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SHORT FORM ORDER

COPY

INDEX No. 12-26332

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 2-26-18
ADJ. DATE 3-14-18
Mot. Seq. # 003 - MotD

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RMS LOUNGES, INC., STEPAN ASLANIAN, ROUPEN ASLANAIN

Plaintiffs,

- against -

MAURICE EL-DEIRY, MAGES EL-DEIRY, MAURICE DESIGNES, INC,

Defendants.

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11 - 23 ; Replying Affidavits and supporting papers 24 - 25 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint against them is granted to extent indicated herein, and is otherwise denied.

This action involves a dispute between former classmates and business partners over their failed attempt to jointly launch and operate a hookah lounge in Farmingdale, New York. Plaintiffs Roupen Aslanian and Stephan Aslanian allegedly entered a partnership agreement with defendant Maurice El-Deiry and proceeded to take certain preparatory steps towards the launch of the business, including the opening of joint business accounts, the purchase of furniture, accessories, and inventory for the business, the forming of a corporation known as RSM Lounges, and the negotiation of a lease for commercial space to house the operation of the business. In anticipation of securing a lease for commercial space they identified at 356 Conklin Street, Farmingdale, New York, the parties allegedly retained the services of a civil engineer, an architect, and legal counsel to aid them in securing certain special use permits

necessary for the operation of the lounge. After the special use permits were approved on June 20, 2011, the parties discontinued their temporary operation of a hookah lounge, known as FUMO, in Huntington, New York. Notwithstanding the progress they made toward launching the new lounge in Farmingdale, the joint business relationship between the three partners allegedly began to erode after a physical altercation occurred between Maurice El-Deiry and the cousin of the Aslanian brothers, nonparty Mitchell Markarian.

It is alleged that following the physical altercation, Maurice El-Deiry secretly formed a corporation with his cousin, defendant Maged El-Deiry, secured the negotiated lease and special use permits for himself, and launched a rival hookah lounge, known as Mystique Gardens. By their complaint, plaintiffs allege eight causes of action against defendants, including claims for breach of contract, breach of fiduciary duties, usurpation of corporate opportunity, corporate accounting, conversion of corporate property, and tortious interference with contract. Defendants joined issue denying plaintiffs' claims and asserting numerous counterclaims of their own, including claims for breach of contract, breach of fiduciary duties, abuse of process, conversion, and corporate accounting. The note of issue was filed on November 28, 2017.

Defendants now move for summary judgment dismissing the complaint on the ground the causes of action predicated on the alleged breach of the parties' partnership agreement, including the causes of action for breach of fiduciary duties and the usurpation of cooperate opportunities, are duplicative and barred by the statute of frauds. Alternatively, defendants assert that plaintiffs' cause of action for breach of a joint venture or partnership agreement must be dismissed, because such agreements are terminable at will where, as in this case, the agreement was orally made and the parties failed to specify a definite period of duration for their alleged partnership. Defendants also seek dismissal of the tortious interference with contract claim against Maged El-Deiry on the ground he did not participate in any conduct intending to induce the breach of the partnership or the lease agreement negotiated on its behalf. Plaintiffs oppose the motion arguing, that the statute of frauds does not bar their claims because defendants openly admit the existence of the partnership agreement and rendered part performance thereunder. Plaintiffs further argue that their claims for breach of fiduciary duties, usurpation of corporate opportunity, and an accounting, are all actionable because the parties were operating under an at-will partnership agreement throughout the time of their dispute. Additionally, plaintiffs assert that triable issues exist as to whether Maged intentionally sought to induce the breach of their partnership agreement with Maurice.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Where the moving party fails to carry such burden, its motion should be denied without regard to the adequacy of the opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Furthermore, in determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether such issues exist (*see* ***Roth v Barreto***, 289 AD2d 557, 735

NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Therefore, "[o]n a motion for summary judgment the facts are to be construed in a light most favorable to the non-moving party and should be denied where there is any significant doubt whether a material issue of fact exists or if there is even arguably such an issue" (*see* ***Bulger v Tri-Town Agency***, 148 AD2d 44, 47, 543 NYS2d 217 [3d Dept 1989]).

At the his examination before trial, Maurice El-Deiry testified that he and the Aslanians jointly agreed to open a hookah lounge in 2011, that they formed a corporation known as "RSM Lounges" for the purpose of opening and operating the proposed hookah lounge, and that a realtor negotiated a lease agreement on their behalf for commercial space to house the proposed business in Farmingdale, New York. Maurice testified that he and the Aslanians deposited money into a corporate checking account on behalf of RSM Lounges, including, among others, an "initial investment" for the business, and that they were all expected to have signing privileges for the account. Maurice testified that the parties continued to contribute their finances and labor, to varying degrees, in order to effectuate the launch of the new hookah lounge, but that their relationships began to falter after he was assaulted by a cousin of the Aslanians, known as Mitchell Markarian. Maurice testified that he filed criminal and civil lawsuits against Markarian after the assault, and that he and Stephan Aslanian had a falling out regarding whether the latter would defend his cousin or testify in Maurice's favor if they went to trial. Maurice further testified that he and Roupen met at a Dunkin Donuts to discuss dissolving RSM Lounges amicably, and that the two of them agreed that if there was no way to dissolve the business amicably, they would either continue to operate the business jointly or the Aslanians would buy him. Maurice testified that shortly after the failed Dunkin Donuts meeting with Roupen, he expedited the formation of a corporation, defendant Maurice Designs, Inc., for the purpose of bidding on the lease because he was informed that the Aslanians were preparing to sign a lease of their own for another lounge in order to squeeze him out of the business. He testified that he asked his cousin, Maged El-Deiry, who was already operating another hookah lounge, to visit the Farmingdale location with him, and that once Maged indicated he liked the location they submitted an independent bid for the lease. Maurice testified that the landlord eventually accepted his bid because he felt there was less risk in agreeing to the offer since Maged was already established in the hookah lounge business. Maurice testified that he utilized the architectural drawings and variance application previously done to obtain variances for the opening of RSM Hookah lounge to secure an amended certificate of occupancy for the hookah lounge he and his cousin eventually launched.

At his examination before trial, Stephen Aslanian testified that he, Maurice, and his brother, initially agreed that they were entering a partnership to launch their own hookah lounge, with each of them having equal share in the business, and that they would invested in varying degrees, capital and "sweat equity" to the business. He testified that they desired to launch the hookah lounge in the Farmingdale location because the lounge in Huntington, known as Fumo, was based on an income sharing agreement they had made with a restaurant owner there. Stephen testified, however, that the personal and business relationship between himself and Maurice fell apart due to the altercation between Maurice and his cousin. Stephen testified that he and his brother offered to buy-out Maurice's portion of the proposed business, but that those negotiations failed due to Maurice's request that he to testify on Maurice's behalf in his criminal case against his cousin, Markarian. Stephen testified that he discovered

that Maurice rejected the proposed buy-out and was not going to continue their joint business agreement when their realtor contacted himself and Roupen and told them that Maurice and his cousin had obtained the lease on the Farmingdale property for themselves. Stephen testified that he, Roupen, and their former boss formed their own corporation under the name of JRS Lounges to make a rival bid on the property, but they were told that the landlord had already accepted Maurice's bid.

At his examination before trial, Roupen Aslanian testified, among other things, that during his Dunkin Donuts meeting, Maurice explained that in addition to the altercation, he was concerned that if he continued to be a member of RMS Lounges, Roupen and Stephen would always out-vote him, since they were brothers and would be loyal to each other. Roupen testified that although the buy-out discussions at Dunkin Donuts were amicable, Maurice never reached out to either himself or his brother regarding their proposed buy-out of his share of the business. As for the loss of the lease on the Farmingdale location, Roupen testified that once he, Stephen, and Maurice identified the Farmingdale location, they proceeded to negotiate a 10-year lease for the space, which included an option to purchase the building after 5 years. Roupen testified, however, that after their falling out, Maurice went behind their backs and negotiated directly with an agent of the owner of the building to acquire a lease for the hookah lounge he subsequently launched with Maged. Roupen further testified that approximately three months after losing the lease to Maurice, he, his brother, and Markarian launched their own hookah lounge in Farmingdale under the name Lava Guys.

The statute of frauds only bars those oral agreements which, by their terms, "have absolutely no possibility in fact and law of full performance within one year" (***D & N Boening v Kirsch Beverages***, 63 NY2d 449, 454, 483 NYS2d 164 [1984]; *see* ***Cron v Hargro Fabrics***, 91 NY2d 362, 670 NYS2d 973 [1998]). The statute is considered to be generally inapplicable to oral agreements to create joint ventures or partnerships (*see* ***Prince v O'Brien***, 234 AD2d 12, 650 NYS2d 157 [1st Dept 1996]; ***F.S. Intertrade Off. Prods. v Babina***, 199 AD2d 95, 96, 605 NYS2d 57 [1st Dept 1993]). This is because, absent any definite term of duration, an oral agreement to form a partnership or joint venture for an indefinite period creates an at-will partnership or joint venture, which may be terminated without liability for breach of contract (*see* ***Gelman v Buehler***, 20 NY3d 534, 964 NYS2d 80 [2013]; ***Foster v Kovner***, 44 AD3d 23, 840 NYS2d 328 [1st Dept 2007]; ***Shandell v Katz***, 95 AD2d 742, 464 NYS2d 177 [1st Dept 1983]). In determining whether parties forged an at-will oral partnership agreement, a court will consider whether the parties' agreement is for an indefinite duration, whether they participated in joint capital contribution, and whether they intend to jointly control and manage the business and share in its profits and losses (*see* ***Baytree Assoc. v Forster***, 240 AD2d 305, 659 NYS2d 19 [1st Dept 1997]; ***Prince v O'Brien***, *supra*). The essential elements of a joint venture are "an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers . . . , some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses (*see* ***Yonofsky v Wernick***, 362 F Supp 1005, 1030-1032, [SD NY 1973]). A joint venture and an at-will partnership are similar in nature, and its members are subject to fiduciary rules requiring duties of loyalty, good faith, and fair dealing toward each other (*see* ***Birnbaum v Birnbaum***, 73 NY2d 461, 466, 541 NYS2d 746 [1989]; ***Framson, Inc. v. Queens Inner Unity Cable Systems***, 168 AD2d 419, 562 NYS2d 545 [2d Dept 1990]; ***Hooker Chemicals & Plastics Corp. v International Minerals & Chemical Corp.***, 90 AD2d 991, 456 NYS2d 587 [4th Dept 1982]).

"An at-will partnership 'may be dissolved at any time by any partner and, upon dissolution, any partner is entitled to an accounting'"(***220-52 Assocs. v Edelman***, 241 AD2d 365, 367, 659 NYS2d 885 [1st Dept 1997]; *see* ***Shandell v Katz***, *supra* at 743). To establish a breach of fiduciary duty claim, a plaintiff need only allege the existence of a fiduciary relationship, misconduct by the purported defendant, and that damages were incurred as a result of such misconduct (*see* ***Burry v Madison Park Owner LLC***, 84 AD3d 699, 700, 924 NYS2d 77 [1st Dept 2011]). "To obtain an accounting, a plaintiff must show that there was some wrongdoing on the part of a defendant with respect to the fiduciary relationship" concerning property in which the plaintiff has an interest" (***Benedict v Whitman Breed Abbott & Morgan***, 110 AD3d 935, 938, 973 NYS2d 341[2d Dept 2013]; *see* ***Lawrence v Kennedy***, 95 AD3d 955, 958, 944 NYS2d 577 [2d Dept 2012]). As to the usurpation of corporate opportunities, the doctrine of diversion of "corporate opportunity" provides that a corporate fiduciary cannot divert, for his or her own benefit, an opportunity that should be deemed an asset of the corporation (*see* ***Yu Han Young v Chiu***, 49 AD3d 535, 536, 853 NYS2d 575 [2d Dept 2008]; ***Alexander & Alexander of N.Y. v Fritzen***, 147 AD2d 241, 542 NYS2d 530 [1st Dept 1989]). Furthermore, "[t]o make out a claim [of] tortious interference with business relationships, a plaintiff must show that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper" (***Nassau Diagnostic Imaging & Radiation Oncology Assoc. v Winthrop-University Hosp.***, 197 AD2d 563, 563-564, 602 NYS2d 650 [2d Dept 1993]; *see* ***Qosina Corp. v C & N Packaging, Inc.***, 96 AD3d 1032, 948 NYS2d 308 [2d Dept 2012]). To sustain such a cause of action, a plaintiff must present evidence that the defendant motivated solely by malice or intended to inflict injury by unlawful means (*see* ***Alexander & Alexander, Inc. v Fritzen***, 68 NY2d 968, 510 NYS2d 546 [1986]; ***Tri-Star Light. Corp. v Goldstein***, 151 AD3d 1102, 58 NYS3d 448 [2d Dept 2017]).

Here, defendants failed to meet their prima facie burden on the branch of their motion seeking dismissal of the complaint as against Maurice El-Deiry and Maurice Designs, Inc. (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). In particular, defendants failed to eliminate triable issues as to whether Maurice El-Deiry and the Aslanian brothers had formed an at-will partnership or joint venture (*see* ***Gelman v Buehler***, 20 NY3d 534, 964 NYS2d 80 [2013]; ***Starr v Akdeniz***, 162 AD3d 948, 80 NYS3d 283[2d Dept 2018]; ***Pugliese v Mondello***, 57 AD3d 637, 871 NYS2d 174 [2d Dept 2008]; ***Foster v Kovner***, 44 AD3d 23, 840 NYS2d 328 [1st Dept 2007]) and, if so, whether Maurice El-Deiry usurped corporate opportunities and converted corporate property when he obtained a lease for himself on the abovementioned property utilizing special permits he jointly acquired with plaintiffs, and launched a rival hookah lounge (*see* ***Burry v Madison Park Owner LLC***, *supra*; ***Yu Han Young v Chiu***, *supra*; ***Adirondack Capital Mgt., Inc. v Ruberti, Girvin & Ferlazzo, P.C.***, 43 AD3d 1211, 842 NYS2d 603 [3d Dept 2007]). In light of the existence of such triable issues, defendants also failed to meet their prima facie burden on the branch of their motion seeking dismissal of plaintiffs' claims for dissolution and a corporate accounting (*see* ***Dee v Rakower***, 112 AD3d 204, 214, 976 NYS2d 470 [2d Dept 2013]; ***Lemle v Lemle***, 92 AD3d 494, 939 NYS2d 15 [1st Dept 2012]; ***220-52 Assocs. v Edelman***, *supra*; ***Shandell v Katz***, *supra*).

Defendants, nonetheless, established their prima facie entitlement to dismissal of the tortious interference claim against Maged El-Deiry by submitting evidence that Maged, who already owned a competing hookah lounge, did not engage in the alleged conduct with the malicious purpose of harming

the Aslanians, or that he interfered with their contractual relations through some unlawful means (*see* ***Guard-Life Corp. v S. Parker Hardware Mfg. Corp.***, 50 NY2d 183, 428 NYS2d 628 [1980]; ***McQuillan v Kenyon & Kenyon***, 271 AD2d 511,705 NYS2d 671 [2d Dept 2000]; ***Nassau Diagnostic Imaging & Radiation Oncology Assocs., P.C. v Winthrop-University Hosp.***, 197 AD2d 563, 602 NYS2d 650 [2d Dept 1993]). Significantly, Maurice El-Deiry testified that he approached Maged and sought to launch a rival business with him because he feared that the Aslanians were about to squeeze him out of their existing partnership. Maurice further testified that while the landlord of the disputed commercial space agreed to grant him the lease because he felt there was less risk in doing so since Maged was already established in the hookah lounge business, it was he who sought the alternative lease agreement in the first place. In opposition, plaintiffs' conclusory assertion that Maged acted maliciously in procuring the breach of the existing partnership agreement between Maurice and the Aslanians merely because he knew of the existence of such agreement, is insufficient to defeat defendants' prima facie showing (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*).

Therefore, defendants' motion for summary judgment dismissing the complaint against them is granted to the extent that the claim against Magen El-Deiry for tortious interference of contractual relations is dismissed, and is otherwise denied.

Dated: September 27, 2018

J.S.C.
HON. JERRY GARGUILO

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION