Seibel v Ramsay
2020 NY Slip Op 33243(U)
October 2, 2020
Supreme Court, New York County
Docket Number: 651046/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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ROWEN SEIBEL, FCLA, LP, THE FAT COW, LLC,

Plaintiff,

- v -

GORDON RAMSAY, G.R. US LICENSING, LP, FCLA, LP, THE FAT COW, LLC

Defendant.

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INDEX NO. 651046/2014

MOTION DATE 9/24/2020

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 461, 463, 465, 489, 490, 491, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 527, 532

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 283, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 462, 464, 466, 468, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 492, 493, 494, 495, 496, 497, 500, 501, 502, 503, 504, 505, 506, 507, 521, 522, 528, 533, 534

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff Seibel for summary judgment on the issue of liability on his derivative claims for breach of the Fat Cow LLC contract (motion seq. 005) is

denied; and it is further

ORDRED that the motion of defendants/counterclaimants Ramsay and GR for summary judgment dismissing the complaint against them (motion seq. 006) is granted to the extent of dismissing Seibel's direct claims and is otherwise denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.

Memorandum Decision

Plaintiff Rowen Seibel (Seibel) brings this action, individually and on behalf of FCLA, LP (FCLA) and The Fat Cow LLC (Fat Cow LLC), entities through which he and defendants Gordon Ramsay (Ramsay) and G.R. U.S. Licensing, LP (GR) opened and operated a restaurant called "The Fat Cow" at 189 The Grove Drive in Los Angeles. Seibel accuses defendants of breach of their fiduciary duties and of breach of contract (Amended Compl. [Compl.] [NYSCEF Doc. No. 286].)[1] In their answer, defendants assert counterclaims based on breach of fiduciary duty, by GR on behalf of FCLA and Fat Cow LLC; breach of contract, by both defendants against Seibel; and indemnification, by Ramsay against Seibel. Discovery is complete, and the note of issue has been filed.

Currently, two motions are before the court. In motion sequence number 005, plaintiff Seibel, on behalf of the Delaware limited partnership FCLA and the California limited liability corporation Fat Cow LLC, seeks summary judgment on the issue of liability on his derivative claims for breach of the Fat Cow LLC contract. In addition, plaintiff seeks dismissal of defendants' third counterclaim, which is for indemnification. In Motion Sequence Number 006, defendants/counterclaimants Ramsay and GR seek summary judgment dismissing the complaint against them. Motion Sequence Numbers 005 and 006 are consolidated for disposition and resolved below. For the reasons below, the court denies motion sequence number 005 and grants motion sequence number 006 to the limited extent of dismissing the direct claims plaintiff asserts on Seibel's behalf.

[1] The court cites to the most recent versions of the complaint and amended answer throughout.

Background Facts

In late 2011, Ramsay, a celebrity chef, and Seibel, who had worked with Ramsay on several restaurant projects, became partners in a venture to open a restaurant in Los Angeles called The Fat Cow (Compl. ¶¶ 16-17.) According to plaintiff, Ramsay pursued the partnership at least in part because of Ramsay's extremely limited cash flow. On November 18, 2011, Ramsay signed a lease with GFM, LLC d/b/a The Grove for a restaurant space in The Grove Building at 189 The Grove Drive in Los Angeles (Id. ¶ 19; Joint Statement of Undisputed Material Facts, ¶ 1 [Joint Statement] [NYSCEF Doc. No. 207].) On October 20, 2012, Ramsay assigned the restaurant lease to FCLA, a partnership consisting of Ramsay and Seibel (Lease Assignment [NYSCEF Doc. No. 212].) Seibel and Ramsay each contributed around $800,000 for the renovation and development of the restaurant (Seibel Dep [NYSCEF Doc. No. 323], p 357, lines 17-18.)

The complaint asserts that Ramsay chose the name The Fat Cow, and, on November 11, 2011, GR, which Ramsay controlled, filed the necessary trademark application with the United States Patent & Trademark Office (the Trademark Office) (Compl. ¶¶ 17-18, 22.) Allegedly, in February 2012, Ramsay informed Seibel that there was a restaurant called "Las Vacas Gordas" (Spanish for "The Fat Cow")[2] in Florida and that this could cause problems with the trademark application. However, according to the complaint, Ramsay and his team assured Seibel that they would handle any problems (Id. ¶¶ 23-24.) On March 14, 2012, the Trademark Office provisionally rejected the application due to the conflict (Id. ¶ 25.) The restaurant (The Fat Cow) opened on September 26, 2012 although the trademark issue was unresolved.

[2] The literal translation is "the fat cows," but the Las Vacas Gordas registration states that the phrase means "the fat cow" (NYSCEF Doc. No. 317, at *5.)

After the restaurant opened, the parties executed several agreements which are relevant here. GR and Seibel, as members, and Ramsay and Seibel, as Managers, entered into the Fat Cow Limited Liability Company Agreement in California on October 12, 2012 (the Fat Cow Agreement, or the LLC Agreement [NYSCEF Doc. No. 209]), which created Fat Cow LLC. Pursuant to the agreement, Seibel and Ramsay each owned 50% of the company (Id. ¶ 5.) The agreement further stated that "[a]ll decisions of the Managers shall be made upon unanimous consent of the Managers" (Id. ¶ 7 [a].) There was no provision for recourse if the managers reached a deadlock on an issue. The same day, GR, Seibel, and Fat Cow LLC executed a Limited Partnership Agreement, forming the Delaware Limited Partnership, FCLA (the FCLA Agreement, or the LLP Agreement [NYSCEF Doc. No. 210].) GR and Seibel were the Limited Partners and Fat Cow LLC was the General Partner of FCLA (Id.) The purpose of this partnership was to create "a first class steak restaurant" named The Fat Cow "or a variation thereof" in California, and to undertake all activities necessary to further that purpose (Id. ¶ 4 [a].) This agreement did not contain the unanimity requirement. In addition, on October 12, Fat Cow LLC licensed The Fat Cow's name and its restaurant concept to FCLA (NYSCEF Doc. No. 211 [the License Agreement].)

Seibel and Ramsay also executed an indemnification agreement on November 15, 2012 (NYSCEF Doc. No. 213 [Indemnification Agreement]). Acknowledging that Seibel and Ramsay owned equal shares of FCLA but that Ramsay alone held the lease, Seibel agreed to "indemnify and save harmless Ramsay against one-half (1/2) of all manner of loss, damage, charge, claims, suit, action and liability, including counsel fees, which may for any cause at any time sustain or incur by reason of having entered into the [restaurant's] Lease, any having continuation or renewal thereof, any modification, into Lease, amendment, limitation or extension thereof, or any new

guaranty or undertaking executed in place thereof" (Id. ¶ 1.) New York law governs the Indemnification Agreement (Id. ¶ 3.)

Plaintiff alleges that defendants took no further action with respect to the trademark issue. In particular, he states that they did not refile the application or change the restaurant's name. Instead, according to the complaint, it was not until Las Vacas Gordas threatened legal action that defendants executed the Trademark Settlement Agreement (NYSCEF Doc. No. 244.) Even then, the September 2013 Trademark Settlement Agreement was only a temporary one, set to expire on March 31, 2014 (Compl. ¶¶ 66-67.)[3] Plaintiff asserts that he believed that the agreement was temporary because until then, an agreement with the Blackstone Group prevented them from renaming the restaurant. However, plaintiff contends that defendants ultimately did not change the name of the existing restaurant because Ramsay's secret plan had always been to open his own restaurant, without Seibel, at the site (Id. ¶¶ 68-77.) Plaintiff accuses defendants of using his $800,000 investment and the work he, FCLA, and Fat Cow LLC contributed to the renovation of the space for this covert purpose (Id. ¶¶ 1, 79.)

Plaintiff also alleges that defendants excluded him from the operations of the restaurant and diverted the financial assets of FCLA and Fat Cow LLC to fund Ramsay's new project. Among other things, Seibel accuses defendants of hiring Ramsay's longtime associate Andi Van Willigan to run the restaurant over Seibel's objection, paying her $10,000 a month (Id. ¶¶ 80-84.) He also states that, in December 2013, Ramsay informed Seibel he would close the restaurant upon the expiration of the trademark license. Over Seibel's objection, defendants issued a 60-day WARN notice to the employees which informed them of the impending closure (Id. ¶¶ 86-93.) Plaintiff

[3] The complaint incorrectly states that the extension was until February 28, 2014 (see License Settlement Agreement [NYSCEF Do. No. 244] ¶ 1.3.)

alleges that defendants altered the agreement he and Ramsay had made to allow the television show "Hell's Kitchen" to record at The Fat Cow, so that the television show now would promote Ramsay's new restaurant instead (Id. ¶¶ 51-52, 95-102.)

The most recent version of the complaint contains two causes of action. In the first cause of action, the complaint asserts that GR, which Ramsay controls, owed duties of care and loyalty to Seibel, Fat Cow LLC, and FCLA in GR's capacity as partner of FCLA (Id. ¶ 113.) The complaint states that GR and Ramsay, as member and manager, respectively, of Fat Cow LLC, owed these duties to Seibel and Fat Cow LLC (Id. ¶ 114.) Next, the complaint states that GR and Ramsay both owed Seibel, FCLA, and Fat Cow LLC the duty to act in FCLA and Fat Cow LLC's best interests (Id. ¶ 115.) Finally, the complaint states that GR and Ramsay owed a duty of loyalty and good faith to Seibel, FCLA and Fat Cow LLC and were required to exercise ordinary diligence, care and skill (Id. ¶ 116.) Allegedly, defendants breached their fiduciary duties to Seibel, FCLA and Fat Cow LLC through the actions that plaintiff sets forth in the complaint (Id. ¶ 117.)

The second cause of action asserts breach of contract against Ramsay, on behalf of Seibel, FCLA, and Fat Cow LLC. It alleges that, among the other problems the complaint sets forth, Ramsay breached the unanimity requirement in the LLP agreement when he closed the restaurant without Seibel's approval (Id. ¶ 121.) Although the LLC agreement does not contain the unanimity agreement, plaintiff argues that Ramsay breached the contract when he closed the restaurant because he usurped the authority of Fat Cow LLC, in violation of Sections 8.1, 8.2, 8.4, and 8.5 of the FCLA agreement (Compl. ¶ 122; see Seibel v Ramsay, Sup Ct, NY County, January 30, 2019, Friedman, J., Index No. 651046/2014 [NYSCEF Doc. No. 485] [Seibel II] [granting leave to amend to assert this claim].)

Defendants' answer denies all charges, sets forth counterclaims, and presents a dramatically different account of the events. The counterclaims assert that Ramsay did not need a cash infusion from Seibel but allowed Seibel to join him in the venture at the latter's request (Counterclaims to Verified Answer to Verified Amended Compl. [Counterclaims] [NYSCEF Doc. No. 499] ¶ 8.) The counterclaims state that Ramsay assigned the lease to FCLA at Seibel's request, but the assignment was not valid because Seibel did not obtain the lessor's approval (Id. ¶ 15.) Further, the partners' goals were at odds; while Ramsay intended to run a first-class steak restaurant, Seibel envisioned an establishment at which there was the fast preparation and delivery of more casual food (see Oral Argument Transcript dated 10/29/19 [10/29/19 Transcript] [NYSCEF Doc. No. 534] at 14, lines 12-21.)[4]

The counterclaims also state that Ramsay always intended that Andi Van Willigan would run the restaurant (See Counterclaims ¶ 7; Ramsay Dep [NYSCEF Doc. No. 167] at 92, lines 7-25.)[5] At Seibel's suggestion, FCLA hired Jerri Rose Tassan, who managed another of Seibel's restaurants, at a salary of $10,000 per month (Counterclaim ¶ 16; ; see Ramsay Dep, 289 lines 2-10, 416 line 23 – 717 line 3.) However, Tassan allegedly mismanaged funds, violated labor laws, and spent most of her time working on Seibel's other restaurants (Counterclaim ¶¶ 17-18.) In addition, Seibel himself allegedly sought reimbursements for expenses unrelated to The Fat Cow and took illegal kickbacks from the restaurant's vendors (Id. ¶ 19.) Seibel purportedly did not pay numerous vendors on time and did not pay others at all (see Mem of Law in Opp to Plaintiff's Motion [Mem in Opp] [NYSCEF Doc. No. 296], at *10 [citing Excerpts from Ramsay Dep

[4] The court cites to deposition transcripts and other documents where they clarify defendants' positions, particularly the timelines relating to the managers' tenures.
[5] In fact, Van Willigan was manager when The Fat Cow first opened, and she remained in this position until around July 2012, when she was terminated (See, e.g., Ramsay Dep at 288, lines 12-20.)

(NYSCEF Doc. No. 328).) According to the counterclaim, these problems, along with the poor management of The Fat Cow by Tassan, damaged the restaurant's quality, which resulted in poor reviews. Further, they caused dissension among the staff and high turnovers, which led to labor claims and a class action lawsuit by restaurant employees (Counterclaims ¶¶ 20-21.) Allegedly, defendants rehired Van Willigan to replace Tassan in the fall of 2013 because of these problems, and Seibel, angered, subsequently, and without Ramsay's consent, paid himself $10,000 a month (Id. ¶¶ 23-24; Ramsay Dep, 417 line 13 – 419, line 23.)

According to the counterclaims, Van Willigan was unable to salvage the restaurant due to the debts that had accrued during Tassan's management. The counterclaims assert that Ramsay put more money into the restaurant, but Seibel refused to do so (Id. ¶¶ 25-26, 30-31.) Defendants attempted to negotiate a buyout, but these efforts were put to the side when other problems emerged (See, e.g., Ramsay Dep at 361, lines 5-19; 365, line 6 – 366, line 18; 371, lines 9-22.) The counterclaims assert that plaintiff refused to approve a bankruptcy filing for Fat Cow LLC, which might have contained the otherwise mounting debt and enabled the restaurant to survive (Counterclaims ¶¶ 36.)

The counterclaims also point to other alleged problems which necessitated the closing of the restaurant. They state that the restaurant could not continue to use the name The Fat Cow after February 2014, that the lessor would not have approved a name change, that the restaurant became insolvent, and that Seibel, who did not want to close the restaurant, provided no suggestions as to how to continue its operations (Counterclaims ¶¶ 30-32.) In addition, Seibel did not show up for a settlement conference Ramsay had scheduled for the parties to the class action lawsuit (Id. ¶ 34.) Thus, The Fat Cow's existence was marked by "18 months of continuous failure as measured by every possible metric" (Mem in Opp, at *8.) Accordingly, there was no way to operate the

restaurant going forward, and Ramsay issued the 60-day WARN notice to The Fat Cow's employees, as required by law, and began the process of closing the restaurant (Counterclaims ¶¶ 32-33, 35). The counterclaims further contend that Ramsay did not want to open a new restaurant in The Grove building, but the lease for the space was ongoing, and the landlord would not approve of Seibel as lessee or co-lessee. Because Seibel threatened legal action, Ramsay did not open a restaurant at the site. Moreover, the landlord sued Ramsay for liability under the lease, and Ramsay ultimately paid back rent, attorney's fees, and money to settle the lawsuit (Id. ¶¶ 37-39.)

Based on these allegations, defendants assert three counterclaims. The first, which GR brings derivatively on behalf of FCLA and The Fat Cow, LLC, is for breach of fiduciary duty.[6] GR bases this claim on its assertions regarding Seibel's alleged embezzlement, kickbacks, use of Tassan for his other businesses, and refusal to declare bankruptcy or otherwise mitigate The Fat Cow's losses (Id. ¶¶ 40-47.) In the second counterclaim, GR and Ramsay sue Seibel directly for breach of contract based on this misconduct (Id. ¶¶ 48-53.) The third counterclaim, which Ramsay asserts against Seibel, seeks reimbursement for half of The Fat Cow rental payments Ramsay made personally and for the lease litigation fees and settlement costs. Ramsay claims that Seibel refused to contribute his share of this money although he was responsible to share the expenses under the Indemnification Agreement (Id. ¶¶ 54-62.)

Discussion

On a motion for summary judgment, the moving party has the initial burden of establishing its entitlement to judgment as a matter of law, with evidence sufficient to eliminate any material issue of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1985].) The facts must be

[6] Defendants assert that the LLC cannot bring the claims directly because Seibel, who is a 50% owner of the LLC, can block this effort. They also maintain their position that the managers of XXX (Id. ¶¶ 41-42.)

viewed "in the light most favorable to the non-moving party" (Ortiz v Varsity Holdings, LLC, 18 NY3d 335, 339 [2011].) The failure to make such a showing requires denial of the motion (Voss v Netherlands Ins. Co., 22 NY3d 728, 734 [2014].) If the moving party "produces the requisite evidence, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft, LLP, 26 NY3d 40, 49 [2015].) The court's task in deciding the motion is to determine whether there is bona fide issues of fact, not to delve into or resolve issues of credibility (Vega v Restani Constr. Corp., 18 NY3d 499, 505 [2012].) If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (Tronlone v Lac d'Amiante Due Quebec, Ltee, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003].)

There is no dispute as to the applicable law. The Fat Cow LLC agreement is governed by California law (Seibel v Ramsay, Sup Ct, NY County, March 27, 2015, Friedman, J., Index No. 651046/2015 [Seibel I] [NYSCEF Doc. No. 39], at *9.) Delaware law governs the parties' obligations to FCLA (Id.)

Standing of FCLA and Seibel to sue for Breach of Contract

Initially, the court examines defendants' challenges to the standing of FCLA and Seibel to sue for breach of contract under the FCLA Agreement (see El Paso Pipeline GP Co., L.L.C. v Brinckerhoff, 152 A3d 1248, 1256-1257 [Del 2008] [Brinckerhoff].) To the extent that defendants argue plaintiff lacks standing to sue derivatively on behalf the FCLA, their argument fails. Defendants are correct that the court dismissed the derivative contract claim as it pertained to FCLA on the ground that the FCLA Agreement did not contain a unanimous consent provision

(see Seibel I, pp 7-8; Sole Energy Co. v Petrominerals Corp., 128 Cal App 4th 212, 232 [Ct App, 4th Dist 2005] [Sole Energy]), but instead gave Fat Cow LLC "'the full and exclusive right, power, and authority to manage all of the affairs and the business' of FCLA" (Seibel I, at *19 [quoting FCLA Agreement ¶ 8.1]). The court noted that, at the time, the complaint contained no other allegations which showed a breach of any part of the FCLA Agreement (Seibel I, at *19.) However, the court subsequently allowed an amendment of the complaint so that it now alleges, "'Ramsay breached the FCLA [] Agreement by, among other things, unilaterally exercising authority and taking actions that were not specifically reserved for the general partner of FCLA, the Fat Cow LLC, in breach of sections 8.1, 8.2, 8.4, and 8.5 of the FCLA [] Agreement'" (Seibel II, at *2 [quoting Compl., ¶¶ 121-122] [brackets in original].) Standing is a threshold issue (Brinckerhoff, 152 A2d at 1256; People ex. rel. Becerra v Superior Court of Riverside County, 29 Cal App 5th 486, 495 [Cal App, 4th Dist 2018]), and Seibel II did not find the claim devoid of merit (Seibel II, at *3). The court would not have allowed the amendment if FCLA lacked standing to assert the claim, because in that instance the amendment would have been palpably lacking in merit (See Y.A. v Conair Corp., 154 AD3d 611, 612 [1st Dept 2017].)

The court reaches a different conclusion as to Seibel's standing to assert a direct breach of contract cause of action on his own behalf. The law is clear that "[a]n individual [stockholder] may not maintain an action in his [or her] own right against the directors for destruction of or diminution in the value of the stock...." (Nelson v Anderson, 72 Cal App 4th 111, 124 [Ct App, 2d Dist 1999] [internal quotation marks and citation omitted].) Instead, he or she must assert an injury that is more than "merely incidental to the alleged harm inflicted upon [the corporation] *and all its shareholders*" (Schuster v Gardner, 127 Cal App 4th 305, 313 [Ct App, 4th Dist 2005]; see Tooley v Donaldson, Lufkin, & Jenrette, Inc.,) In Seibel I, the court did not dismiss Seibel's direct claim

because defendants did not satisfactorily address whether Seibel sustained direct injury or direct damages. (Seibel I, at *9.) However, the court stated that it was "questionable that this claim is maintainable by Seibel in his individual capacity" because the allegation that Seibel did not consent to Ramsay's use of the corporate assets seemingly alleged a derivative injury (Id., at *9 n 2.) Ramsay's decision to close The Fat Cow and open a new restaurant in its place (id. ¶¶ 78-79, 86-91) asserts damages to FCLA and Fat Cow LLC, rather than damages unique to Seibel, including any related to the lost value of The Fat Cow.

The only asserted damages unique to Seibel are related to his initial investment of over $800,000 for the development of the restaurant. According to a page from plaintiff's QuickBooks record, these expenditures total $832,806.73 (QuickBooks excerpt [NYSCEF Doc. No. 182].) This argument lacks merit. Plaintiff states that his initial financial contributions to the business count as direct damages because Ramsay always intended to use the money for the development of his own restaurant. However, as defendants point out, plaintiff introduces no evidence supporting this position. In fact, several aspects of the narrative to which defendants point – Ramsay's initial $800,000 contribution, his work to settle the class action lawsuit, his initial deal with Hell's Kitchen to benefit The Fat Cow, and his subsequent cash infusion to pay some of the restaurant's mounting expenses –belie the statement that Ramsay never intended for the restaurant to succeed.

Breach of Contract

Now, the court considers whether summary judgment or dismissal of plaintiff's derivative breach of contract claims is appropriate. As stated, a successful breach of contract claim in California establishes that a contract exists, that the plaintiff performed or was excused from performing the contract, that the defendant breached the contract, and that as a result of the defendant's breach the plaintiff sustained damages (Oasis West Realty, LLC v Goldman, 51 Cal

4th 811, 821 [Cal 2011] [Oasis]; see State Compensation Ins. Fund v ReadyLink Healthcare, Inc., -- Cal Rptr 3d – [Ct App, 4th Dist 2020] [avail at 2020 WL 3118580, at *14].) The party that seeks summary judgment must show that there is no question of fact with respect to all four elements of the claim (see Aguilar v Atlantic Richfield Co., 25 Cal 4th 826, 850 [Cal 2001].) In Delaware, the standard is essentially the same. The plaintiff or counterclaim-defendant must show that a contract existed, that the opposing party breached a contractual obligation, and that damages resulted (VLIW Technology, LLC v Hewlett-Packard Co., 840 A2d 606, 621 [Del 2003] [in context of motion to dismiss].)

Questions of fact exist as to whether plaintiff and defendant complied with their contractual obligations. In particular, plaintiff relies on the statement of purpose at paragraph 4, which states that "[t]he purpose(s) of the Company are to (i) serve as the general partner of FCLA, LP . . . and receive any fees or other compensation to which the Company is entitled." In addition, plaintiff points to the FCLA Agreement, which states, at 4 (a), that the business of FCLA was "[t]o develop, own and operate a first class steakhouse restaurant under the name 'Fat Cow,' or a variation thereof as determined by the General Partner, at the Location." Thus, by opening and running the restaurant, Seibel states, he fully complied with the two agreements.

Plaintiff also has shown that Ramsay did not comply with the unanimity requirement. It is undisputed that Ramsay closed the restaurant even though Seibel objected to the closure (see Ramsay 12/13/13 email [e.g., NYSCEF Doc. No. 177] ["The Fat Cow has to close"].) Ramsay's attorney, Michael Thomas, also conceded as much in his deposition testimony (Thomas Dep [NYSCEF Doc. No. 169], p 204 lines 6-10, see also Ramsay Dep [NYSCEF Doc. No. 167], p 158 lines 18-20 [implicitly acknowledging that he closed the restaurant unilaterally].) It is also correct that the LLC required unanimity on a decision to close the restaurant (Fat Cow LLC Agreement ¶

7[a].) Also, plaintiff asserts that Ramsay's usurpation of the decision-making power harmed FCLA by destroying the value of the business. This establishes a prima facie case, and therefore defendants' motion to dismiss the cause of action is denied.[7]

However, defendants also set forth a prima facie case that it was Seibel who breached the contract, and that Seibel's breach relieved Ramsay of his contractual obligations. Defendants point to paragraphs 4 (b) and (c) of the FCLA, which obliged each party

> (b) to engage in such other activities ancillary to, and in furtherance of, the foregoing business as may be necessary, advisable, or appropriate as hereafter determined by the General Partner, including, but not limited to entering into, performing and carrying out contracts, including joint venture agreements, leases, or take action of any kind necessary to, in connection with, or incidental to, the accomplishment of the foregoing purposes;
> (c) from time to time, to do any one or more of the things and acts set forth herein.

Among other things, defendants contend that Seibel violated this prong of the FCLA when he paid vendors late or not at all, violating his obligation to keep the business running (see Mem of Law in Opp to Plaintiff's Motion [Mem in Opp] [NYSCEF Doc. No. 296], at *10 [citing excerpts from Ramsay Dep (NYSCEF Doc. No. 328) at 417, line 13 – 419, line 23].) According to defendants, plaintiff also breached the contract when he took funds from the restaurant without authorization (Fat Cow LLC ¶ 11.) As support, they submit redacted bank records showing several of these withdrawals (NYSCEF Doc. Nos. 329-331.) Defendants point to the nonpayment and underpayment of several contractors as an additional breach (citing, e.g., Mechanics Lien

[7] Plaintiff also claims that Ramsay hired Willigan without his consent, in breach of the unanimity requirement. However, there are issues as to whether he was excused from the requirement based on Tassan and Seibel's mishandling of the restaurant. The class action lawsuit was filed on June 13, 2013 (see Compl, Becerra v The Fat Cow, LLC [NYSCEF Doc. No. 313]), which purportedly alerted Ramsay to the labor dispute and other existing problems such as the unpaid bills and accumulating debts. He replaced Tassan with Willigan the following month.

notification [NYSCEF Doc. No. 227]; Wenlock email dated January 22, 2013 [NYSCEF Doc. No. 228].) Also, defendants state that when the restaurant faced a financial crisis, Seibel refused to make additional contributions to save it (Counterclaim ¶¶ 25-26, 30-31; FCLA ¶ 4 [b].) These allegations raise triable questions (see Sanchez v County of San Bernadino, 176 Cal App 4th 516, 529 [Ct App, 4th Dist 2009].)

In addition, defendants have raised triable issues as to whether they were excused from their performance under the doctrine of impossibility.[8] As defendants note, the term "impossibility" is not strictly construed in this context. "A thing is impossible in legal contemplation when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost" (Habitat Trust for Wildlife, Inc. v City of Rancho Cucamonga, 175 Cal App 4th 1306, 1336 [Ct App, 4th Dist 2009] [Habitat Trust] [internal quotation marks and citation omitted]; see Cal Civ Code § 3531 ["[t]he law never requires impossibilities"].) Under California law, performance under a contract may be excused under the impossibility doctrine even if literal impossibility does not exist, if performance is "impracticab[le] due to excessive and unreasonable expense" (City of Vernon v City of Los Angeles, 45 Cal 2d 710, 717 [Cal 1955]; see Walker v Ticor Title Co. of California, 204 Cal App 4th 363, 372 n 10 [Ct App, 1st Dist 2012].)[9]

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[8] In Seibel I, the court questioned the merits of defendants' "extraordinary contention that a party anticipatorily breaches a unanimous consent provision by opposing the closing of a going business venture, or that the . . . doctrine permits a party . . . to seize unilateral control of an entity that he has no right to manage except under the terms of the parties' contracts" (Seibel I, at *20; see id., at *20-21 [citing Romano v Rockwell Intl., Inc., 14 Cal 4th 479, 489 (1996)]). Defendants' arguments here regarding the merits of the anticipatory breach claim are unpersuasive, and therefore the court does not address them further.

[9] Maudlin v Pacific Decision Sciences Corp. (40 Cal Rptr 3d 724 [4th Dist, Div 3 2006]), on which defendants rely, is less useful, as that case discusses temporary rather than permanent impossibility.

Largely, defendants argue that the restaurant's financial woes necessitated the restaurant's closure. The report of defendants' expert, Anthony M. Bracco, stated that "as of January 28, 2014, FCLA was financially incapable of continuing operations without additional cash infusions, whether it be as capital contributions or loans to the Company" (Bracco Report ¶ 8 [NYSCEF Doc. No. 299].) The report states that on January 28, 2014, a month before the scheduled closing date, The Fat Cow's liabilities were $759,000 greater than its assets. The report also indicates that the potential liability under the class action lawsuit ranged from $500,000 plus legal fees in a settlement up to nearly $2,000,000 if plaintiffs made a full recovery at trial (Id. ¶ 16.)[10] The report also estimated a negative cash flow of $83,000 since its inception and a net operating loss of $1,267,000, along with a hefty negative cash free flow and continued cash shortfalls in the coming months (Id. ¶¶ 22-24.) The report further noted that Ramsay made significant additional financial contributions to the restaurant during late 2013 and that Seibel withdrew around $70,000 between October 2013 and March 2014 for his own benefit (Id. ¶¶ 26-27.) Based on this data, the report concluded that FCLA was insolvent and could no longer operate without substantial capital infusions from the partners or outside sources (Id. ¶ 29.) Along with other evidence defendants have submitted,[11] this is sufficient to raise an issue of fact regarding the impracticability of moving forward (see Habitat Trust, 175 Cal App 4th at 1336.) To the extent that plaintiff counters that, based on his experts' reports, the business had a positive cash flow and a bright future, he merely raises factual disputes suitable for the court or jury to assess at trial.

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[10] The report notes that ultimately the lawsuit settled for $140,000, but states the class action plaintiffs only accepted the lesser amount because the restaurant no longer existed and it would have been harder to collect a higher sum (Bracco Report n 6.) Thus, had the restaurant remained open, the potential liability would have been much greater (Id.)

[11] Among other things, defendants submitted redacted documents showing that Ramsay's company, Kavalake Ltd, now Gordon Ramsay Restaurants Ltd., made payments on behalf of The Fat Cow during the final critical months (see NYSCEF Doc. Nos. 329-331).

In addition, defendants state that it was impossible to continue The Fat Cow as a joint venture because of the deadlock over the restaurant's future. As defendants argue, courts often grant dissolution in the face of an insurmountable deadlock. Defendants point out that these same considerations led to the Delaware Court of Chancery's decision granting dissolution of another venture of Seibel and Ramsay on the ground that it was "no longer reasonably practicable" for the restaurant venture to operate (Matter of GR Burger, LLC v Seibel, CA No 12825-VCS, August 25, 2017, Slights, V.C., Court of Chancery of Delaware [available at 2017 WL 3669511]; also citing Huff Energy Fund, L.P. v Gershen, CA No 11116-VCS, September 29, 2016, Slights, V.C., Court of Chancery of Delaware [available at 2016 WL 5462958] [Huff] [in reviewing challenge to dissolution].) Here, defendants allege that the decision over whether to continue the operations of The Fat Cow made it impossible for the venture to move forward.

Plaintiff's arguments to the contrary are unpersuasive. Principally, he asserts that the parties' disagreements were over minor issues such as the design of the menu, and that, as other people managed the day-to-day operations of The Fat Cow, the restaurant was able to continue despite these minor disputes (Plaintiff's Opp, at *12.) According to defendants, the rifts between the parties were also about more fundamental issues, including the nature of the restaurant they were creating (see Oral Argument Transcript dated 10/29/19 [10/29/19 Transcript] [NYSCEF Doc. No. 534] at 14, lines 12-21.) Though these disputes did not create the actual deadlock, defendants state that it complicated the parties' ability to work together. The restaurant may have been able to operate under other circumstances, defendants suggest, but the financial and legal problems, along with the impending expiration of the trademark, brought things to a head. Further, defendants state that when Seibel withdrew funds for his personal use at a time when the restaurant was in serious financial trouble (see Bracco Report ¶¶ 26-27), blocked Ramsay's efforts to file for bankruptcy,

and otherwise obstructed The Fat Cow's chances for survival, it was no longer feasible for operate restaurant. Again, plaintiff's expert report and expert valuation do not completely refute defendants' expert, but instead raise triable issues underscore the necessity of a trial. Plaintiff's position that Ramsay cannot rely on the impossibility doctrine because he caused the problems by his wrongful conduct merely raises a triable dispute as to whether Ramsay or Seibel violated the agreement.

The parties additionally disagree as to whether the imminent expiration of the trademark license mandated closure of the restaurant. According to plaintiff, the temporary license could have been extended or that the name could have been changed (*see supra*, at *4.) Plaintiff contends that defendants did not change the name of the existing restaurant because of Ramsay's secret plan to open his own restaurant, without Seibel, at the site (Compl. ¶¶ 68-77), but that the license could have been renewed. However, defendants counter by pointing to the Trademark Settlement Agreement with Las Vacas Gordas, which indicates that the arrangement was intended to be temporary:

> On or before March 31, 2014, TFC [Ramsay's group] shall change the name of its restaurant, currently named "The Fat Cow," to a different name that is not colorably similar to the Mark. Further, TFC Group and their affiliates, managing agents, successors and assigns hereby agree not to ever use at any time in the future the Mark or any other similar name in connection with any restaurant venture or food-related products or services. In addition, TFC Group agrees that, as of the date of this Agreement, it shall not open any additional restaurants in the United States under the name "The Fat Cow" or any similar variation thereof and represents that the only restaurant that TFC Group has opened under the name "The Fat Cow" or any similar variation thereof, is the single restaurant in Los Angeles, California contemplated herein (License Settlement Agreement, ¶ 1.2.)

Thus, the trademark issue was more complex than plaintiff suggests. Defendants also contend that due to problems with the landlord, continued operation at the site may have been

problematic (see, e.g., Grove letter dated January 29, 2013 [NYSCEF Doc. No. 239] [letter from the landlord expressing displeasure over the negative reviews as well poor comments from customers shopping at the Grove, and asking the partners to outline their future plans and assure the landlord that Ramsay would increase his involvement at The Fat Cow]; Grove letter dated April 25, 2013 [NYSCEF Doc. Nos. 240] [following up on landlord's discussion with Ramsay, and suggesting termination of lease may be advisable].) They also submit a copy of correspondence between several individuals working for The Fat Cow, which mention, among other things, that the contractor and kitchen suppliers intended to file liens on The Fat Cow for nonpayment of bills (January 2013 emails [NYSCEF Doc. No. 301].)

There are also questions regarding plaintiff's claim that the trademark issue that alone kept the parties from continuing The Fat Cow's operation. Plaintiff contends that the remaining problems, such as the financial problems, were fabricated after-the-fact to justify Ramsay's unilateral action. On the one hand, plaintiff points to correspondence from Willigan which referred solely to the Trademark Settlement Agreement's expiration date as justification (Willigan email dated Dec 28, 2013 [NYSCEF Doc. No. 412].) However, the January 6, 2014 Wolfe email, on which plaintiff also relies, states that because of the status of the class action lawsuit, the public statement would cite only the trademark issue as the reason for the restaurant's closure (Wolfe email dated Jan 6, 2014 [NYSCEF Doc. No. 420].) In addition, Ramsay's December 13, 2013 email stated that the restaurant had to close not only because of the loss of the right to use the trademark but due to employee "issues" and financial losses (Ramsay email dated 12/13/2013 [NYSCEF Doc. No. 349].) Defendant also submits a copy of a letter from Ramsay's counsel's office to Seibel's counsel's office, which lays out several reasons The Fat Cow could not continue in addition to the trademark problem:

> The restaurant is closing due to the need to cease using the name Fat Cow and the fundamental impact on the venture and this restaurant that that has, your client's refusal to engage and settle the employee claims in 2013 and continued refusal to fund the business moving forwards. It cannot meet its debts as they fall due and has not been able to given the employee liability.
>
> You have not responded in detail to the points I made with respect to the money taken out by your client, the additional funding from the GR entities historically and to pay rent and fund the business moving forwards. I do not know why your client does not respond to these specific points. There are many unanswered emails dealing with the history of this matter.
>
> My clients are of the view that there is no alternative now but to shut down this venture and commence the necessary Bankruptcy proceedings.
>
> As I have told you on several occasions we need to talk to the Landlord to mitigate the position here and will now do so (Steers email dated 3/6/2014 [NYSCEF Doc. No. 350].)

Even if all these problems existed, plaintiff contends, the only appropriate remedy was to seek judicial dissolution, which they did not do until a few months after the restaurant had been closed (Plaintiff's Mem, at *11) He states that this court ruled as much in Seibel I. Plaintiff cites this court's decision in Seibel I in support of this proposition (Id.). Plaintiff misquoted the statement in Seibel I. The court did not state that dissolution was "the appropriate mechanism" for resolving a deadlock, but that it was "an appropriate mechanism for resolving managerial deadlock" (Seibel I, at 20-21 [footnote omitted] [emphasis supplied].) However, defendants have set forth credible reasons which may support its decision. For one thing, the trademark license was expiring, and this forced the parties to decide whether the restaurant should close when the license ended on February 28, 2014. Because of the requirement that the restaurant issue a 60-day WARN notice to employees in the event of closing, the decision had to be made two months earlier, or at the end of December. Defendants raise a viable argument that the short timetable, along with the restaurant's mounting debts, necessitated that Ramsay take the more immediate route of closing the restaurant, and seek dissolution later. Their expert report supports their position that "FCLA

was insolvent as of January 28, 2014, and would not have been able to continue to operate without additional capital contributions from its partners or other cash infusions" (Bracco Report ¶ 29.) Set against plaintiff's experts' different assessment of the restaurant's viability, there are issues of credibility more appropriate for resolution by a factfinder (Vega, 18 NY3d at 505.) Finally, on this point, the court notes that the doctrines of impossibility and impracticability would not exist if dissolution were the only option.[12]

Next, the parties hotly dispute whether plaintiff sustained damages, an essential element for a breach of contract claim (Navellier v Sletten, 106 Cal. App. 4th 763, 775 [Ct App, 1st Dist 2003].) Under California law, "the measure of damages, except where otherwise expressly provided by [the California Civil] Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom" (CA Civil § 3300.)

Plaintiff argues that The Fat Cow was a valuable, thriving restaurant, and that the lost value of this business is compensable in a breach of contract case. In support, he includes evaluations by Janet Lowder of Restaurant and Foodservice Advisors, who projected that, for a variety of reasons, the restaurant would have become profitable after the payment of nonrecurring expenditures such as those incurred as a result of the class action lawsuit (Lowder Report [NYSCEF Doc. No. 184]);

[12]The court rejects defendants' argument that there was no breach because the unanimity requirement was an agreement to agree and therefore nonbinding. Although agreements to agree are not enforceable (Copeland v Baskin Robbins U.S.A., 96 Cal App 4th 1251, 1256 [Ct App, 2nd Dist 2002]), there was nothing vague about the parties' intention here. As such, the requirement is distinguishable from the situation in Vangel v Vangel (116 Ct App 2d 615, 630-631 [Ct App, 2d Dist 1953]), on which defendants rely. The language in Vangel –that "[t]he parties shall from time to time agree upon a fixed amount to be drawn by each party by way of a drawing account, living expenses or wages" – stands in contrast to the very specific unanimity requirement in the LLC.

and from E. John Bautista of CohnReznick Advisory Group, who assessed the restaurant's value as $9.3 million (Bautista Report [NYSCEF Doc. No. 185.)

Lowder studied court documents including depositions, The Fat Cow's menus, social media reviews, information about California's labor standards and wage requirements, and certain financial records of The Fat Cow (Lowder Report, at **5-7.) She concluded that "The Fat Cow restaurant was a successful and viable operation despite some issues that affected the concept in the initial eighteen months of opening. If left open, it would have been a highly profitable and successful venture" (Id., at *7, 9-10.) Among other things, Lowder cited the enviable location at The Grove, the upcoming publicity due to the upcoming Hell's Kitchen coverage, and positive reviews on sites such as Yelp. She also noted that expenses such as the class action lawsuit would not recur, and she projected a 10% increase in profits on an annual basis (Id., at **7-9, 19.) Bautista relied on Lowder's report with respect to several critical issues, and it also looked to documents provided by plaintiff (see Bautista Report, at *39). The Bautista report noted that it did not independently verify the data (Id., at *6.) As external factors, the report considered "the economic and capital market outlooks, the outlook for the industry, and the competitive environment" (Id.) Plaintiff also challenges defendants' expert, Bracco, as lacking expertise about the restaurant industry (Lowder Rebuttal Report [NYSCEF Doc. No. 416], at *1.)

Defendants state that the Lowder and Bautista reports lack evidentiary value and must be ignored. They state that for an "unestablished" restaurant like The Fat Cow, "damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent" (Mem in Opp, at *21 [quoting Kids' Universe v In2Labs, 95 Cal App 4th 870, 883 [Ct App, 2d Dist 2002].) Moreover, under the standards established in Frye v United

States (293 F 1013, 1014 [DC Cir 1933])[13], evidence is only admissible if the rely on generally accepted techniques (citing Sean R. v BMW of N. Am., LLC, 26 N.Y.3d 801, 809 [2016].) They point out that in cases such as VBH Luxury, Inc. v 940 Madison Assoc., LLC (2011 NY Slip Op 33412[U], *15 [Sup Ct, NY County, 2011] [expert estimated amount of sales which were lost had the retail store opened several months earlier], affd 100 AD3d 563 [1st Dept 2012]), trial courts in this State have dismissed claims for lost profits when the expert's report was speculative or otherwise unfounded. Defendants rely on the Bracco Report, which is discussed above (see supra pp 15-16), to counter plaintiff's assertions that the restaurant was a thriving or potentially successful restaurant. In addition, they submit the expert report of Raymond S. Dragon, who concludes that "Lowder's forecast of FCLA's financial performance includes highly speculative and faulty assumptions, as well as calculation errors . . . and should be disregarded" (Dragon Report [NYSCEF Doc. No. 281 ¶ 9.) Further, Dragon finds that because Bautista's report relies largely on Lowder's conclusions, that report must be disregarded as well (Id.)

The court concludes that the parties have both raised credible arguments regarding the issue of damages. All four experts have submitted detailed reports and have creditable resumes. Defendants' challenges to plaintiff's claim for lost profits lack merit because, as plaintiff explains, he relied on lost profits to show the lost value of the business. Some of the experts' conclusions – including whether the $140,000 settlement of the class action lawsuit was lower because the restaurant no longer existed, what the settlement or lawsuit would have cost The Fat Cow had it remained open, and whether the projected growth in profitability is accurate – are open to debate. Defendants are right to caution against overreliance on expectation damages (see Metro

[13] The court notes that in Daubert v Merrill Dow Pharmaceuticals, Inc. (500 US 579, 586-590 [1993]), the Supreme Court found that rules in the Federal Rules of Evidence superseded Frye in federal court proceedings.

Communication Corp. BVI v. Advanced Mobilecomm Technologies Inc. (854 A2d 121, 167-168 [Ct Chancery, Del 2004], as such damages are available if they can be measured with certainty (see Siga Technologies, Inc. v PharmAthene, Inc., 132 AD3d 1108, 1122 [Del 2018]). However, Lowder's methodology and analysis is not so vague or speculative as to warrant dismissal. Instead, "the disagreement between the experts present[] a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution" (Ain v Allstate Ins. Co., 181 AD3d 871, 878-879 [2d Dept 2020] [internal quotation marks and citation omitted].)

Finally, while this motion was pending, the court issued an interim order which granted plaintiff's motion to amend the complaint to assert that Ramsay breached the FCLA Agreement when, among other things, he unilaterally closed The Fat Cow. Plaintiff argues that, although the LLP agreement did not contain a unanimity requirement, the LLP, which was a general partner of the LLC, was deprived of its the right to participate in the decision-making process. In their supplemental brief, defendants seek dismissal of this newly alleged claim. For one thing, defendants state, Ramsay is not a party to the FCLA Agreement, and the cause of action should be dismissed as against him. The court already denied defendants' motion to dismiss Ramsay on this basis, however (Seibel I, at **12-14.) Although Ramsay's deposition indicates that he had oversight rather than direct managerial control, this issue is best left to the factfinder for determination. Furthermore, the same reasons that the court denied dismissal of plaintiff's other breach of claims – impossibility, impracticality, frustration of purpose, and lack of damages – apply here as well. Defendants' reliance on Seibel I, which dismissed the claim as it related to FCLA, is misplaced because Seibel II allowed plaintiff to assert the claim based on plaintiff's newly asserted theory.

Breach of Fiduciary Duty

Defendants have moved for summary judgment dismissing plaintiff's breach of fiduciary duty cause of action. Plaintiff does not seek summary judgment for breach of fiduciary duty in his motion. However, in opposition to defendants, he asserts that Ramsay's breach is so blatant that this court should exercise its authority under CPLR § 3212 (b) and grant him summary judgment instead (Def Opp, at *17).[14] The court notes that in denying defendants' motion to dismiss this cause of action as duplicative, the court found that "[t]he breach of fiduciary cause of action encompasses a significantly broader range of alleged misconduct, including defendants' questionable handling of the trademark application, and their allegedly disloyal negotiations with the landlord and producers of the Hell's Kitchen television program" (Seibel I, at *17.) Further, it applies to other actions which did not require the unanimous consent of the parties (Id.). Therefore, the court shall focus on these additional allegations. To the extent that these issues have already been discussed in the context of the breach of contract claims, the court shall reference the prior discussions.

The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages (Oasis, 51 Cal 4th 811 at 820; see Beard Research, Inc. v Kates, 8 AD3d 573, 601 [Del Ch 2010] [listing relationship and breach as the elements] aff'd sub nom ASDI Inc. v Beard Research, Inc., 11 A3d 749 [Del 2010].) Under both Delaware and California law, the business judgment rule creates a rebuttable presumption that general partners "act[] on an informed basis" in the honest belief that their actions are in the partnership and limited partners' best interests (Zoren v Genesis Energy, L.P., 836 A2d 521, 528 [Del Ch 2003]). The same is true in cases involving limited liability corporations (See Berg &

[14] There is no pending application for summary judgment with respect to defendants' cause of action for breach of fiduciary duty, and the court shall not address it.

Berg Enters., LLC v Boyle, 178 Cal App 4th 1020, 1045 [Ct App, 6th Dist 2009] [Berg].) The business judgment rule precludes judicial second-guessing unless the presumption of good faith can be overcome (Hill Stores Co. v Bozic, 769 A2d 88, 110 [Del Ch 2010].) Indeed, the FCLA agreement incorporates the business judgment rule, stating that there is no liability for good faith errors in judgment (FCLA Agreement ¶ 8.10.)

However, an exception to the business judgment rule exists in both States. "Delaware law imposes an entire fairness burden when the fiduciary charged with protecting the minority in a sale of the company does not have an undivided interest to extract the highest value for the shareholders" (Matter of LNR Prop. Corp. Shareholders Litigation, 896 A2d 169, 177 [Del Ch 2005].) The FCLA incorporates this limitation, stating that liability applies to "acts of fraud, bad faith or willful misconduct" (FCLA Agreement ¶ 8.10.) Similarly, in California, which governs Fat Cow LLC, "the rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest" (Berg, 100 Cal App at 1045.) Thus, "the rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest" (Id. [internal quotation marks and citation omitted].) In such circumstances, the "entire fairness" doctrine is applicable. Under this standard, the burden shifts to the defendant or the counterclaim-defendant to show that the challenged conduct was fair to the other party (See In re Walt Disney Co. Derivative Litigation, 906 A2d 27, 52 [Del 2006].)

The parties disagree as to the applicable standard. Defendants argue that the business judgment rule applies because Ramsay operated in good faith. According to defendants, financial necessity, management problems, lawsuits, and the imminent end of the Trademark Settlement Agreement drove Ramsay to close The Fat Cow. They allege that all the challenged actions were

undertaken to save the business and, when that proved impossible, to minimize his and Seibel's losses. Defendants assert that plaintiff cannot rebut the presumption that Ramsay made informed decisions that he believed were in The Fat Cow's best interest (Def Mem, at *13.) In this, defendants rely heavily on some of the arguments they used in opposition to plaintiff's breach of contract claim. They cite the Bracco and Dragon reports, both of which reached this conclusion. Defendants' damages arguments, which the court detailed above, also applies to plaintiff's breach of fiduciary duty cause of action (see Cline v Grelock (No. 4046-VCN, 2010 Del. Ch. LEXIS 43, at *3 [Del. Ch. Mar. 2, 2010].) Defendants again rely on the landlord's letters as well (January 29, 2013 letter [NYSCEF Doc. No. 239]; April 25, 2013 letter [NYSCEF Doc. No. 239].) They also submit a copy of correspondence between several individuals working for The Fat Cow, which mention, among other things, that the contractor and kitchen suppliers intended to file liens on The Fat Cow for nonpayment of bills (January 2013 emails [NYSCEF Doc. No. 301].)

In addition, defendants contend that the business judgment rule applies because plaintiff cannot show Ramsay acted out of self-interest. They state that Ramsay did not benefit from the closure of The Fat Cow, as he, like Seibel, lost his substantial initial investment (Def Reply, at *6.) They contend that, as additional proof of his disinterest, Ramsay did not receive a payout or benefit financially from the closure (citing Huff, 2016 WL 5462958, at *11), and that he bore the substantial costs of settling the class action litigation as well as the problems with unpaid bills and the lawsuit over the lease.[15] As discussed earlier, defendants state that plaintiff's own actions, from his improper withdrawals from restaurant funds to his refusal to resolve the class action case, pay the rent, or otherwise participate in efforts to salvage the restaurant created the situation Ramsay had no choice but to resolve.

[15] Plaintiff does not allege that he contributed to these payments.

Plaintiff counters that the evidence is conclusive that Ramsay acted in bad faith and the total fairness doctrine applies. Plaintiff states that Ramsay "closed a profitable Restaurant based on a fabricated excuse . . . , refused to meet with his partner to discuss alternatives, and engaged in secret conduct to take the Lease and assets of the Restaurant for use in his new restaurant" (Plaintiff Opp, at *16.) He accuses Ramsay of planning to steal the lease, design, and employees from The Fat Cow for his new restaurant; of stealing the deal with Hell's Kitchen for the same purpose. Plaintiff reiterates that when Ramsay negotiated the Trademark Settlement Agreement in September 2013, he secretly planned to close The Fat Cow. He also argues that Ramsay's insistence that the two communicate through their attorneys rather than in person demonstrates Ramsay's unwillingness to resolve the restaurant's problems.

If Ramsay closed the restaurant simply because he wanted to end his partnership with Seibel and start a new restaurant, there would be a breach of fiduciary duty (see Cline v Grelock, No. 4046-VCN, 2010 Del. Ch. LEXIS 43, at *2 [Del. Ch. Mar. 2, 2010].) However, for the reasons the court already has outlined, issues of fact exist as to whether this is the case. In addition to the points this court has addressed earlier, there is a question as to why Ramsay settled the trademark problem the way he did. In opposition to the motion for dismissal, Seibel submits several pages from the deposition of Luis Gajer, owner of Las Vacas Gordas (Gajer Dep Excerpts [NYSCEF Doc. No. 202].) Gajer's testimony suggests that the plan all along was for the restaurant's name to change (Gajer Dep Excerpt, p 19 lines 11-19). This is consistent with the September 2013 Trademark Settlement Agreement, which clearly states that The Fat Cow would have until March

31, 2015 to change its name (see Trademark Settlement Agreement, ¶ 1.2.) It is not clear that Gajer's statement indicates an intent by Ramsay to violate his duty to Seibel.[16]

It is not disputed that Ramsay worked on plans for a new restaurant at the site of The Fat Cow. Plaintiff has provided numerous documents showing that Ramsay and his associates discussed plans to open a restaurant called Chicken Soup at the site (e.g., November 26, 2013 email to Gillies and Willigan [NYSCEF Doc. No. 186]; January 16, 2014 email from Wenlock to Willigan, [NYSCEF Doc. No. 194]) and even that, days after the closure of The Fat Cow on March 28, 2014, Willigan stated that she wanted to rehire numerous The Fat Cow employees for the new restaurant (March 31 - April 1, 2014 email chain between Gillies, Wenlock and Van Willigan, among others [NYSCEF Doc. No. 198].) However, the parties debate whether Ramsay considered opening a new restaurant because there were eight years left on the lease and he wanted to avoid or minimize The Fat Cow's liability (see Ramsay Dep, p 593 lines 3-20), or whether Ramsay simply wanted to operate a restaurant without Seibel despite his fiduciary duty to Seibel (E.g., Compl ¶¶ 71-80.) Further, although Seibel states that Ramsay moved forward secretively (id.), Ramsay suggested that he had no furtive purpose and Seibel was aware of Ramsay's plans all along. Indeed, the earliest email plaintiff submits indicating plans to establish a new restaurant is dated November 26, 2013 (NYSCEF Doc. No. 186), when Ramsay had already expressed his intention to close The Fat Cow.

Although the issue of Seibel's purported breach of fiduciary duty is not before the court, it is relevant to the extent that it reflects upon Ramsay's actions. As already stated, defendants have

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[16] The court notes that Gajer's attorney, Eric Isikoff, states that Ramsay intended to close the restaurant when the license expired (Isikoff Dep Excerpts [NYSCEF Doc. No. 201], p 34 lines 16-20). This further complicates the factual dispute.

shown, through redacted financial statements, that Seibel made withdrawals that defendants state were improper. Further, Ramsay states that Seibel cut a check to a contractor that bounced (Ramsay Dep, p 330 lines 12-16; p 331 lines 6-7), and that in late fall of 2013, when the future of The Fat Cow was uncertain, he received evidence that Seibel was taking kickbacks (Id., p 490 line 13 – 491 line 9.) According to Ramsay, this information, along with information about the class action lawsuit and restaurant quality concerns, left him "disheartened," "shocked," and with "no appetite to continue a new business" with Seibel (Id., p 492 lines 6-9.) There are issues as to whether the problems between Ramsay and Seibel were so extreme, and Seibel's conduct such a breach of contract and fiduciary duty, that they freed Ramsay of any duty he might have had to start the proposed new venture at the site with Seibel.

In addition, it is does not appear that Ramsay's insistence, after mid-December, that they meet through their attorneys rather than in person evinced a breach of fiduciary duty. In response to the suggestion that Seibel tried to meet directly, Ramsay stated that Seibel's attempt was illogical because he made it "[o]utside the lift in Vegas, when I'm going to do a book signing, a meet and greet with 300 guests" (Id. p 523 lines 16-18.) Seibel, on the other hand, suggests that his requests to communicate with Ramsay directly were more frequent. However, Ramsay stated that the parties were in direct contact until late in 2013, after which their legal teams continued the conversation. "[I]t's not like there's no communication. The fact is that the two main parties refused to speak. Our legal teams were across this every step of the way," he explained (Ramsay Dep, p 523 lines 3-7.) Given that their prior, direct communications had led to deadlocks and Ramsay continued to negotiate with Seibel through his counsel, Ramsay's course of action does not seem unreasonable. Moreover, Seibel points to no case or legal principle supporting his argument that this was a breach.

Indemnification

Plaintiff's motion also seeks dismissal of defendants' counterclaim for indemnification. He argues that Ramsay's closure of The Fat Cow was wrongful, and it was the closure that caused the rental payments to accrue. He states that breach of fiduciary duty is an intentional tort. Additionally, a tortfeasor cannot indemnify himself against his own tortious conduct (citing Austro v Niagara Mohawk Power Corp., 66 NY2d 647, 676 [1985]).[17] Plaintiff claims that Ramsay intentionally breached the Fat Cow LLC and the FCLA agreements and intentionally breached his fiduciary duties with respect to both. Therefore, he concludes, Ramsay cannot avail himself of the indemnification clause (See Plaintiff's Mem, at **15-17.) Plaintiff adds that the Indemnification Agreement does not include sufficiently specific language showing a contrary intent (Id., at **17-18.) He also states that the agreement is limited to expenses incurred under the lease, so it does not apply to expenses incurred due to the lease's termination (Id., at **18-19.)[18]

In opposition, defendants state that dismissal of their indemnification counterclaim is unwarranted. They accuse plaintiff of misrepresenting disputed facts as uncontroverted. According to defendants, even if Ramsay had breached the parties' contracts – an issue that, defendants underscore, is "hotly disputed" (Def's Opp, at *19) – this would not necessarily relieve plaintiff of his obligation to comply with the Indemnification Agreement (Id., at *19-20.) This is because "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (Panattoni Dev. Co., Inc. v Scout Fund 1-A, LP, 154 AD3d 555,

[17] New York law governs the indemnification agreement (Indemnification Agreement ¶ 3).
[18] Plaintiff finally argues that the language in the lease assignment agreement is broad, by comparison, and by implication reveals that the indemnification agreement must be read more narrowly. The court agrees with defendants that because the language of the indemnification agreement is clear, extraneous documents such as the lease assignment are irrelevant.

558 [1st Dept 2017] [internal quotation marks and citation omitted].) Here, defendants state, plaintiff cannot establish beyond dispute that an independent legal duty has been violated. Defendants also argue that plaintiff has provided no evidence of Ramsay's harmful intent, which is necessary before Seibel can be absolved of his obligations under the Indemnification Agreement. In support, they cite J.P. Morgan Sec. Inc. v. Vigilant Ins. Co. (21 NY3d 324, 335 [2013]), in which the Court of Appeals refused to apply the exception to deny insurance coverage to Bear Stearns even where "Bear Stearns' numerous securities laws violations [were] willful" because the evidence did "not conclusively demonstrate that Bear Stearns also had the requisite intent to cause harm." At the very least, defendants contend, an issue of fact exists regarding Ramsay's intent (citing Bank of New York v. Neumann, 216 AD2d 189, 190 [1995] ["The evidence might very well lead to a business purpose which had an intended result of causing harm, but this is a factual issue. If the proof is developed that there was no such intent, then the public policy question need not even be reached."].) Defendants also reassert that Seibel rather than Ramsay caused the breach by blocking Ramsay's attempt to mitigate their losses by opening a new restaurant at the site.

As the court has discussed at length, issues of fact remain regarding breach of contract and breach of fiduciary duty. It need not rehash these arguments here. Because of the outstanding issues, especially regarding Ramsay and Seigel's intent, summary judgment is denied on the indemnification claim.

Conclusion

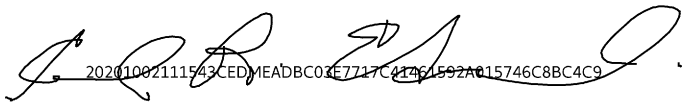
Accordingly, it is

ORDERED that the motion of plaintiff Seibel for summary judgment on the issue of liability on his derivative claims for breach of the Fat Cow LLC contract (motion seq. 005) is denied; and it is further

ORDRED that the motion of defendants/counterclaimants Ramsay and GR for summary judgment dismissing the complaint against them (motion seq. 006) is granted to the extent of dismissing Seibel's direct claims and is otherwise denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.



10/2/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[x]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[x]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE