SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ESTHER J. O'MAHONEY and KEN FOLEY, individually and on behalf of DUBCORK INC., a New York Corporation, d/b/a SMITHFIELD and SMITHFIELD NYC,

INDEX NO. 652621/2014

Plaintiffs,

-against-

HON. JENNIFER SCHECHTER
PART 54

GAVIN WHISTON, THOMAS MCCARTHY, KIERON SLATTERY, MOXY RESTAURANT ASSOCIATES, INC., and DUBCORK INC. d/b/a SMITHFIELD TAVERN, SMITHFIELD NYC and SMITHFIELD HALL NYC

Defendants.

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DEFENDANTS' POST-TRIAL BRIEF

ELAINE PLATT
Attorney for Defendants
5 Tudor City Place
New York, NY 10017
(646) 602-1489
smartworkout@verizon.net

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PRELIMINARY STATEMENT

Plaintiffs have made claims of Shareholder Oppression and Theft of Corporate Opportunity. The law is pretty well settled in these areas, and liability is determined by establishing operative facts.

Plaintiffs have the burden of proof on these claims and it is respectfully submitted that they did not sustain their burden, based on the testimony produced at trial.

Defendants, as fiduciaries, have a duty to account for the expenditure of Dubcork's funds. It is respectfully submitted, that we have produced a clear and thorough explanation for all deposits and withdrawals from Dubcork's bank account; have identified all sources of cash revenues (both reported and unreported); and have identified all cash expenses. Summarily, we have appropriately discharged our duty to account.

THE ACCOUNTING

A. Procedural History

On November 5, 2020 I filed an accounting on behalf of the Defendants. [DKT 414].

Many of the exhibits in this filing did not have bates numbers, and several of the affidavits were not signed.

I asked for, and was granted, leave to make a supplementary filing, to cure these defects.

On December 13, 2020, I made the supplemental filing [DKT 468]. Unsigned affidavits were replaced with signed ones; and receipts that did not have bates stamps were replaced with identical receipts that were bates stamped. The December filing in all other respects was identical to the November filing.

On January 4, 2021, Mr. Goldman filed objections to the accounting [DKT 485]. No further action was taken with regards to his objections at that time. Both my opportunity to respond, and rulings on the objections, were held over to trial.

On June 8, 2021, Mr. Goldman made a motion to preclude Defendants' accounting. This motion was denied. Justice Schechter stated [DKT 610, at page 7]:

> "Anything they prove through documents that were properly produced, I will absolutely consider."[1]

At the trial, Mr. Goldman made the allegation that the numbers in the accounting that we presented at trial, were materially different from the numbers presented in our November 5, 2020 filing. I responded that there were no new or additional receipts relied upon; and that the exact same receipts and documents, that supported the November 2020 accounting, were used to support our trial

[1] Justice Schechter did bar our use of the "kitchen reports" because they were produced in a "dump". But the parties later stipulated to the admission of these reports. [DKT 636]

testimony. Only the narrative presenting these documents had differed, not the supporting data.

Your Honor directed that this issue, along with Mr. Goldman's pre-trial objections, be addressed in our post-trial briefs.

B. Differences between the November, 2020 presentation and the Trial Testimony

1. Scope of the Accounting

The scope of the November, 2020 Accounting was set out in my Affirmation in Support of the accounting, as follows:

> .This Court's decision of October 4, 2019, set out the contents of the required accounting:
>
> - To substantiate the business benefit that $903,445 of cash revenues were expended upon;
>
> - To explain why Gavin Whiston received payment from Dubcork of $47,000 ($40,000 in the form of a credit towards his capital investment, and $7,000 as a check to Whiston).
>
> - To explain why Tom McCarthy received payment from Dubcork of $120,668.21 (specifically, four $1,5000 checks to McCarthy's wife; one check to McCarthy for $6,421.19; and payments made to McCarthy's personal credit card accounts of $105,247.02).

Mr. Goldman objected to this limited scope, saying that our accounting did not cover enough.

At our hearing on July 15, 201, I asked the Court for further guidance as to the scope of the accounting that should be presented at trial.

The Court responded, at page 50:

> But the point, simply, is that, to the extent that there are expenses or monies paid out or monies coming in to the business, that is where I just need – I need to see the proof. That's all. No forensic accountant. I'm not precluding an accounting. The accounting will be determined based on admissible evidence.
>
> MS. PLATT: Well, income and expenses sounds like operations. Are you extending this to, like, all investments, where capital that was invested – how was it spent?
>
> You know, we're talking about 10 years ago.
>
> THE COURT: I understand. I just need to see proof in terms of allocation of money, that's what I need to see, so that I know that there is substantiation for the defendants' claims in terms of where money went and for what. So long as I have that substantiation – it's the defendants' burden here on the accounting. So long as I have that substantiation, there isn't an issue.

While this directive wasn't crystal clear to me, there did seem to be a focus on explaining money coming in, and money being paid out.

So when we prepared the accounting testimony for the trial, we added a chart explaining the source of every deposit, and we added another chart identifying, and explaining, every check written to cash, or to any of the Defendants. [Exhibits J, and K, DKT 1039]. These charts were created by Mr. Whiston, from Dubcorks' bank statements and deposit slips.

Dubcork's bank statements and deposit slips were exhibits to the November, 2020 accounting. [See DKTs 418 and 419]

And Dubcork's bank statements and deposit slips are on the parties' joint exhibit list for the trial. [DKT 686, 687, J48, and J48A]

The scope of the accounting in the November 2020 filing addressed only two things:

- How was Dubcork's cash expended
- Why did Whiston and McCarthy receive payments from Dubcork

The scope of the accounting in Whiston's trial testimony also addressed these two things, and in addition, included charts describing and explaining all deposits, and all checks made to cash or to any of the defendants.

No new supporting data [receipts or documents] was added to the trial testimony.

Also, in each of the individual Defendants' trial testimonies, they gave a personal accounting. They described any contributions or loans that they had made to Dubcork by cash or by check, and pointed out the deposit slip or check number that would evidence this. If they created a "loan" by personally paying for something for Dubcork's benefit, they referenced the receipt for this purchase. And

then they identified all monies that they received from Dubcork (with corresponding check numbers).

In all cases, the checks, the deposit slips, and the purchase receipts used for these personal accountings, had all appeared in the November, 2020 accounting.

2. "First Touch" and "Jazz" Expense

In the November accounting, I attached 51 receipts for payments to "First Touch", and 28 receipts for payments for the Jazz band. And that is all we claimed in the November accounting on account of these two categories of expense.

At trial, Kieron Slattery testified that we had paid First Touch 90 times (even though we only had 51 receipts), and that we had paid for Jazz 67 times (even though we only had 28 receipts).

At trial, we added Kieron Slattery's claims to our accounting, clearly and explicitly detailing how much was supported by receipts, and how much was supported only by Mr. Slattery's testimony.

The November accounting, which was submitted pursuant to this Court's Summary Judgment decision [DKT 369] clearly asked for "expenses [to be] substantiated with <u>proof</u> [eg] receipts". [Emphasis supplied]

I did not think that the unsupported testimony of a defendant would be acceptable within the November 2020 filing. So I only included in the November 2020 filing, those claims for which we had receipts.

At trial, Slattery could testify in person; could be cross-examined; and Your Honor could assess his credibility. So at trial, we added the additional claims that were testified to by Slattery.

3. Dave Massey's Cash Payment

Just before the trial, I learned that Massey had only received $10,000 in cash as a repayment of his loan, not the $73,000 that I had written in the November 2020 filing.

Ethically, I had to make this correction. It significantly impacted [reduced] our explanation for our cash expenditure.

4. Reimbursements

A new narrative, titled "reimbursements" was added to our trial testimony, to try to give a clearer explanation as to how the receipts that we were using to substantiate our accounting, were processed within Smithfield:

Many people on our staff made purchases for Dubcork. Paul Geary, our chef, made the bulk of these purchases. All of these purchases were reimbursed by Dubcork.

A small portion of these receipts were reimbursed by check. The rest were reimbursed with cash.

All of these purchases were evidenced by the "receipts" that we used to substantiate our November, 2020 accounting.

A reading of the November 2020 accounting might give the impression that Tom McCarthy personally provided all the cash needed to make these reimbursements. That is not accurate. And that is why we added this additional narrative to the accounting we presented at trial.

Dubcork had 8 "banks", each with $400 in it. When someone made a purchase that they wanted to be reimbursed for, they would take the money out of the "bank", and leave the receipt in the bank. For larger purchases (or accumulated small purchases), they would go to the office, and they would be reimbursed there (likely by Tom).

To the extent that Dubcork had cash from revenues, this cash would be used to replenish the "banks", and kept in the safe in the office, for Tom to use to make reimbursements.

But, when there was a shortfall (more cash expenses than cash income). Tom McCarthy used his own money to make up the shortfall. He would personally replenish the "banks", and personally reimburse the receipts brought to the office. But to be clear, Tom McCarthy picked up the shortfall (only). We did not intend to say that McCarthy paid all the receipts or made all the purchases that generated the receipts.

Only this explanation (clarification) was added to the trial testimony. The subject receipts were precisely the same in both November 2020, and in the trial testimony.

McCarthy made two categories of contribution:

- He personally made the purchases for all of the items charged to his personal American Express card. All of the receipts for these purchases are in Exhibit I to Whiston's accounting testimony. Each receipt has McCarthy's credit card number on it; and
- He funded the shortfall. To the extent that there weren't sufficient cash revenues to reimburse everyone, or to restock the "banks", McCarthy contributed the cash to make up the difference.

Again, only the narrative changed. All the supporting documentation is precisely the same as that attached to the November, 2020 accounting.

C. Authentication

Gavin Whiston testified to the procedure employed by Smithfield for processing, recording, and saving receipts. [See transcript pages 1163, 1184-5, 1230]. He testified that Lilyana Cruz, their office manager, would be given the receipts; that she would enter them into the computer; and also file the hard copies.

Lilyana Cruz also testified at her deposition[2] (DKT 1017 at pages 89-95, 99-100) the system for filing, categorizing, and retrieving receipts.

D. Testimony Supporting the Veracity of the Accounting

In addition to the testimony of the Defendants themselves, other people gave testimony supporting various aspects of the accounting.

- Robbie York at transcript pages 354, 362, and 403, and Sean Dillon, at pages 415-17, both testified that there were cash payments made to vendors; and that employees would often make expenditures for the bar, for which they would be reimbursed, most often in cash.
- James Gerding, at pages 657-8; Gerry O'Riordan, at page 694; and John Schneider at pages 716, 722, and 744, testified that all or some of their loan repayments were made in cash.

[2] Ms. Cruz was unavailable to attend the trial. It was agreed that her deposition testimony could be submitted instead.

- Mick Callahan, at pages 748 and 762, testified that he received a salary of $54,000, all in cash
- Bryan Tynan, at page 924, testified that he was paid in cash, off the books
- Robbie York, at page 362, acknowledged that he got some salary in cash.

E. Dubcork had $810,000 in cash revenue

Dubcork (d/b/a Smithfield Tavern) had $810,000 in total cash revenues (both reported and unreported), not $1.7 million, as Plaintiff's expert contends.

Plaintiff's expert starts with the $249,000 of reported cash; then calculates $903,445 as unreported cash from sales other than parties, to get $1,152,445 in cash revenue; and then with no substantiation or reasoning, says there's $542,067 more unreported cash from parties, totaling $1,699,502 in cash income.

Plaintiff's expert arrived at the $903,445 by dividing the "cash" line on the POS report by the "unadjusted receipts" line (which includes tips and taxes), resulting in 26% as the ratio of cash receipts to total income. He then deducted 6% for the $249,000 reported income, and concluded that 20% of all income is unreported. He applied this 20% to the 4.5 million in sales reported on the tax returns, and concludes that there's $903,445 in unreported income.

As Defendants' expert John Johansen wrote in his rebuttal report (DKT 618) and in his trial testimony (DKT 963), and testified to at trial (pages 1598-1603),

Plaintiff's expert's calculation is incorrect, because he did not reduce the cash line by the amount of the tips line. He should have divided the cash-net-of-tips amount by the line that says "sales before taxes and tips". This calculates to an 18% ratio. Applying 18% to $4.5 million in reported sales, results in $810,000 total cash.

Regardless of the various criticisms that have been made about the methodologies employed by both parties' experts, in this instance, both experts agree that the amount of total cash (unreported and reported together) can be obtained by utilizing two lines on the POS: divide one into the other, and multiply the resultant ratio by the $4.5 million gross income that appears on our income statement.

The experts differ only as to which two lines on the POS to employ when making this calculation.

Plaintiff choose to divide the "cash inclusive of tips" line by the "unadjusted receipts" line (includes tips and taxes).

Defendants choose to divide "cash net of tips", by the "sales before taxes and tips".

It should be apparent that tips and taxes are not part of our income, cash or otherwise, and the lines that include them should not be employed in our calculation.

Moreover, the $4.5 million on our income statement that is our reported income, is an amount that is explicitly net of tips and taxes.

F. All Supporting Documents Were Properly Produced

Plaintiff alleges that the documents that we relied upon to support our accounting were not properly produced. This is not true, to any extent.

All of the receipts (except the Kitchen Reports) were produced in 2016, pre-ESI. The Kitchen Reports were utilized per stipulation between the parties.

DEPOSITION PAGES REQUESTED
TO BE ADMITTED INTO EVIDENCE

I request that the following Deposition pages be entered into evidence:

DKT 302 – Deposition of Ken Foley, pages 153, 564;
DKT 301 – Deposition of Esther O'Mahony, page 497;
DKT 307 – Deposition of Robbie York, page 47

Each of these pages would impeach the testimony of a witness. I asked Mr. Goldman if he would consent to their admission, and he would not consent as to any page.

CPLR 3117(a)(2) is entitled "Use of a Party's Deposition by Adversely Interested Party Subject to Trial Court's Discretionary Power to Control Proceedings". It authorizes the use of a party's deposition for any purpose. It can be used not only for impeachment, but also as evidence in chief, even though the

deponent is available to testify as a witness. This is subject to the trial court's discretion [St. John's Law Review, Volume 55, Winter 1981, Number 2, Article 9 by Daniel Rubino; *Naso v 1994 BA Leasing Corp*, 13 Misc 3d 1230, (S. Ct. NY County, 2006); *Rivera v New York City Tr. Auth.*, 12 Misc 3d 1167 (S. Ct. NY County, 2006).]

Esther O'Mahony testified that she and Ken had no idea that Defendants were going to open another bar, until December 22, 2013, when Kim Rubino mentioned it to them.

I showed O'Mahony pages 297 to 299 of her deposition, where it states that she had heard rumors from the staff, as early as September, 2013, that defendants were going to open another bar.

When Your Honor asked her about these inconsistent statements, she said (transcript page 291), that she'd "gotten my months mixed up. I knew it was the latter of 2013; I just couldn't remember which month at the time."

> THE COURT: But as you sit here now, you're sure it was December?
>
> THE WITNESS: Yes. Yes, because my husband was there with me at the time. And he remembered that I had… it happened in December. I knew it was late 2013; I just didn't know what month it was.

Yet on page 153 of Ken Foley's deposition, it reads:

> A: We were being told by members of staff that there was a new bar being built and we weren't being made a part of this.
>
> Q: When were you told this?
>
> A: Around September, I believe. September, maybe October.

And on page 564 of Ken Foley's deposition it reads:

> Q: And when did you first hear rumors that the three defendants were going to open a new bar of their own?
>
> A: I think it was around September 2013.

O'Mahony says she'd mentioned "September or October" because she'd "gotten her months mixed up".

Did Foley have the precise same "mix-up"?

Foley had completed testifying before O'Mahony talked about her "mix-up", and I didn't have the opportunity to question Foley after O'Mahony testified.

I ask this Court to exercise the power of its discretion to admit these deposition pages into evidence.

Page 497 of O'Mahony's deposition reads as follows:

> Q: If the defendants had come to you and said "Look, we just gave you $197,000. Would you give it back to us so that we could form another bar together", would you have given them that $197,000?
>
> A: No.

This impeaches her testimony as to whether she would have wanted to invest in "the new Smithfield".

Page 47 of Robbie York's deposition reads as follows:

> Q: Did you receive a salary every week that you were employed?
> A: Yes.
> Q: Were you paid by cash or check?
> A: Cash.
> Q: Did you request to be paid in cash?
> A: Yes.

But at trial (transcript page 362) his testimony was:

> Q: How were you paid, in cash or check?
> A: I can't recall, but probably about… I think it was a little bit of cash and there might have been some checks. I'm just not sure I can't recall.

His deposition page would impeach his trial testimony. It's important to our accounting to establish the $50,000 cash payment that we made to Robbie York.

THE CORPORATE OPPORTUNITY DOCTRINE

A. Tangible Expectancy

Theft of corporate opportunity occurs when an employee of a company pursues an opportunity for himself, when the corporation he works for, had a "tangible expectancy" of that opportunity.

Dubcork did not have a "tangible expectancy" of purchasing Chelsea Manor. Indeed, Dubcork had no contact whatsoever with Chelsea Manor.

Bill Zorzy testified that Gavin Whiston contacted Zorzy, whom he had known from prior dealings in the industry, and had asked Zorzy to look for sites for himself. Zorzy further testified that he did not regard Whiston to be acting in a representative capacity for Dubcork, but rather, he was acting in his individual capacity for his own self. (Transcript 837-838). Thereafter, Zorzy introduced Whiston to Chelsea Manor. Dubcork never had any involvement of any kind with Chelsea Manor, and hence could not have had a tangible expectancy of acquiring that property. (See *Alexander & Alexander v Fritzen*, 147 AD2d 241, First Dept, 1989, holding that there is no diversion of corporate opportunity where the parties understood that the employee would simultaneously pursue other interests, even ones related to, or in direct competition with the business of the corporation.)

B. Acquiescence

Even if Dubcork did have a tangible expectancy in Chelsea Manor, it's a complete defense to a theft of corporate opportunity claim, if plaintiffs knew about Defendants' plans to open a new bar, yet said and did nothing about it. This inaction ("acquiescence") is deemed an implied waiver of their claim. (See *Lee v Manchester Real Estate & Construction,* 118 AD3d 627, First Dept, 2014; *Ackerman v 305 E 40th Owners Corp.*, 189 AD2d 665, First Dept, 1993.)

Plaintiffs acknowledged that in December of 2013, that they knew about Defendants' new bar (they claim that Kim Rubino told them on December 22nd. And in fact, there is ample evidence that they had heard rumors to this effect, months earlier, in October of 2013.

They acknowledge that they said and did nothing; that they just waited for the defendants to come to them. The new bar didn't open until May of 2014. Yet for the five months from December, 2013 (or the 7 months from October, 2013), Plaintiffs simply acquiesced. [Transcript pages 302-303]

C. Plaintiffs Would Not Have Invested in MOXY Had They Been Offered the Opportunity to Do So

Plaintiffs have stated that they wouldn't have wanted to give up their interest in Dubcork for $197,000.

But this is a red herring. No one wanted that.

Defendants also didn't want to have to give up their interests in Dubcork for $197,000. But this was the most that ADG was willing to pay, and Defendants had scant negotiating power.

But the question here, isn't at what price would plaintiffs have agreed to sell their shares.

The question here is whether plaintiffs would have opted to invest $150,000 of their own money, to go into a new venture with the defendants, had they been offered the opportunity.

O'Mahony was asked this precise question at her deposition [DKT 301, at page 497]:

> Q: If the Defendants had come to you and said: "Look, we just gave you $197,000 would you give it back to us so that we could form another bar together?" Would you have given them that $197,000?
> A: No.

It is a complete defense to a Theft of Opportunity claim, if the plaintiffs wouldn't have invested, had they been offered the opportunity to do so.

DUBCORK'S ASSETS

Plaintiffs claim that the defendants absconded with assets of Dubcork, and should be required to pay for them.

A. Furnishings, Fixtures and Equipment

Gavin Whiston testified that the Stipulation of Settlement (DKT 889), required that they deliver the premises "broom clean", which was defined as devoid of any personal property. The Stipulation contained a draconian penalty clause: that they would forfeit their $1.9 million buy-out, if they failed to deliver the premises "broom-clean".

They had just two weeks to empty the space. So they packed up everything as fast as they could, and moved everything to a storage facility.

When the lease on the storage facility expired, they had to decide whether they wanted to take all, some, or none of what was stored there.

Contrary to Plaintiffs' allegations that they took "everything", they took very little. Their new premises were one third the size of Smithfield Tavern, and came fully furnished and equipped. They had neither the need, nor the space, to take "everything".

They did take a few items. Kieron Slattery prepared a list of every item that they did take, along with its original purchase price, and estimate of resale value in 2014.

It's true that we didn't pay for what we took. We thought that it was abandoned property. Had we not taken what we did, it most certainly would have been destroyed.

B. Website, Twitter, and Facebook Accounts

After Smithfield Tavern had closed, Smithfield Hall continued to use the Tavern's website, Facebook and Twitter accounts (just changing the handles).

Plaintiffs allege that this is a theft of "Goodwill".

Again, these sites were abandoned, as Dubcork had ceased all operations, and had ceased to pay the hosting fee.

But legally significant, Plaintiffs have never ascribed any specific value to these intangible assets.

See *Bonanni v Horizons Invs*, 2016 NY Slip Op 50281 S.Ct. New York County 2016, where Plaintiff's claims for misappropriation of the corporation's assets was dismissed because

> "Plaintiffs have failed to establish the value of any of the assets that were transferred from the corporation to the new company…"

C. Customers

Kieron Slattery's testimony distinguishes between "Fan Clubs" and other customers. He testified that they lost most of the other customers, because the 25th Street location wasn't convenient for them, and because the 25th Street location didn't have spaces where private parties could be held.

As for the fan clubs, the relationships that he, Tom and Gavin had with them, was not developed at Smithfield Tavern. They were developed at Nevada Smiths. They brought the clubs to the Tavern, and ultimately some of the clubs also went to 25th Street. But this was achieved only because of the hard work and quality of service that they gave to the clubs. (See trial testimony of Kieron Slattery, DKT 982, paragraphs 9-16). No customers were "taken" from Dubcork.

D. The Name "Smithfield"

Dubcork never trademarked the name "Smithfield" (see transcript page 30), and indeed they could not have. Kieron Slattery explained in paragraphs 7 and 8 of his trial testimony (DKT 982), that the name "Smithfield" is ubiquitous, and in common use throughout NYC, the US, Dublin, Belfast and London. He testified:

- There are 20 Smithfield's (Towns/Places) in the USA including 1 in New York State
- Smithfield foods is one of the largest meat producers in the world and is headquartered at Smithfield, VA. www.smithfieldfoods.com
- Smithfield is a famous market area in Dublin
- Smithfield is a famous market area in London
- Smithfield is a market in Belfast
- Smithfield was a bar in New York City
- https://smithfieldgourmetbakery.com
- https://smithfieldinn.net

  There had been another bar at 115 Essex Street called "Smithfield" that named itself after the market in Dublin and used the exact same www.smithfieldnyc.com url.

E. The Sign

Gavin Whiston explains [DKT 1046], at paragraph 38:

> "38. Plaintiffs point out that we took the Smithfield sign with us to the new bar.
> a) Firstly, it would have been abandoned had we not. Certainly no one would want to purchase our old sign.
>
> b) Secondly, the sign was hung on the wall inside Smithfield Hall, like a piece of art… actually like a piece of nostalgia. The sign was not hung outside and used to attract people to enter. You'd have to already be inside the bar, in order to see the sign. In fact, we paid $2,500 for a new sign that we did hang outside our door.

F. Dubcork's Cash

Foley acknowledges that he personally did not put any cash into MOXY, but claims that "his corporation" (Dubcork) did, and because of this cash from Dubcork, he has a claim for the future and past profits of MOXY.

But when examining him further about the details of this cash from Dubcork (transcript 78, 82, 83, 86-19), he describes only the advances that the defendants took from their distributive shares, that were all repaid in full six weeks later, (by reductions in the amounts of defendants' distributive shares). In fact, Defendants have provided absolutely no evidence that any cash from Dubcork was used to fund MOXY.

G. Inventory

Plaintiffs allege, with no basis, that defendants took the liquor from Dubcork, and used it to sell at Smithfield Hall (when it opened five months later).

Defendants rebut this unfounded allegation, three ways:

— That because they knew that they would soon be closing, they kept inventory levels lower than usual;

— That Scott Ackerman arranged for returns and credits of unopened cases; and

— That it is illegal to sell liquor that another bar purchased, and there are severe penalties if caught

(See testimony of Kieron Slattery, DKT 982, paragraphs 35-40)

H. "Operating Style"

Plaintiffs contend that the Defendants simply "relocated" the business that was operating on 28th Street (Smithfield Tavern), to 25th Street. They reason that if this is the exact same business, just with a different location, that they should still own 20% of it.

There are a few flaws in their reasoning.

Firstly, each of the Defendants had to contribute $150,000 to launch the business on 25th Street. Plaintiffs contributed nothing.

Second, it's difficult to understand how the operation on 25th Street could be considered the same business that was on 28th Street, when the space was only one-third the size, and did not have rooms for private events (a significant portion of the business at 28th Street).

What 25th Street did have, was the application of the Defendants' talents, contacts and industry expertise, that they had used to launch and operate Nevada Smith's, Lunasa, and Smithfield Tavern.

Plaintiffs claim ownership of Defendants' personal "operating style", and Defedants reject this notion.

Plaintiffs repeatedly point to the proposal that Defendants gave to prospective landlords, to describe the use that they would make of the site if granted a lease. Plaintiffs say that this is evidence that Defendants wanted to replicate Smithfield Tavern. Defendants contend that its evidence only that they want to establish a sports bar of the quality of Nevada Smiths, Lunasa and Smithfield Tavern.

Gavin Whiston wrote the proposal, and he testified that this was his intention.

Plaintiffs say that in their opinion, Defendants did actually relocate Smithfield Tavern on 25th Street. They make this allegation on what they describe as the appearance and ambience of the bar. Yet the plaintiffs acknowledge that they have never even been inside 25th Street… that their conclusions are based on seeing pictures on the internet.

Robbie York testified that he did visit 25th Street, but only one time, and that he stayed in one place, near the door, the entire time that he was there. His submitted testimony said that 28th Street had a "unique" style… so unique that it should be considered as a valuable asset, and that this unique style was replicated

on 25th Street. Yet when Mr. York was shown a dozen pictures of 28th Street, 25th Street, and several other sports bars in NYC, he could not point to any unique aspect of 28th Street that could create this allegedly valuable asset.

See the trial testimony of Gavin Whiston where he testifies as to why Plaintiffs should have no claim on Dubcork's operating style:

> Perhaps the most outrageous of Plaintiff's claims, is that we stole *their* operating style.
>
> Plaintiffs had no operating style. Tom, Kieron and I were the operations of the Tavern, and its "style" was our style.
>
> Smithfield Tavern was launched with the skillset, talent, experience, and effort of the three of us. The plaintiffs did nothing! They in no way contributed to the "operating style" of the Tavern.
>
> Let's take a brief review of all that had to be done to launch Dubcork, and let's see who did it.
>
> - Set up audio and TV equipment – Kieron
> - Cultivate supporter clubs – Kieron and Tom
> - Designing the space – Gavin
> - Finding investors – Tom, Gavin, Kieron
> - Assembling a professional team of architects, engineers, contractor, and liquor license attorney – Gavin
> - Obtaining loans – Tom, Gavin
> - Graphic design logo, website and social media – Kieron
> - Developing the menu – Gavin, Kieron, Tom
> - Cultivating beverage vendors – Gavin, Kieron
> - Staffing – Gavin, Kieron
>
> Noticeably absent from this list is Ken's name. That is because KEN DID NOTHING!
>
> Dubcork's "operating style" is the talents and expertise of the Defendants. This was not created at Dubcork. Defendants brought their talents and industry experience to Dubcork, to set up and operate

Smithfield Tavern. Dubcork never owned the talents and expertise of the Defendants, and Plaintiffs should have no claim on them.

THE LOAN

Tom McCarthy testified that he paid back Foley's loan. Foley says that he didn't.

At Foley's request, the repayments were all made in cash, and the loan was kept off the books.

So how do we prove that Foley was paid?

One thing we did prove, is that every other lender was paid off in full. Why would we singularly select only Foley to not be paid? Over and over you heard our other lenders saying how much they trust Tom McCarthy. Many of these lenders made their transactions on a handshake, with little or no documentation to establish their right to payment. They proceeded on trust, and their trust proved to be well-founded. Every one of them was repaid in full. [Transcript pages 668, 669, 731, 736, 923]

Surely we've established a pattern of dealing, showing that we repay our debts.

Who has the burden of proof here?

If there is some legal rule that would prevent the Court from finding for us, then we request, at a minimum, that you reduce the claim by $16,000, representing Plaintiffs' excess distribution. Had Plaintiffs received this $84,000 claim back in 2014, then the fund left to distribute would have been reduced by $84,000; and plaintiffs would have received $16,000 less on their distributive share.

SPOLIATION

There are three criteria that must be met, to warrant a finding that there was spoliation:

— At the time that the materials were destroyed, there was a reasonable anticipation of litigation [*China Dev Indu Bank v Morgan Stanley*, 183 AD 3d 504 (1st Dept 2020)];

— That the destruction was done with "a culpable state of mind" (*McAddley v Western Beef Prop*, 188 AD 3d 536 (1st Dept 2020)]; and

— That the destroyed materials were the sole means to establish (or defend) a claim. [*Rossi v Doka USA*, 181 AD 3d 523, (1st Dept 2020)]

The testimony in our case establishes that the hard drive from Dubcork's old POS system was not wiped until May 9, 2014.

The soonest that defendants could have anticipated litigation was when they received a letter from Plaintiff's attorney, Mr. Bhatta, dated July 10, 2014, more than two months after the hard drive had been wiped.

Liam Thompson testified (DKT 954, at paragraphs 1-10) that the POS was wiped in the context of setting up Defendant's new business. Thompson says that he was advised by their POS vendor, that if he wiped the POS hard drive, the system would run faster and better. Thompson says that the drive was wiped only because he was given this recommendation. The "wipe" was not done with a culpable state of mind.

But most significant, for 9 of the 20 months of Dubcork's operations, the POS had been downloaded and preserved, and it was used by both parties' Experts to calculate Dubcork's cash income. Plaintiffs' prosecution of their claim was in no way impaired by the wiping of the POS hard drive.

SHAREHOLDER OPPRESSION

A. Returning Investments Before Distributing Profits

When making the final distribution of Dubcork's funds, Defendants first paid off all bills owed to vendors, and all debts owed to all lenders. Next, Defendants returned the full amount of the money invested by each investor. What

remained after these payments, was distributed pro rata to each shareholder, in proportion to their percent of ownership.

Plaintiffs objected to this procedure, saying that returning investments before distributing profits, reduced the amount of money that they received in the final distribution. This is of course true. But defendants respond that the same terms applied to themselves, and they too had a reduction in what they would have received in the final distribution. Nonetheless, they claim this procedure to be proper, as they had promised this to each investor, in order to induce the investment.

In this Court's 10/4/19 decision, Your Honor held:

> "It is unclear how the parties treated the settlement distributions, namely whether (according to defendants) they were meant to be a return of capital in accordance with the alleged oral agreement reached with Massey at the time of his investment or whether (according to Plaintiffs) the proceeds should have been distributed on a pro rata basis. If defendants can prove the alleged agreement with Massey (an issue that implicates their credibility), it seems that what was given to Massey was not only proper, but indeed legally required. But if that alleged agreement is not proven, then plaintiffs have a compelling claim that shareholder distributions must be made in proportion to their percentage equity, and thus plaintiffs are owed their share of the extra amount paid to Massey.

Each and every one of Dubcork's investors testified that they were promised that their investments would be returned in full before there was any distribution of profits.

To be sure, not everyone knew what this meant, or cared what it meant. But everyone testified that they expected that their full investment would be returned to them. And some in fact stated that this promise was part of what induced them to invest.

See eg, Deposition of Nicole Massey, at page 14:

> We invest in properties that we know we're going to get our investment back.

At page 20:

> Q: He promised you that your investment would be repaid in full before any profits were distributed?
>
> A: Yes.

See trial testimony of John Schneider (transcript page 726)

> Q: Do you remember that your investment was supposed to be repaid in full?
>
> A: Yes.

See trial testimony of Keith Duval (transcript page 906):

> Q: You mentioned that Mr. McCarthy approached you to make an investment in Dubcork, is that correct?
>
> A: That's correct, yes.
>
> Q: You mentioned that he had said that you would get all of your money you invested before anyone else took any profits?
>
> A: Correct.

And at page 913-14:

> Q: Did the fact that you would get your investment back before other payments to shareholders were made, in any way influence your decision to invest?
>
> A: Yes… that's how I understood the deal.

And at page 915-916:

> Q: I know that you don't make an investment based on just one thing, that there are a bundle of influences, but was this expressed representation that your investment would be returned, part of the inducement for you to invest in this bar?
>
> A: Yes….

See trial testimony of Eric Manning (transcript page 1261):

> Q: Mr. Slattery told you that you would be repaid in full before any profits were distributed, is that correct?
>
> A: That is correct.

See trial testimony of David Massey (transcript page 1271):

> Q: You were told by Thomas McCarthy that your investment would be repaid before any profits were distributed. Is that something you recall?
>
> A: Yes. That was the deal.
>
> Q: Was that something you asked for?
>
> A: That's basically the deal they were offering. They were offering to sell me 10% for $150,000 and that before anyone would take profits, I would get my investment back.[3]

[3] Mr. Goldman asked each investor about having received dividends, and said to each of them that dividends are a distribution of profits. I'm not clear on the relevance of these dividends to the promise made that they would get their investments returned in full. But Mr. Goldman seems to think it's very important, so maybe I'm missing something.
I ask this Court to take judicial notice of the fact that a dividend is not necessarily the same thing as a distribution of profits. It could be a distribution of profits; but it could also be a distribution of excess working capital, or a distribution of additional paid-in-capital. This is not disputable. It's black letter corporate law.
In fact, Dubcork never had a profit until the time that it received the pay-out from ADG for the sale of the leasehold.

B. Foley Was Never Denied Workshifts

You only have to look to the transcript of the first tape to see the Defendants literally begging Ken to come in to work more often, and offering him his choice of days and times. (See transcript 115, 116).

And Willie Thompson testified that he asked Foley on multiple occasions to take on more shifts, but Foley was not interested. (See transcript 793-797)

> Q: You asked Ken on multiple occasions to pick up shifts, but he had no interest in doing them, correct?
> A: That is correct.

And Robbie York, testified that he'd never say "no" to an owner, if they asked to be put on the schedule (transcript 360, 361), and that no one ever told him not to put Ken on the schedule. (Transcript 362)

C. Propriety of Selling the Leasehold

The issue of whether Defendants properly settled the lawsuit that ADG brought against them, has already been decided, and is law of the case.

The decision of Justice Kornreich (DKT 38) reads in pertinent part:

> As for the first cause of action dealing with the breach of fiduciary duty of care of the Board, and this deals with <u>whether they properly settled the lawsuit</u> with the landlord which went on for a number of months, which I am sure was quite costly and which dealt with landlord tenant law, and holdover proceedings, et cetera. They did bring a Yellowstone from what I saw. I believe that the Business Judgment Rule absolutely kicks in on this. There was – they were litigating, there's nothing to show they did not litigate in good faith

> and, therefore, I am dismissing the first cause of action. [Emphasis supplied]
>
> MR. GOLDMAN: It wasn't settled for enough money.
>
> THE COURT: And I think that was a business judgment. There was a lengthy litigation, it was costing money, you had a board which was fighting for months, and I believe – as I said earlier, Rosenberg & Estis is a very high powered firm and it's known for fighting tooth and nail and being very aggressive. I believe, that business judgment protects the settlement. [Emphasis supplied]

Summarily, Plaintiffs' breach of fiduciary duty claim has been dismissed and it can not be resurrected in this case. Justice Kornreich held that the Business Judgment Rule "protects the settlement", and the settlement was to sell the leasehold for $1.9 million.

D. The Bonuses

Gavin Whiston's testimony (DKT 1046) describes how these bonuses came about:

> Tom, Kieron and I had been complaining to our accountant about how unfair to us our arrangement with Ken had turned out to be. We complained about how little work Ken performed at the bar (he rarely ever stepped foot in the place, except to play jazz on Sunday nights; and even that little bit of effort, he had discontinued in July 2015). Ken never participated in any management, yet he collected the same management fee as we did, every week; and now he was going to receive the same distributive earning as we were going to receive, when we did all the work of keeping the place viable. Dubcork could have gone under so many times… because of our financial struggles; Hurricane Sandy (Ken didn't even CALL to find out about the damage; he certainly didn't ask if he could help in any way); the

> landlord's suit against us (another problem he just dumped on us – he never even asked how it was progressing); so many things could have caused us to go under. But because of OUR effort, with absolutely no contribution from Ken, we kept the business alive and now we had $1.9 million to distribute. It pissed us off that Ken was going to get the exact same amount as we were, and that we weren't going to get anything more than he was, despite the very much more effort and contribution that we had made to the enterprise.
> Our accountant then suggested that we give ourselves a bonus, to make up for the disparity of our return to our effort. He said "why don't you give yourselves a commission on the transfer of the leasehold". He said that brokers usually get 5% of the sale price of a property transferred; that we were very involved in negotiating the transfer; and that's how he came to the $165,000 number that we gave ourselves (three bonuses of $55,000).
> After this lawsuit started, (after we'd engaged counsel), our attorney commented to us on our accountant's advice. While she was sympathetic to our complaint that we had devoted uncompensated time to the business, she was emphatic that claiming a brokerage commission was not something that we should do. She advised us instead, to submit invoices for our unpaid labor, and to detail the dates, services rendered, the amount of time devoted to each task, and the "rate" that we felt was fair compensation for our time. We each have made these timesheets, and if their total falls short of $165,000, we would confess judgment for the shortfall.

Mr. Whiston continues his testimony by describing how they set the hourly rate for the work they sought compensation for.

Each of the Defendants has submitted timesheets for the work they did for the bar for which they were never compensated.

We urge the Court to set-off the fair value of the work they did for the bar (for which they were never compensated) against the $165,000 in bonuses that they gave to themselves in error.

Dated: April 4, 2022
New York, NY

Elaine Platt

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

The undersigned, counsel to Defendants who has been primarily responsible for the preparation of this Post-Trial Brief, hereby certifies that the number of words in this Brief are 7,507 and the Brief complied with the 10,000 word expanded word limit specified by the Court in its Order dated February 4, 2022 [Dkt. 1078].

Dated: April 4, 2022.

Elaine Platt

Elaine Platt