

Marcello v MK Cuisine Global LLC

2025 NY Slip Op 32234(U)

June 18, 2025

Supreme Court, New York County

Docket Number: Index No. 654805/2022

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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FRANCESCO MARCELLO,	INDEX NO.	<u>654805/2022</u>
Plaintiff,	MOTION DATE	<u>05/14/2025</u>
- v -	MOTION SEQ. NO.	<u>002</u>
MK CUISINE GLOBAL LLC, MATTHEW KENNEY, LAZZARI LA, LLC, MKCCPB LLC	DECISION + ORDER ON MOTION	
Defendants.		

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 were read on this motion to CONFIRM REFEREE REPORT.

Plaintiff Francesco Marcello (“Plaintiff”) moves for an order pursuant to CPLR 4403 confirming the report and recommendation of Special Referee Joseph Burke, dated April 28, 2025 (NYSCEF 27) and directing the entry of judgment. Upon the foregoing documents and for the reasons stated below, Plaintiff’s unopposed motion is **GRANTED**.

The Court previously granted Plaintiff’s motion for a default judgment against Defendants and referred the matter to the Special Referees Part for an inquest on damages for Plaintiff’s breach of contract and breach of fiduciary duty claims (NYSCEF 18 [“Default Decision”]).¹ Pursuant to CPLR § 4403, “[u]pon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the verdict of an

¹ On June 17, 2025, Defendant Matthew Kenney (“Kenney”) moved to vacate the Default Decision and to sever and stay the claims against Defendant MK Cuisine Global, LLC pending its retention of counsel (NYSCEF 57). The resolution of that motion may, of course, impact whether a judgment may be entered against Kenney and, if so, in what amount pursuant to this Decision and Order.

advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing... Where no issues remain to be tried the court shall render decision directing judgment in the action.” While the referee’s report is not binding, “a special referee’s findings of fact and credibility will generally not be disturbed where substantially supported by the record” (*RC 27th Avenue Realty Corporation v New York City Housing Authority*, 305 AD2d 135, 135 [1st Dept 2003]).

The referee’s report recommends a total award of \$912,233.67, comprised of \$826,053.33 in damages for breach of fiduciary duty and breach of contract, and \$86,180.34 in contractually permissible attorney’s fees and costs. The report further recommends awarding prejudgment interest on the damages sum from December 14, 2022, the date of this action’s commencement, and interest on the attorney’s fees and costs from August 11, 2023, the date of the Court’s decision on liability.

The damages amount includes (1) the value of Plaintiff’s loan to CJFM, which the referee found was unable to be repaid due to Defendants’ breaches; (2) the cost of the security deposit for the premises that Plaintiff was unable to recover; (3) the “key money” that Plaintiff used to purchase assets of the business that were later seized to satisfy the tax liens resulting from Defendants’ failure to pay the taxes of the business as required by the relevant operating agreements; (4) the cost of the restaurant’s outdoor seating permit and liquor license, which the referee found were lost as a result of Defendants’ breaches; (5) the sums Plaintiff expended in start-up design and construction costs; (6) the value of CJFM’s tax liability, which Plaintiff became personally responsible for; and (7) the legal costs incurred by Plaintiff in contesting the tax liability and filing for bankruptcy as a result of the tax liability. The referee properly excluded the sum of \$300,000.00 attributed to the value of CJFM as Plaintiff’s capital

contribution to the joint venture, as the valuation thereof was not supported by evidence in the record and recovery thereof would be duplicative of recovery for Plaintiff's out of pocket start-up costs and loans. Likewise, the amount of Plaintiff's garnished wages was properly excluded as duplicative of recovery for the amount of the tax liability.

Following the inquest hearing, the referee requested supplemental briefing on the allocation of damages between Marcello and CJFM, the entity on behalf of which Marcello brought derivative claims (NYSCEF 25). Plaintiff argued that the start-up costs (including the security deposit, key money, liquor license, sidewalk permit, and design/construction costs) should be allocated to CJFM, as well as the attorney's fees and costs in this action, subject to the principle that those fees and costs be directed from CJFM to Marcello, who paid them personally (*see Glenn v Hoteltron Sys.*, 74 NY2d 386, 393 [1989] [directing the entity to pay its successful derivative plaintiff's legal costs]). Marcello argued that his individual damages consisted of his personal increased tax liability and related expenses, as well as the loans he made to the company because of Defendants' failure to fund the company's operating expenses as agreed in the joint venture agreement and operating agreement (NYSCEF 33 § 1 [a]; NYSCEF 34 § 6.2 [b]). The referee awarded all damages to Marcello directly because he "sustained damages individually, and any recovery would be to his benefit," citing *Scott v pro Mgt. Servs. Group, LLC* (124 AD3d 454 [1st Dept 2015]). This is consistent with Marcello's direct claims for breach of contract and breach of fiduciary duty arising out of the operating agreement.

While Marcello incurred the start-up costs prior to the alleged breaches as contemplated by the relevant agreements, an award of these sums as reliance damages is appropriate where an award of expectation damages in the form of lost profits cannot be proven with certainty, as is

the case here (*see St. Lawrence Factory Stores v Ogdensburg Bridge and Port Auth.*, 13 NY3d 204, 208 [2009], citing Restatement [Second] of Contracts § 349).

In sum, the Court has reviewed the referee’s findings regarding the amount of damages and reasonable attorney’s fees and finds them to be supported by the record.

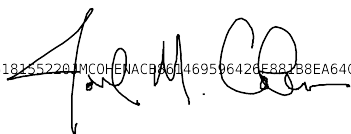
Accordingly, it is

ORDERED that Plaintiff’s motion to confirm the report and recommendation of Special Referee Joseph Burke is **granted**; it is further

ORDERED that Plaintiff may submit a proposed judgment consistent with this decision and the referee’s report within 14 days of the date of this decision; and it is further

ORDERED that Defendants may file objections to the form of the judgment within 7 days of Plaintiff’s filing thereof.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

6/18/2025

DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT		