

PRELIMINARY STATEMENT

Plaintiff, SANDRA G. MANZELLA, both individually and derivatively on behalf of KESTE GROUP, LLC (“Plaintiff Manzella”), by her undersigned attorney, respectfully submit this memorandum of law in opposition to the instant motion seeking that the court grant Summary Judgment in favor of Defendant and against Plaintiff.

This action arises out of a dispute between Plaintiff and Defendant concerning management and control of a restaurant called Keste Pizza & Vino (“Keste”), a company incorporated under the laws of New York State, for the purpose of operating a restaurant by the same name, “Keste,” which is located at 271 Bleecker Street, New York, NY 10014. Here, Defendant is alleging that Plaintiff has breached various duties owed to Defendant. Yet, as will be discussed herein, Defendant’s motion is wrought with baseless conclusory actions, and is simply asking the court to revisit issues and facts that the court has already decided upon, and in fact, ruled against.

The facts underlying this action are more fully set forth in the accompanying Affirmation of Daniel Lust, Esq., affirmed June 2, 2015, and the Affidavit of Plaintiff Sandra G. Manzella sworn to on June 2, 2015. Accordingly, these facts will not be repeated herein in full in the interest of judicial economy, and instead, only the salient facts will be incorporated into the legal argument.

**DEFENDANT FAILS TO MEET THE APPLICABLE SUMMARY JUDGMENT
STANDARD AND THUS HIS MOTION MUST BE DENIED**

New York Civil Practice Law and Rules §3212 states in relevant part: “[a]ny party may move for summary judgment in any action...The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (See CPLR § 3212).

Contrary to Defendant's arguments, the *conditional* contempt order is not dispositive to establish that he is indeed entitled to Summary Judgment. Moreover, as was detailed in the annexed affirmation, Defendant entirely mischaracterized the actual contents of the Order. In fact, Plaintiff was *never found to be in contempt*. As discussed therein, Plaintiff was directed by the judge to cure the contempt within a certain timeframe and if she complied he would strike the contempt. Plaintiff, of course, followed the judge's plain directives contained in the order and thereby purged the contempt.

Plaintiff does not dispute the actual contents of the Operating Agreement, which states in relevant part: "[t]he Company should be managed and controlled by its Member by the affirmation vote of a majority in interest of the Members (unless otherwise provided herein) and shall not have any managers within the meaning of the Act. Notwithstanding anything to the contrary contained in the provisions of this Agreement, the Members agree that Caporuscio and Manzella shall have primary responsibilities for running the day to day operations of the Company."

Nevertheless, Defendant alleges that he is entitled to summary judgment for the following alleged breaches of the Operating Agreement:

- a. Plaintiff's withdrawal of \$17,500 from Keste's account breaching Paragraphs 4.1, 4.4(a), 4.4(c) of the Operating Agreement;
- b. Defendants allegation that Plaintiff disregards Caporuscio's instructions concerning her handling of Keste's daily deposits;
- c. Defendants allegation that Plaintiff under-reports employee hours for payroll;
- d. Defendants allegation that Plaintiff fails to adhere to a work schedule;
- e. Defendants allegation that Plaintiff is paying herself for days she did not work;
- f. Defendants allegation that Plaintiff harasses and has attempted to fire Vianello;
- g. Defendant's allegation that Plaintiff has failed to make a properly called-for capital contribution under Paragraphs 3.3 and 4.2A.

Defendant himself mentions that four essential elements that are necessary to sustain a breach of contract claim. Defendant would need to prove (1) the existence of contract; and (2) the plaintiff's performance under the contract; (3) the defendant breach of that contract; and (4) resulting damages to demonstrate that Defendant is entitled to summary judgment. Hampshire Properties v. BTA Bldg. & Developing, Inc., 122 A.D.3d 573 (2nd Dep't 2014).

Applying the applicable standard, as detailed above, Plaintiff disputes any and all allegations that her actions extended beyond her permissible capacity, and in any event could have somehow breached an obligation or duty owed to Defendant, Keste, or its employees. Defendant does not even address the damages portion of the applicable standard. This error on the part of Defendant is *fatal in and of itself*.

Furthermore, as Defendant states himself: "every contractual obligation contains an implied covenant of good faith and fair dealing which is breached 'when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreements.'" See, P.T. & L. Contracting Corp. v. Trataros Const., Inc., 29 A.D.3d 763 (2nd Dep't. 2006).

Nevertheless, as is discussed in detail in the annexed documents, with respect to every cause of action upon which Defendant is seeking summary judgment, Defendant fails to demonstrate how the above referenced allegations are referenced in either the Consent Order or Operating Agreement; how any of these allegations rise to the level of a breach; how Defendant has performed in accordance with the Consent Order or the Operating Agreement himself; and lastly, how Defendant has been damaged as a result. All of which are required elements under the applicable law.

Based on the foregoing, it is clear that Defendant's motion must be denied.

PLAINTIFF HAS SUCCESSFULLY SET FORTH SUFFICIENT EVIDENTIARY PROOF TO DEFEAT DEFENDANT'S SUMMARY JUDGMENT MOTION

As expressed by the Second Department, “[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. (b)).” Zuckerman v. City of New York, 49 N.Y.2d 557, 562, (1980).

“Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form.” Id. The Second Department has repeatedly held “that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” Id.

Here, based on the applicable standard, even assuming Defendant has brought forth a prima facie cases warranting the granting of summary judgment, Plaintiff has nevertheless satisfied her own obligation necessary to defeat the motion.

Plaintiff has supplied overwhelming amounts of evidentiary proof throughout this litigation, which is also reproduced herein and in the annexed documents that ultimately are sufficient in defeating Defendant's summary judgment motion. As further detailed in the

annexed affidavit, Plaintiff Manzella has repeatedly denied or pointed out the clear mischaracterization of nearly all allegations discussed in Defendant's motion papers. For those others allegations that are not expressly denied, it remains Plaintiff's contention that her actions are explicitly covered and authorized under applicable provisions of the Operating Agreement and/or the Consent Order.

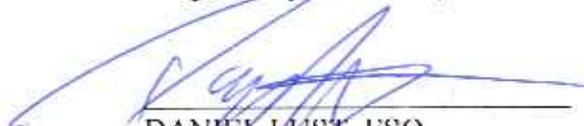
Accordingly, summary judgement is precluded due to the fact that Defendant has established that triable issues of material fact remain in dispute.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that Defendant's motion for must be denied in its entirety.

Dated: White Plains, NY
June 2, 2015

Respectfully submitted,



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