

**Adelstein v Finest Food Distrib. Co. N.Y. Inc.**

2010 NY Slip Op 30149(U)

January 13, 2010

Supreme Court, Nassau County

Docket Number: 010776-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present: HON. TIMOTHY S. DRISCOLL  
Justice Supreme Court**

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**JOEL ADELSTEIN,**

**Plaintiff,**

**-against-**

**FINEST FOOD DISTRIBUTING CO. N.Y. INC.,  
STEVEN ADELSTEIN and  
LAWRENCE ADELSTEIN,**

**Defendants.**

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Index No. 010776-09  
Motion Seq. No. 1  
Submission Date: 11/6/09**

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**The following papers having been read on this motion:**

- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affidavit in Opposition and Exhibits.....x**
- Memorandum of Law in Opposition.....x**
- Reply Affirmation in Further Support.....x**
- Reply Memorandum of Law..... x**

This matter is before the Court for decision on the motion filed by Defendants Finest Food Distributing Co. N.Y. Inc., Steven Adelstein and Lawrence Adelstein on July 24, 2009, and submitted on November 6, 2009, after the Court conducted oral argument on the motion. For the reasons set forth below, the Court grants Defendants' motion.

**BACKGROUND**

**A. Relief Sought**

Defendants Finest Food Distributing Co. N.Y., Inc. ("Finest"), Steven Adelstein ("Steven") and Lawrence Adelstein ("Lawrence") (collectively "Defendants") move for an Order, pursuant to CPLR §§ 3211(a)(5) and/or 3211(a)(7), dismissing the Summons and Verified

Complaint (“Complaint”) against the Defendants. Plaintiff Joel Adelstein (“Plaintiff”) opposes Defendants’ motion.

B. The Parties’ History

Plaintiff alleges the following in the Complaint:

Plaintiff started Finest in or about 1948, along with his brothers Sidney and Jacob Adelstein (“Brothers”), who are not the individual Defendants in this action. Plaintiff is the President of Finest and owns one-third of the common stock of Finest. The individual Defendants, who are Plaintiff’s nephews, each own one-third of Finest. In addition, Plaintiff owns one-third of a limited liability company that owns the real property on which Finest conducts its business. Each of the Brothers also owns one-third of this limited liability company.

Plaintiff has worked as a salesman for Finest from its inception until his termination in February of 2009. Prior to his termination, Plaintiff’s compensation consisted of 1) a salary of \$600 per week, and 2) the payment of his automobile insurance and other automobile-related expenses, including but not limited to gasoline and repairs. In or about February 2009, allegedly without cause, the Individual Defendants advised Plaintiff that he would no longer be a salesman on his assigned accounts. Since on or about March 15, 2009 the Defendants have not permitted Plaintiff to work, and have not paid him sums that are due him, including \$390,000, allegedly representing Plaintiff’s share of undistributed earnings of Finest.

In the first cause of action, Plaintiff seeks to recover for Defendants’ breach of the alleged agreement between Plaintiff and Defendants for Plaintiff to work as a salesman for and receive certain compensation from Finest. In the second cause of action, Plaintiff alleges that the Individual Defendants breached their fiduciary duties to Plaintiff by terminating his employment, failing to pay money owed to him, and failing to provide him with documentation that he requested, including but not limited to Finest’s tax returns. In the third cause of action, Plaintiff seeks to recover against Defendants under the theory of unjust enrichment in connection with Defendants’ alleged failure to distribute profits to Plaintiff. Plaintiff also seeks punitive damages.

C. The Parties’ Positions

Defendants move to dismiss the Complaint alleging, *inter alia*, that 1) the allegations in the first cause of action are insufficient to maintain a cause of action for breach of contract; 2) to

the extent that the first cause of action is based on an alleged employment agreement, it is barred by the Statute of Frauds; 3) any employment agreement between Plaintiff and Defendants was an at-will employment agreement, terminable at any time by either party; 4) the allegations in the second cause of action are insufficient to maintain a cause of action for breach of fiduciary duty, because a) the acts complained of do not relate to the Individual Defendants' fiduciary duties as directors, officers or shareholders of Finest; b) a breach of fiduciary duty claim may not be based on an employer-employee relationship; and c) Plaintiff was not entitled to the documentation that, he alleges, Defendants failed to provide to him; and 5) the allegations in the third cause of action are insufficient to maintain a cause of action for unjust enrichment because the funds that Defendants allegedly retained do not rightfully belong to Plaintiff.

Plaintiff opposes Defendants' motion, submitting that 1) the first cause of action states a claim for relief by providing allegations regarding the agreement regarding Plaintiff's employment and compensation by Finest, and Defendants' alleged breach of that agreement; 2) the agreement is not void under the Statute of Frauds because, in light of Plaintiff's sworn allegation that he could only be terminated if he acted in a way that seriously damaged Finest, the agreement could be performed within one year; 3) the second cause of action states a claim for relief because a) it alleges that the Individual Defendants terminated the employment of Plaintiff, a shareholder, so that they could retain more of Finest's income for themselves; and b) Plaintiff, as a shareholder and officer of Finest, had the right to inspect Finest's books; and 4) the third cause of action states a claim for relief because it contains allegations that the Individual Defendants have benefitted by terminating Plaintiff's employment and retaining funds to which Plaintiff is entitled.

### RULING OF THE COURT

#### I. APPLICABLE LAW

##### A. Standards for Dismissal

Pursuant to CPLR § 3211(a)(5), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of the statute of frauds. In turn, New York General Obligations Law § 5-701(a)(1) provides as follows:

Every agreement, promise or undertaking is void, unless it or some note or

memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime[.]

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims that are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

#### B. The Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

The elements of a claim for breach of fiduciary duty are: (1) existence of a fiduciary

relationship, (2) misconduct, and (3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007).

## II. APPLICATION OF LAW TO THE PRESENT CASE

### A. Plaintiff was an At-Will Employee and thus Cannot Prevail on His Breach of Contract Claim

It is well settled that, absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party, for any reason or even for no reason. *DeSimone v. Supertek, Inc.*, 308 A.D.2d 501 (2d Dept. 2003), citing, *inter alia*, *Lobosco v. New York Tel. Co./NYNEX*, 96 N.Y.2d 312, 316 (2001). The Court concludes that, in light of the absence of an agreement between Plaintiff and Defendants establishing a fixed duration, Plaintiff was an employee-at-will, who could be fired for any reason. Because Plaintiff was an employee-at-will, his breach of contract claim must necessarily fail.

### B. Plaintiff's Unjust Enrichment Claim Fails Because he Cannot Sue Finest Directly on this Theory

Plaintiff's claims that the Defendants breached the parties' agreement, and were unjustly enriched, by failing to distribute profits despite Plaintiff's demand are derivative ones. Allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually. *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985), citing *Niles v. New York Cent. & Hudson Riv. R.R. Co.*, 176 N.Y. 119 (1903); *Carpenter v. Sisti*, 45 A.D.2d 529, 531 (1<sup>st</sup> Dept. 1974). Generally, a direct cause of action is not permitted when the plaintiff is seeking a return on his investment. *Corso v. Byron*, 11 Misc. 3d 1072A (Supreme Court of Suffolk County, 2006), citing *Greenfield v. Denner*, 6 N.Y.2d 867 (1959). Where the standing of the plaintiff is that of a shareholder who is suing other shareholders for converting corporate assets and profits, the plaintiff may sue only derivatively. *Corso v. Byron*, *supra*, quoting *Glenn v. Hotelron Systems*, 74 N.Y.2d 386 (1989); *Menna v. DiMenna*, 232 A.D.2d 257 (1<sup>st</sup> Dept. 1996).

A shareholder, even a sole shareholder or one in a closely held corporation, typically

does not have standing to sue directly for injuries to the corporation itself and that shareholder must instead commence a derivative action on behalf of the corporation. *Solutia Inc. v. FMC Corp.*, 385 F. Supp. 2d 324 (S.D.N.Y. 2005); *Abrams v. Donati*, 66 N.Y.2d at 953. A direct action will be permitted only if the plaintiff stockholder has suffered an injury that is either separate and distinct from the injury suffered by the corporation or if the injury arises out of a violation of a special duty running from the alleged wrongdoer directly to the stockholder and that special duty is independent and extrinsic to the corporation. *Solutia Inc. v. FMC Corp.*, *supra*. Here, Plaintiff's unjust enrichment claim fails to assert any individual injury to him. Rather, any recovery on this claim would belong to the corporation. Plaintiff's claim can thus be asserted only via a derivative action. Because Plaintiff has not properly pleaded this cause of action, it must be dismissed.

C. Defendants did not Owe a Fiduciary Duty to Plaintiff as Employee

With respect to his breach of fiduciary claim, Plaintiff alleges that the Individual Defendants violated their duties as directors, officers and shareholders of Finest by terminating his employment and failing to produce tax returns and legal documents for his inspection. This claim fails as a matter of law.

Officers of corporations stand in a fiduciary relationship to their corporation and owe the corporation their undivided loyalty. *Yu Han Young v. Chiu*, 49 A.D.3d 535 (2d Dept. 2008). Thus, an officer may not, without consent, divert and exploit for his or her own benefit any opportunity that should be deemed an asset of the corporation. *Id.*; *Commodities Research Unit [Holdings] Ltd. v. Chemical Week Assoc.*, 174 A.D.2d 476, 477 (1st Dept. 1991).

As officers and directors of Finest, the Individual Defendants had fiduciary obligations to all the shareholders. *See Alpert v. 28 Williams Street Corp.*, 63 N.Y.2d 557, 568-569 (1984), *rearg. den.* 64 N.Y.2d 1041 (1985). The Defendants, however, did not owe a fiduciary duty to Plaintiff in their capacities as Plaintiff's employer. *Freedman v. Pearlman*, 271 A.D.3d 301 (2d Dept. 2000), citing *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183 (1989). In *Ingle*, Justice Bellacosa, writing for the majority, held as follows:

The pleading here does not support the conclusion that respondents breached a fiduciary duty as corporate officers by dismissing an at-will employee and exercising an agreed-upon repurchase-upon-termination clause [citations omitted]. '[T]here is no reason why an appeal to general fiduciary law should be used \*\*\* as a

pretext for evading \*\*\* contractual obligations' [citations omitted].

Here, the Court concludes that the second cause of action, while phrased in terms of a breach of fiduciary duty, is really based on the allegation that the Defendants improperly terminated Plaintiff as an employee, and not on the Defendants' conduct in their fiduciary capacities as officers of Finest. Given that the Defendants did not owe a fiduciary duty to Plaintiff in their capacities as his employers, the Court concludes that Plaintiff has failed to allege a sustainable cause of action for breach of fiduciary duty based on the Defendants' allegedly improper failure to pay Plaintiff certain moneys.

Moreover, with respect to the Defendants' failure to produce requested documents, while the documents at issue ( tax returns and legal agreements) are not required to be maintained and produced under Business Corporation Law § 624, the Defendants have alleged but not proven that such records are not required to be maintained and produced by the corporate by-laws. Pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where the pleadings suggest that the directors did not act in good faith. *Ackerman v. 305 East 40<sup>th</sup> Owners Corp.*, 189 A.D.2d 665, 6667 (1<sup>st</sup> Dept. 1993), citing *Bryan v. West 81<sup>st</sup> Street Owners Corp.*, 186 A.D.2d 514 (1<sup>st</sup> Dept. 1992); *Schmidt v. Magnetic Head Corp.*, 101 A.D.2d 268 (2d Dept. 1984). Plaintiff, however, has not alleged in the Complaint that the Individual Defendants did not act in good faith or that they acted tortiously, and therefore, their conduct is protected by the business judgment rule. That rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. *Levandusky v. One Fifth Avenue*, 75 N.Y.2d 530, 537-538 (1990), quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979) and *Pollitz v. Wabash R. R. Co.*, 207 N.Y. 113, 124 (1912).

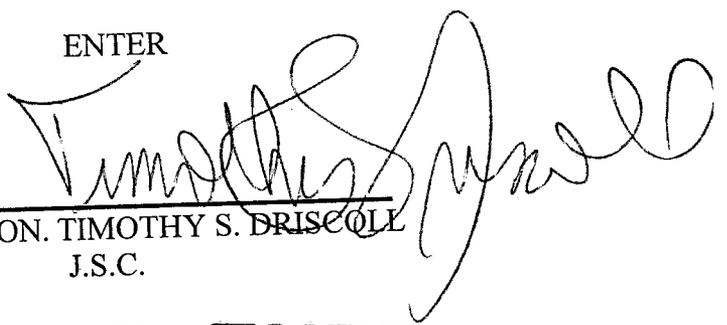
#### D. Conclusion

The Court concludes that Plaintiff was an at-will employee, whom Defendants could fire for any reason. In addition, under the circumstances, Plaintiff was not authorized to institute a direct, rather than a derivative, action against Finest. Moreover, the Individual Defendants did not owe a fiduciary duty to Plaintiff in the context of his employment relationship with Finest. Finally, Plaintiff has not established a statutory right to view the documentation to which the Complaint refers, and has not alleged bad faith by the Defendants that might trigger Plaintiff's right to access to Finest's records.

Accordingly, the Court grants the Defendants' motion and dismisses the three causes of action in the Complaint.

DATED: Mineola, NY  
January 13, 2010

ENTER

  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

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**ENTERED**

JAN 20 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE