[* 1]

SHORT FORM ORDER

INDEX NUMBER: 41351-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 11-09-2011
Motion Submit Date: 02-08-2011
Motion Sequence No.: 001 MOTD

[ ] FINAL
[x] NON FINAL

---X

RICHARD HYNES, KATHERINE HYNES, NICK DELLA SPERANZA, GENEVIEVE DELLA SPERANZA, JOSEPH DIGIOVANNI, EILEEN DIGIOVANNI, and Individually and as Limited Partners of FIVE STAR ASSOCIATES, A New York Limited Partnership, suing on behalf of Themselves and for the benefit of Five Star Associates ,

Plaintiffs,

-against-

SBARRO, INC., Individually and as General Partner of Five Star Associates, and MARIO SBARRO,

Defendants.
---X

Attorney for Plaintiff
The Weinstein Group
10 Newton Place, Suite 201
Hauppauge, New York 11788

Attorney for Defendants
Steinberg, Fineo, Berger & Fischoff, PC
By: Douglas Thaler, Esq.
40 Crossways Park Drive
Woodbury, New York 11797

ORDERED that the motion by defendant Mario Sbarro (motion sequence number 001) for summary Judgment is granted to the extent indicated herein.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs, Richard Hynes, Katherine Hynes, Nick Della Speranza, Joseph

DiGiovanna and Eileen DiGiovanna, individually and as limited partners of Five Star Associates ("Five Star"), a New York limited partnership, commenced this action against Sbarro, Inc. and Mario Sbarro for the dissolution and winding up of the affairs of Five Star due to the alleged waste and mismanagement, misrepresentations and frauds amounting to a breaches of fiduciary duty and the duties of loyalty, trust and good faith owed to plaintiffs by Sbarro, Inc., the general partner of Five Star, making it impossible for Five Star to carry on its business.

The complaint alleges that defendant Mario Sbarro was the chief executive officer of Sbarro, Inc. and its predecessors in interest from approximately 1977 until December 31, 2006. The plaintiffs allege that they were close friends with Mr. Sbarro and that he proposed that they go into business together to operate a Sbarro's restaurant. Mr. Sbarro allegedly provided plaintiffs with a business plan/proposal and a prospectus for a franchise arrangement. Plaintiffs contend that, in reliance on Mr. Sbarro's unique skill, experience, and superior knowledge in running a chain of restaurants, they agreed to go into business with him in the form of a limited partnership.

On December 1, 1981, the plaintiffs, as limited partners, entered into an Agreement of Limited Partnership with general partner Sbarro of Lynnhaven Mall, Inc., Sbarro, Inc.'s predecessor in interest. The parties entered into an Amended and Restated Agreement of Limited Partnership in 1990. Pursuant to franchise agreements, Five Star operated Sbarro brand name restaurants.

The plaintiffs allege that beginning in 2000, Mr. Sbarro sought to retire and sought to have Sbarro, Inc. merge with or be acquired by another corporation. Plaintiffs claim that Mr. Sbarro used Five Star franchises to filter monetary liabilities away from Sbarro, Inc. restaurants, in an effort to make Sbarro, Inc. appear more attractive to potential purchasers. Plaintiffs allege, among other things, that Sbarro, Inc. used Five Star's revenue to pay for unnecessary advertising for its own benefit rather than for the benefit of Five Star; that Sbarro, Inc. used Five Star's locations and revenue to train and pay managers and/or employees who ultimately were sent to work in locations not owned by Five Star; that Mr. Sbarro and Sbarro, Inc. failed to properly manage Five Star's franchises and allowed them to operate at a loss; that Sbarro, Inc. held back Five Star profits to cover losses; and that Sbarro Inc. breached the Amended Partnership Agreement. According to the plaintiffs, Mr. Sbarro sold his shares of stock in Sbarro, Inc. on or about December 31, 2006.

The complaint sets forth three causes of action. The first cause of action claims that both Sbarro, Inc. and Mario Sbarro breached their duties of loyalty, fidelity and fair dealing to Five Star. The second cause of action alleges that Sbarro, Inc. made a capital call in bad faith, arbitrarily and without foundation and justification solely for the purpose of diluting the plaintiffs' shares in Five Star and forcing the plaintiffs out of the partnership. The third

cause of action claims that Sbarro, Inc. breached the Amended Partnership Agreement.

Defendant Mario Sbarro now moves for summary judgment dismissing the complaint as asserted against him. In an affidavit submitted in support of the motion, Mr. Sbarro avers that he never signed any agreement with the plaintiffs in his personal capacity; that he was never personally in privity with the plaintiffs in the partnership; and that he owed no contractual obligations or other duties with respect to the plaintiffs. He states that all of the allegations in the complaint arise out of the rights and responsibilities between the general partner, Sbarro, Inc., and the plaintiffs as limited partners, under the terms of the partnership agreements and/or franchise agreements, to which he was not a party. Mr. Sbarro states that any documents signed by him were signer in his former capacity as President of Sbarro, Inc. Mr. Sbarro argues that there is no evidence to support a finding of personal liability against him since all of the documents annexed to the complaint indicate that Sbarro, Inc., and not Mario Sbarro individually, was the general partner of Five Star. Mr. Sbarro believes that he was named a defendant in this action to harass and annoy him and in an attempt to use his past relationship with Sbarro, Inc. as leverage in getting Sbarro, Inc. to settle. In an affirmation in support of the motion, Mr. Sbarro's counsel states that on multiple occasions before making the instant motion, plaintiffs' counsel was asked to produce any documents signed by Mr. Sbarro in his individual capacity which support the imposition of personal liability against him. Counsel states that no such documents were ever produced. Thus, Mr. Sbarro seeks recovery of the attorneys' fees he has incurred in defending what he characterizes as a frivolous action.

In opposition to the motion the plaintiffs have submitted, among other things, an affidavit from plaintiff Richard Hynes, attached to which is a copy of a sublease between Sbarro Franchise Realty Corporation and Five Star dated June 20, 1983, which Mr. Hynes states was signed by Mr. Sbarro in his individual capacity as a personal guarantee by Mr. Sbarro. Mr. Sbarro's signature is immediately preceded by the word "By" and appears immediately below "SBARRO FRANCHISE REALTY CORPORATION (Sublessor)". Additionally, Mr. Hynes repeats many of the allegations contained in the complaint and asserts that Mr. Sbarro breached his individual fiduciary duty owed to the plaintiffs. Mr. Hynes asserts that he and the other plaintiffs trusted Mr. Sbarro based on his purported expertise and based on their close friendship and that Mr. Sbarro should not be permitted to escape liability by "hiding behind a corporate veil".

In reply, Mr. Sbarro points out that the sublease provided by the plaintiffs to support the imposition of personal liability upon him is a sublease between a non-party corporation, Sbarro Franchise Realty Corporation, and Five Star, that clearly indicates that it was signed by Mr. Sbarro on behalf of Sbarro Franchise Realty Corporation. In a reply affidavit, Mr. Sbarro avers that he was the President and CEO of Sbarro Franchise Realty Corporation and that he signed the sublease in that capacity. He further states that he did not personally guarantee the sublessor's obligations under the sublease. It is further

argued that the allegations against Mr. Sbarro mirror the allegations made by the plaintiffs against the general partner, Sbarro, Inc. claiming mismanagement of the limited partnership.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue; however, once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2d Dept 1996]). Speculative and conclusory allegations are insufficient to defeat summary judgment (*see, Boone v. Bender*, 74 AD3d 1111, 1113 [2d Dept 2010]).

Here, only the first cause of action alleging breach of fiduciary duty is asserted against Mario Sbarro in his individual capacity. The second and third causes of action are only asserted against Sbarro, Inc. and the plaintiffs have made no argument that the facts warrant piercing the corporate veil to impose liability upon Mr. Sbarro with regard to the potential liability of Sbarro, Inc. on the second and third causes of action. "[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Matter of Morris v. New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). Therefore, the issue is not whether the facts and circumstances support the imposition of Sbarro, Inc.'s obligations on Mario Sbarro, but rather whether there existed a fiduciary relationship between plaintiffs and Mr. Sbarro, separate and apart from the relationship between plaintiffs, as limited partners, and Mr. Sbarro, as President/CEO of Sbarro, Inc., the general partner of Five Star.

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct (*Kurtzman v. Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). Summary judgment dismissing a cause of action for breach of fiduciary duty is warranted where the evidence fails to demonstrate that the defendant owes the plaintiff a fiduciary duty (*see Kallman v. Pinecrest Modular Homes, Inc.*, 81 AD3d 692 [2d Dept 2011]). "A fiduciary relationship may exist where one party reposes confidence in another

and reasonably relies on the other's superior expertise or knowledge . . ., but an arms-length business relationship does not give rise to a fiduciary obligation (internal citations omitted)" (*WIT Holding Corp. v. Klein*, 282 AD2d 527, 529 [2d Dept 2001]). Officers and directors of a corporation stand in a fiduciary relationship to the corporation and owe their undivided and unqualified loyalty to the corporation (*Yu Han Young v. Chiu*, 49 AD3d 535, 536 [2d Dept 2008]). The members of a partnership owe each other a duty of loyalty and good faith and as a fiduciary each partner must consider the other partner's welfare and refrain from acting for purely private gain (*Gibbs v. Breed, Abbott & Morgan*, 271 AD2d 180, 184 [1st Dept 2000]).

Here, Mario Sbarro has demonstrated his entitlement to judgment as a matter of law on the plaintiffs' cause of action to recover damages against him for breach of fiduciary duty by demonstrating that he owed no fiduciary duty to the plaintiffs. Although it is clear that Mr. Sbarro, as President of Sbarro, Inc., stood in a fiduciary relationship with the corporation, the evidence demonstrates that there was no fiduciary relationship between Mr. Sbarro and the plaintiffs, the limited partners in Five Star. It is undisputed that Five Star is a limited partnership between plaintiffs and Sbarro, Inc. and that Mr. Sbarro, in his individual capacity, is not a partner in Five Star. Mr. Sbarro avers that he never signed any agreement with the plaintiffs in his personal capacity; that he was never personally in privity with the plaintiffs in the alleged partnership; and that he had no contractual obligations or other duties with respect to the plaintiffs. He states that all of the allegations in the complaint arise out of the rights and responsibilities between the general partner, Sbarro, Inc., and the plaintiffs as limited partners, under the terms of the partnership agreements and/or franchise agreements, to which he was not a party. Mr. Sbarro states that any documents signed by him were signed in his former capacity as President of Sbarro, Inc. Thus, Mr. Sbarro has made a prima facie showing of entitlement to judgment as a matter of law.

The plaintiffs' assertions in opposition to the motion are insufficient to raise a triable issue of fact. The plaintiffs' contention that the1983 sublease was executed by Mr. Sbarro in his personal capacity is without merit. The document clearly reflects that Mr. Sbarro executed it on behalf of non-party Sbarro Franchise Realty Corporation, and not in his individual capacity. Additionally, the assertions made by plaintiff Richard Hynes related to the alleged mismanagement of Five Star by the general partner, Sbarro, Inc., even if proven, would not result in the imposition of liability on Mr. Sbarro individually. "The general rule . . . is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (*East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009], *affd* 16 NY3d 775 [2011]). Moreover, as mentioned above, plaintiffs do not allege in their complaint or argue in opposition to the instant motion that the corporate veil of Sbarro, Inc. should be pierced to impose liability

upon Mr. Sbarro individually for any wrongdoing by the corporate entity. In any event, there has been no showing that Mr. Sbarro exercised complete domination over Sbarro, Inc. and abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiffs (*id.*). The plaintiffs' assertions that they trusted Mr. Sbarro based on his purported expertise and based on their close friendship are insufficient to raise a triable issue of fact as to the existence of a fiduciary relationship (*Kallman* at 694). Accordingly, that branch of defendant Mario Sbarro's motion which seeks summary judgment dismissing the complaint as asserted against him is granted.

That branch of defendant Mario Sbarro's motion seeking attorneys' fees is denied. Pursuant to 22 NYCRR 130-1.1, sanctions may be imposed against a party or the attorney for a party for frivolous conduct (*see* 22 NYCRR 130-1.1[b]). Conduct is frivolous if it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is taken to primarily delay or prolong the resolution of the litigation, or harass or maliciously injure another; or it asserts material factual statements that are false (*see* 22 NYCRR 130-1.1[c]; *Joan 2000, Ltd. v. Deco Constr. Corp.*, 66 AD3d 841, 842 [2d Dept 2009]). Here, the plaintiffs' conduct was not frivolous within the meaning of 22 NYCRR 130-1.1 (*see Matter of Wieser v. Wieser*, ___ NYS2d ___, 2011 WL 1499218 [2d Dept 2011]; *Joan 2000, Ltd.* at 842).

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: May 2, 2011
Riverhead, New York

EMILY PINES
J. S. C.

[ ] FINAL
[x] NON FINAL