered academic in light of the earlier dismissal, supra.

Mtn Seq. No. 006

Defendants seek to amend their answer to plead a new affirmative defense of lack of derivative standing insofar as it is based on the license agreements between JOMR and the pre-1995 New Palms. Defendants assert that the proposed second amended answer, although pleading a new affirmative defense of lack of derivative standing for the pre-1995 New Palms, is based on the same facts relating to the pre-1995 New Palms that underlie their existing affirmative defenses, and that these facts have already been thoroughly litigated.

As for the merits of the defense, defendants argue that, pursuant to section 626 of the Business Corporation Law ("BCL"), plaintiffs do not have standing to bring a derivative claim, because they do not have continuous ownership of stock in the corporations at issue from the time of the allegedly wrongful transactions and through the filing of the action.

In opposition, plaintiffs argue that they satisfy the continuous ownership rule. They also contend that defendants' motion is procedurally defective because it is untimely, and that defendants have waived any derivative standing defense.

"Business Corporation Law § 626(b) mandates that shareholders instituting a derivative action must demonstrate that they owned stock both when the lawsuit was brought and at the time of the transaction(s) of which they complain" (Pessin v Chris-Craft Indus., 181 AD2d 66, 70 (1st Dept 1992)). Defendants argue that none of the plaintiffs held shares in JOMR prior to 1995 when JOMR began licensing the Palm IP to the Pre-1995 New Palms. Nor did any of the plaintiffs receive their shares "by operation of law" from a qualifying shareholder, i.e., a person who held shares in JOMR prior to 1995. Thus, they argue, to the extent that plaintiffs purport to bring the first and fourth causes of action on the allegedly wrongful licenses between JOMR and the Pre-1995 New Palms, none of them have standing to do so.

According to plaintiffs, they had received their stock by operation of law in compliance with BCL § 626(b). The Cook

Estate holds the JOMR stock owned by Charles Cook at his death in July 2012. Charles Cook had inherited his JOMR stock upon the death of his mother, Lorraine Ganzi Cook, in April 2003 (Rievman Affirm., February 13, 2014, ¶ 8). Gary and Claire received their JOMR stock following the death of their father, Charles Ganzi, in November 2010 (Id., ¶ 9). These assertions are uncontroverted.

"[W]here shares are acquired through a will or intestacy, they devolve by operation of law since neither the decedent nor recipient had any control over the death" (Pessin v Chris-Craft Indus., 181 AD2d at 71). Thus, there is no dispute that plaintiffs received their shares of stock in the relevant corporations by operation of law.

Nonetheless, defendants argue that the exception (receipt through operation of law) does not apply because Charles Ganzi and Lorraine Ganzi Cook received the JOMR stock as a gift from their mother, Adele Ganzi, in 1995 (Rievman Affirm., February 13, 2014, ¶ 10). This assertion, however, is inconsequential.

The critical issue is the manner in which plaintiffs herein acquired their shares of stock. That a gift occurred somewhere in the chain of ownership is irrelevant to the purposes sought to be accomplished by the rule. As stated by the Court of Appeals:

[o]wnership at the time of the alleged wrong, known as the contemporaneous ownership doctrine, originated in the Federal courts to preclude a shareholder from manufacturing diversity jurisdiction by transferring stock to a nonresident after a cause of action has accrued ... Later, the rule was adopted by State courts and Legislatures to prevent litigious persons from

buying stock for the purpose of bringing suit as to
alleged past mismanagement"

(Independent Inv. Protective League v Time, Inc., 50 NY2d 259,
263 [internal quotation marks and citations omitted], rearg
denied 50 NY2d 1059 [1980])). Such concerns are clearly not
present here.

Accordingly it is

ORDERED that defendants', Walter Ganzi, Jr. and Bruce E.
Bozzi, Sr., motion for summary judgment is granted to the extent
of dismissing the fifth, eighth, and tenth causes of action, and
denied as to the first and fourth causes of action (mtn seq. no.
005); and it is further

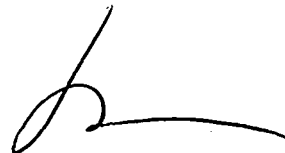
ORDERED that defendants', Walter Ganzi, Jr. and Bruce E.
Bozzi, Sr., motion for leave to amend their answer, and for
dismissal of the first and fourth causes of action is denied (mtn
seq. no. 006); and it is further

ORDERED that counsel shall appear in Part 48, 60 Centre
Street, Room 242, on March 23, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order
of the Court.

Dated:

2/11/16



HON. JEFFREY K. OING, J.S.C.