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ON SUBMISSION

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Appellate Case Nos.: 2023-01485 2023-03634 2023-04151

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

Plaintiff-Respondents,

-against-

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

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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

Attorneys for Defendants-Appellants

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<u>POINT I</u>

A SUBSTANTIAL AMOUNT OF THE ATTORNEY TIME BILLED FOR, WAS FOR TIME DEVOTED TO PLAINTIFFS' PERSONAL CLAIMS, AND FEES FOR THAT TIME SHOULD <u>NOT BE RECOVERABLE PURSUANT TO BCL 626(e)</u>

Neither the Court, nor indeed the Plaintiff themselves, have denied the concept that the fees incurred for time devoted to Plaintiff's personal claims, should not be recoverable under BCL 626(e).

The Court resolved the issue by saying that the amount of time devoted to personal claims was too "trivial" to have impacted the fee claim.

The Plaintiffs claim that the ratio of pages devoted to personal claims in a document, is not a true measure of the time devoted to the personal claims. That argument could be true, to some extent.

But two of the seven sample documents provided were the transcripts for the first two days of the trial (Dkts. 1135 and 1136). For these two documents, the ratio of the amount of pages devoted to personal claims, ***is*** a true measure of the amount of time devoted to personal claims.

And two of the seven sample documents provided , were the trial testimonies of the two Plaintiffs (Dkts. 942 and 943). Given that these documents were prepared after all research and discovery had been concluded, and all that was needed to prepare these document was to actually write them, it seems reasonable to conclude

that the ratio of the number of pages devoted to personal claims is a true measure of the amount of time devoted to personal claims.

Similarly, to the extent that the post-trial brief (Dkt. 1082) contained pages devoted to the personal claims, that ratio would also seem a reasonable measure of the time devoted to the personal claims

The Complaint (Dkt. 227) contained six causes of action. Three were for personal claims, and three were for derivative claims. While it is conceivable that the interview time needed to elucidate the derivative claims was longer than that reflected in their written representation. But it is just as conceivable that the interview time needed to elucidate the personal claims was longer than that reflected in their written representation. The only person who could know this for sure, is the Plaintiffs' attorney, and he did not reflect this in his timesheets. The only thing that *is* certain, is that a substantial amount of time was devoted to Plaintiffs' personal claims.

Similarly, preparation time of Plaintiffs' Memorandum in Support of its Summary Judgment motion (Dkt. 281) could have involved more research time for the derivative claims than that reflected by the ratio of written pages, but it is just as possible, that the research time for the arguments on the personal claims, could have been more time consuming than that reflected by the ratio of written pages. Only Plaintiffs' attorney knows for sure, and he did not reflect this in his timesheets. What

is certain, is that a substantial amount of time was devoted to Plaintiffs' personal claims.

63% of the pages in these seven documents were devoted to personal claims. $390,920 was billed for just these seven documents. Surely Plaintiffs' claim should be reduced by at least $200,000 on account of just these seven documents.

And these seven documents constituted just a small portion of what was billed for. Mr. Goldman's timesheets (Plaintiffs' lawyer) submitted a bill that was 140 pages in length, totaling $1.8 million.

It took literally hours to compute what was charged for just these seven documents, as there were time entries relating to these documents all over the place; on different pages; posted by different people, each charging different rates. It would be a tremendous burden to require Defendants to go line-by-line through the 140 pages of Plaintiffs' legal bill, and then to group the lines that are scattered throughout multiple pages that are related to the same tasks, in order to compute the total charged for every one of the documents in this case (more than 1,000 on the Court docket). This should not be Defendants' burden.

Surely Defendants have established that a substantial amount of the $1.8 million billed for was for personal claims (not for the derivative claims), and this fee award should be substantially reduced.

Plaintiffs seek to "blame" Defendants for the large legal bill, claiming it was due to Defendants dilatory discovery responses.

But this begs the issue… Defendants do not raise an issue at this time, with the amount of Plaintiffs' legal bill. We are objecting only to the fee shifting, to the extent that the time billed was not in service to the derivative claims.

Plaintiffs take the untenable position that they didn't pursue any individual claims, other than the return of Foley's loan.

This is belied in the first instance by looking at the Complaint (Dkt. 227), in which three of the six causes of action are denominated "brought individually."

The individual causes of action allege that Plaintiffs didn't receive their pro-rata share of the proceeds of the leasehold sale, and allege minority oppression, elaborating that they didn't get work shifts.

Plaintiffs are now claiming that every breach of fiduciary duty claim is a derivative claim, notwithstanding that they previously (and correctly) claimed that Defendants/Managers owed a fiduciary duty to the minority shareholders, and it is this duty, owed to them individually, that they alleged to in the Complaint, to have been breached.

The record objectively shows that Plaintiffs did actually pursue the individual claims that appeared in the Complaint. The arguments in every document on the

docket, deal with the individual claims; and Plaintiffs question in every deposition dealt with the personal claims.

The fee award of $1.8 million should be substantially reduced.

POINT II

THE APPELLATE DIVISION HAS BROAD JURISDICTION TO ADDRESS UNPRESERVED ISSUES IN THE INTEREST OF JUSTICE

The Appellate Division has the authority to consider arguments even if not presented in the lower Court. See *Merrill by Merrill v Albany Medical Ctr. Hosp.*, 71 NY 2d 990, (1988), where the Court of Appeals stated: "[The Appellate Division has broad] jurisdiction to address unpreserved issues in the interest of justice."

In *United States v Brumer*, 726 F. 3d 299, (2d Cir, 2013), the Second Circuit held "the rule against considering arguments raised for the first time on appeal, is prudential, not jurisdictional."

And the First Department, in 2018, in the case of *Watson v City of New York*, 157 AD 3d 510 (1st Dept, 2018) stated: "[The Appellate Division regularly exercises its authority to review new arguments] as long as the issue is determinative and the record on appeal is sufficient to permit review."

In Point VIII of Plaintiffs' brief, they identify three of Defendants' arguments, and say that these arguments have been raised for the first time on Appeal and therefore shouldn't be considered by this Court. This is an incorrect statement of fact

as to two of these claims. The credit asked for on account of an excess distribution caused by the late repayment of the Foley loan, was raised below (See Defendants' Post-Trial Brief, Dkt. 1083, page 28), as was the claim for a set-off attributable to Defendants' unpaid work hours (See Post-Trial Brief, Dkt. 1083, page 40) and in the trial testimony of all three Defendants (See Dkts. 979, 981, 982, 984; and 987, 989).

As for the request that some equitable adjustment be made, attributable to the fact that Defendants each contributed their $197,000 distribution from Dubcork into Moxy, while Plaintiffs' retained theirs, this claim only accrued after Justice Schecter held that Moxy is a successor corporation to Dubcork, and that Plaintiffs should share equally with Defendants in the profits of Moxy. Defendants are appealing this decision, and the equitable adjustment is an inherent part of our Appeal.

But Plaintiffs do have an argument with regards to Defendants' claim that BCL 626(e) only provides "reimbursement" of the Plaintiffs actual fee obligations, and that Defendants shouldn't make a profit on the legal fee.

This argument was first raised against the proposed additional judgment (Dkt. 1126). The Decision on that argument (Dkt. 1130) held "though not denominated as such, defendants motion seeks reargument of the fee award. The Court will not consider arguments that were not previously made in opposition to the fee application."

Defendants promptly filed a Notice of Appeal of this decision, and it is perfected within this Appeal.

Whether or not it is accurate to consider that this argument is being made for the first time on Appeal, this Court has the authority to consider it in the interest of justice.

Defendants acknowledge that the retainer agreement provided for a contingency award, but states that the agreement applied to the gross amount of all recovery, on both the derivative as well as the individual claims, and not just to Plaintiffs' share of the recovery as Defendants have claimed.

Taking Plaintiffs at their word, the $1.8 million legal fee award is *still* excessive. Plaintiffs state, at page 42 of its brief, that the recovery, including pre-judgment interest, is $211,976.37. Thirty per cent of this amount is $1,563,593, not $1.8 million. At a minimum, the legal fee award should be reduced by $236,409.

POINT III

THE DISBURSEMENTS CLAIMED HAVE BEEN ALLOWED IN THEIR ENTIRETY, AND SHOULD BE SIGNIFICANTLY REDUCED

The original bill tendered by Plaintiffs' attorney was for $2,141,612 for legal time, and expense reimbursement of $185,733.73.

Defendants objected to the fee application on several grounds; one of which was that there was excessive billing for several of the tasks.

The Court did hold that there was excessive billing. The Court stated, in relevant part:

> "…the Court does not award the full amount that Plaintiffs sought… reduction for some excessive billing is warranted, and the amount sought is excessive relative to the judgment… the Court finds that it would be reasonable for the company to reimburse $1.8 million to Plaintiffs."

The reference to "excessive billing" is reasonably interpreted to apply to the attorney's time, not to the disbursements.

It's inaccurate to hold, as Plaintiffs would have it, that all the specific objections to the disbursements have already been dealt with by the Court below.

POINT IV

THE TRIAL COURT ERRED IN HOLDING THAT THE DEFENDANTS MISAPPROPRIATED DUBCORK'S OPPORTUNITY

None of Dubcork's Cash was Transferred to Moxy

When the sale of the leasehold closed, the purchase funds were put into escrow, pending the completion by Dubcork of the conditions in the settlement agreement [eg vacating the premises by January 14, 2014; delivering the premises "broom clean," etc.].

Defendants pleaded with the buyer to release a portion of the escrowed funds just a few weeks early, so that they could make the payments they owed on their purchase contract for Chelsea Manor.

After the balance of the funds were turned over, Defendants paid all of Dubcork's obligations, and then calculated what everyone's distribution would be from the remaining funds *as though the advances hadn't been taken*. They computed that $197,500 should be given to every 20% shareholder. The Plaintiffs did receive $197,500, but the Defendants only received $54,950. The $142,550 that they had each received in advance was deducted from the $197,500 that they would have otherwise received. All of the parties had identical K1's (Dkt 309). The advances depleted only the Defendants distributive share, and no one else's. It is a distortion of fact to say that the funds of Dubcork were used to fund Moxy.

The Defendants Sold the Leasehold Because They Were Forced To

Plaintiffs argue that "Smithfield ceased operations not because the landlord forced it to close, but because the landlord paid Dubcork $1.9 million to do so." (Page 16 of Plaintiffs' brief). Plaintiffs go on to say that by not reinvesting this $1.9 million into a new bar, Defendants prevented Dubcork's survival.

These allegations were long ago addressed by Justice Weinreich (See Dkt. 38). Plaintiffs had alleged that Defendants had breached their fiduciary duty by selling the leasehold. Justice Weinreich dismissed that claim, holding that the sale was a valid exercise of the Business Judgment rule, considering the vigorous and expensive litigation that the landlord was pursuing.

As for distributing the $1.9 million and dissolving Dubcork, instead of continuing Dubcork's operation by investing the $1.9 million into a new location, this choice was made because 80% of the shareholders wanted it done this way. All eight of the investors wanted their funds distributed immediately at the time that Smithfield Tavern ceased operations.

It should be noted that every one of the investors in Dubcork appeared at the trial to testify on the Defendants' behalf. (See trial testimony of Dave Massey, Keith Duval, John Schneider, Nicole Massey, and Erik Manning, at Dkts. 953, 960, 948, 959, and 961.)

The Settlement Agreement Provided that $1.9 Million Would be Forfeited if the Premises Were Not Delivered "Broom Clean"

Plaintiffs alleged that the Defendants emptied out the premises, only because they wanted to appropriate all of Dubcork's assets for themselves, and that they could have just left everything there instead.

Defendants testified at trial that the settlement agreement provided that they would forfeit $1.9 million if they did not deliver the premises "broom clean" (See Dkt 889, Settlement Agreement, at pages 4 and 13).

Plaintiffs quote from paragraph 5 of the agreement (on page 4) that started out by saying "Respondent may remove such personal property that it desires," and wants this Court to imply from sentence, that there was no obligation (or penalty) to remove personal property.

But at the end of the **very same paragraph**, it states: "This provision shall not be construed as a modification or waiver of tenant's obligation to deliver possession of the premise to Petitioner in Broom Clean condition."

And then on page 13, in paragraph 24(c), it says "Breaches of any of the terms and conditions of this stipulation [will cause] Respondent [to] forfeit and waive its right to the compensation provided herein."

The settlement agreement definitely provided for a forfeiture of the $1.9 million lease purchase price, if the premises weren't delivered "Broom Clean," i.e. devoid of personal property.

Defendants each put in fourteen, 12-hour days, of unpaid labor, emptying out the premises. Plaintiffs, as usual, did nothing!

Even if there were no penalty provision, everything left behind (as Foley acknowledged) would be deemed abandoned and would accrue to the interest of the landlord. (See Dkt 286, Foley's deposition, at pages 174-177).

Plaintiffs premise their theft of opportunity claim on this so-called "looting," while Defendants were breaking their backs trying to preserve the $1.9 million payment for Dubcork.

Defendants did keep a few of the assets, which would otherwise have been abandoned. If taking some assets of the defunct Dubcork was wrongful, then let Defendants pay for the value of those assets. Making Defendants instead pay out

10 years of profits of Moxy's business, is an onerous penalty, and hugely disproportionate to any wrongful taking.

Use of the Smithfield Name

It is true that the Defendants approached prospective landlords with a brochure saying that they wanted to "create a new Smithfield."

Plaintiffs allege that this means that they wanted to move Smithfield Tavern to a new location.

Smithfield Tavern was 8,000 feet. They gave this brochure to the landlord at 25th Street, for a site that was only 3,000 feet. How can you possible recreate an 8,000 foot facility in 3,000 foot premises?

Bill Zorzy, the Defendants' real estate broker, testified that Defendants were holding themselves out to prospective landlords, as the "Smithfield Group," owners and managers of three other sports bars (Nevada Smith's, Lunasa, and Smithfield Tavern); that they were now looking to acquire another bar for their group – another "Smithfield." And indeed the brochure (R 3182-3196) described all three of theses bars.

The use of the name Smithfield did not mean that they wanted to duplicate Smithfield Tavern. Indeed, Defendants felt that they had bit off more than they could chew when running an enterprise as large as Smithfield Tavern, and believed that they barely escaped bankruptcy, and wanted to avoid making the same mistake

again. Zorzy testified that Whiston told him that he wanted a much smaller space, similar to the size of Lunasa. (Dkt. 962).

The ”Football Following” Didn’t Belong to Dubcork

Plaintiffs assert that if any of the football clubs that were at Smithfield Tavern went to Smithfield Hall, that this was taking an asset of Dubcork’s, because “Smithfield’s football following belonged to Dubcork.”

The “football following” in fact, doesn’t “belong” to anyone. As Kieron Slattery testified (Dkt. 982), these clubs have to be constantly serviced to maintain their patronage.

Firstly, every club that was at Smithfield Tavern, came there because of Slattery’s and McCarthy’s pre-existing relationship with them, when they were working at Nevada Smiths. No relationships with soccer clubs were first developed at Smithfield Tavern.

Secondly, when Smithfield Tavern closed its doors, all of these clubs relocated to other bars. Smithfield Hall didn’t open for another six months, and it had no supporter clubs at the time of its opening.

Slattery had to make tremendous effort to persuade some of these clubs to relocate to Smithfield Hall.

No soccer clubs were "taken" from Smithfield Tavern. See Kieron Slattery's uncontested testimony (Dkt. 982, at paragraphs 11-16):

> 11. Fan clubs are different than customers. Fan clubs go where they will get the best service and where they have a good relationship with the provider.
>
> 12. Tom, Gavin and myself had spent years building relationships with New York based soccer fan clubs. Tom had owned one of the most popular bars in all of the US for watching soccer, Nevada Smiths, from 1992-2011. I worked the soccer games there and built strong relationships with many of them. These clubs had moved from place to place after Nevada Smiths lost their lease, (including Lunasa, which Tom and Gavin owned). So our plan was to find a larger venue to host them. Once we secured the lease on 28th street, Tom and I went to bat to try and convince these fan clubs to call 28th street their home. The personal bonds we'd built up with these guys was a huge factor in convincing them to join us and many did.
>
> 13. We got a name for soccer because of our hard work and dedication to it, opening for games at ungodly hours when nobody else would. People knew we took it seriously. It's the personalities and the hard work that makes success, not the name or a website!
>
> 15. The fan clubs can do whatever they want. We do not sign contract with them. The only thing we have is our relationship with them and vice versa.
>
> Opening early for games, 6am on a Sunday morning, making sure we have the right tv/internet packages so we show the game; hanging the flags, selling the right beers. This is all part of it as well.
>
> 16. These relationships were built up over the years. It's not easy keeping these guys happy. You've got to be open. Sounds silly but some games re at 7am on Saturday and Sunday mornings, indeed I've done a few 6am games. That means you have to get to the bar at 5:30am for a 7am kickoff. Most bars are just not prepared to do this.
>
> You need to know what stations or internet stream each game is on. You need multiple satellite, cable, and streaming devices, as

> you may/will have multiple games at the same time. Saying sorry, I don't have enough satellite cable, and steaming devices, just won't cut it. You need to know which game gets sound. You need to know where to put each group so that they can watch their game together.
>
> It's listening to them, like putting out a particular beer/liquor that the want, e.g. Estrella for Barcelona, Paulaner for Bayern, Richard Pastis for Marseille.
>
> You have to have senior staff that know the game. Just turning a game on the TV is not enough. The relationship will break down without continued communication.

POINT V

BUSINESS EXPENSES WERE PAID WITH UNREPORTED CASH

Cash payments for business expenses of $318,000 were proven at trial, for the most part by testimony of the recipients of these payments. Yet the Court failed to credit the Defendants for any of these payments and held them personally responsible for all money it deemed to be "unreported cash" ($648,551).

The Court gave no explanation as to why no credit was given for these payments.

Plaintiffs proffer their own explanation, saying that these payments could have come from the reported income, and not the unreported income, so a credit against the unreported income isn't warranted.

Firstly, there wasn't $330,551 in reported income.

Secondly, Defendants have previously explained that the "reported cash" was the amount that they deposited into their bank account, and later withdrew to make their payroll payments. (See Dkt. 284, Deposition of Gavin Whiston, at pgs. 43-45.)

Plaintiffs then contend that it's "not plausible" that Defendants would pay business expenses from unreported income. Plaintiffs simply do not understand that this was a requirement of some employees who needed to hide their income, eg, some did not have a green card and weren't permitted to work; someone like Robbie York, was collecting unemployment, so couldn't show earnings. (See Dkt 307, deposition of Robbie York, at pgs. 47-48.) Defendants know that they miss out on the tax deductions when they pay these people in cash. It's part of the mix when striking a deal with these employees.

It was grievous error to not give Defendants credit for the cash payments that were unequivocally proven at trial.

Dated: New York, New York
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Respectfully submitted by:

Elaine Platt, Esq.
5 Tudor City Place
New York, NY 10017
(646) 602-1489
smartworkout@verizon.net
Attorney for Defendants-Appellants

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