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VASYL STANKOVYCH *Plaintiff,* v. KONSTANTIN BARDAKH, individually and as an officer of FENCING SPORT CENTER CORPORATION, and FENCING SPORT CENTER CORPORATION *Defendants.*	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART BERGEN COUNTY DOCKET No. BER-C-113-16 CIVIL ACTION DECISION

Argued: August 7, 2017 & August 8, 2017
Decided: August 16, 2017

Honorable Robert P. Contillo, P.J.Ch.

Joshua D. Levine, Esq. appearing on behalf of the plaintiff, Vasyl Stankovych. (Levine Law Firm LLC).

Robert K. Chewning, Esq. appearing on behalf of the defendants, Konstanin Bardakh, individually and as an officer of Fencing Sport Center Corporation, and Fencing Sport Corporation. (McLaughlin & Nardi, LLC).

DECISION

This matter was tried by the court sitting without a jury on August 7 and 8, 2017. Following closing argument on August 8, 2017, the court reserved decision.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Vasyl Stankovych ("Stankovych") filed a complaint on April 26, 2017, against defendants Konstantin Bardakh, individually and as an officer of Fencing Sport Center Corporation ("Bardakh"), and Fencing Sport Center Corporation ("FSCC").

According to the Complaint, Bardakh signed on January 4, 2012 a promissory note evidencing a loan of $20,000 by Stankovych. Stankovych further alleges that on January 9, 2012 – some five (5) days later – the partners entered into an agreement to form a business entity to be named FSC of Springfield. Neither the note nor the agreement is annexed to the Complaint. The agreement is said to name Bardakh as 75% owner of the business, and Stankovych as 25% owner. The agreement is further said to designate Bardakh as President and Trustee, with Stankovych as Vice President and Secretary. Lastly, the agreement is said to require the partners to share the net profits of the business in proportion to their respective interests. On June 22, 2012, Defendant FSCC was formed as a New Jersey Corporation with Bardakh and Stankovych as the incorporators. Bardakh is said to have defaulted under the payment terms of the Note, and to have breached the agreement regarding FSC of Springfield. Stankovych claims that Bardakh exercised complete control over Defendant FSCC, used its assets for his own purposes, and acted fraudulently and illegally, mismanaging the corporation, abusing his authority as an officer, and acting oppressively and unfairly toward his fellow shareholder Stankovych, warranting dissolution under N.J.S.A. 14a:12-7. No specific facts supporting the allegations of misconduct are contained in the pleading.

The complaint has four (4) counts:

1. Default on the note; repayment plus costs and attorney's fees are sought;
2. Breach of the agreement regarding FSC of Springfield and/or "The Fencing Center Corporation" by not paying Stankovych his 25% share of the net profits; damages are sought;
3. An accounting of Fencing Sport Center Corporation, and imposition of a constructive trust, and damages;

4. Dissolution and winding up the affairs of Fencing Sport Center Corporation;
5. Piercing the Corporate Veil of Fencing Sport Center Corporation to render defendant Bardakh personally responsible for the debts of FSCC.

No response to the Complaint was filed by defendant Bardakh until on August 22, 2016, when he filed an Answer and Counterclaim. In the Answer, Bardakh denied the material allegations of the Complaint, and advised that defendant Fencing Sport Center Corporation filed a Chapter 7 bankruptcy petition on February 2, 2015 and has since been discharged on or about February 10, 2016.

By way of Counterclaim, Bardakh alleges that the parties entered a January 9, 2012 agreement to form Sports Center of Springfield. The business was eventually formed as Fencing Sport Center Corporation, owned 100% by Bardakh. Bardakh alleges Stankovych agreed to pay him $35,000 and to perform services for a 25% interest in the company. Bardakh agreed to contribute his already established fencing business, its clients list, the rights to rental property, and other capital investments for his 75% interest in the company. Bardakh asserts that while he performed his obligations under the agreement, Stankovych did not. Stankovych is said to have only paid $20,000 of the $35,000 he promised to pay for his 25% interest in the company. The parties entered a new agreement whereby Stankovych agreed to pay to Bardakh the remaining $15,000, and to immediately close his own fencing club, "Maestro Fencing Club". In addition, Stankovych would work as needed as manager of the company "and/or coach" at the company. In addition, Stankovych would contribute 50 percent of the necessary funds and/or labor performed for the renovations of the rental property, and would be responsible for the maintenance and cleaning services for the fencing club. Lastly, Stankovych was to pay 50% of all utilities.

Neither the original agreement nor the new one is attached to the Counterclaim.

Bardakh claims that Stankovych failed to perform his obligations under this new agreement: he did not pay the remaining $15,000; he kept his own fencing club ("Maestro") until June, 2013 – 16 months after he agreed to close it; and did not make himself available to work as needed at the company. These alleged failures to perform left Bardakh responsible for the additional work, and was otherwise in violation of the parties new agreement. His Counterclaim is in thirteen (13) counts.

Stankovych filed an Answer to Counterclaim on September 20, 2016, denying the material allegations contained therein.

Default was entered against defendant FSCC on September 20, 2016, at the request of Plaintiff Stankovych.

A Case Management Conference was had on September 21, 2016, yielding a case management order on that date. Following a status conference on December 9, 2016, an order was entered setting a May 22, 2017 trial date. The parties engaged in mediation, but did not resolve their differences.

At the request of Defendant Bardakh, the May 22, 2017 trial was adjourned to August 7, 2017 on a peremptory try or dismiss basis.

Trial was had on August 7 and 8, 2017. Stankovych testified, as did Bardakh. A Russian interpreter assisted the Plaintiff.

Plaintiff also called assistant fencing coach Pavel Kutelvas as a rebuttal witness.

Numerous exhibits were received into evidence.

As refined in Plaintiff Stankovych's trial brief, his sole claim is against Defendant Bardakh is for recovery under the promissory note of January 4, 2012 in the face amount of $20,000.00, plus interest, costs and attorney's fees (Count One). D-4.

All other claims, including Breach of Contract by Defendant in connection with an alleged written contract between the parties as to FSCC of Springfield (Count Two), for an accounting of FSCC (Count Three), for dissolution of FSCC (Count Four) and Piercing the Corporate Veil of FSCC (Count Five), were dismissed with prejudice at the commencement of the trial.

DECISION OF THE COURT

It is not disputed that the Defendant Bardakh signed a promissory note on January 4, 2012, which he himself prepared, acknowledging receipt of $20,000 from the Plaintiff and agreeing to repay that sum without interest within a year. There is no dispute that in fact the Plaintiff gave the defendant the $20,000.00. It is not contended by Defendant that he repaid the note in accordance with its terms. Rather, the Defendant contends that the promissory note was never intended to obligate him to repay Plaintiff the $20,000. Rather, the advance of $20,000 by Plaintiff to Defendant was simply a payment by Plaintiff towards an alleged obligation of the Plaintiff to pay Defendant $35,000 in "Key Money" which Plaintiff had agreed to pay in connection with Plaintiff acquiring a 25% interest in a venture between Plaintiff and Defendant to conduct a club to teach fencing. Per this defense, Defendant does not owe Plaintiff $20,000 and never did; nor was it ever intended he would be so indebted. Rather, Plaintiff still owes Defendant $15,000, which he never paid towards the $35,000 "Key Money" obligation. Secondly, the Defendant alleges that the parties entered into a binding agreement regarding a

fencing venture, which agreement Plaintiff is said to have breached, damaging Defendant far in excess of any money damage claims Plaintiff may have against Defendant.

The court determines that Defendant bears the burden of proving his affirmative damage claims, and proving them by a preponderance of the evidence.

The court is unpersuaded that the promissory note, drafted by Defendant, does not mean exactly what it says: Defendant was to receive $20,000 from Plaintiff (which indisputably was paid), and Defendant was to pay it back without interest within a year (which indisputably he did not do). Why would Defendant prepare and sign a promissory note acknowledging a $20,000 loan from Plaintiff, and promising to pay it back in no uncertain terms, by a date certain, if in fact that $20,000 was actually a partial payment towards an obligation Plaintiff owed to Defendant? It makes no sense. No plausible explanation was advanced why a payment in partial satisfaction of an obligation would be concealed as the reverse: an obligation of the party owed the money. If the alleged obligation was owed to the company being formulated by the parties — instead of owed to Defendant personally — the same incongruity presents itself. Why, if Plaintiff was supposedly obliged to pay Defendant $35,000 in connection with a business venture, would Defendant create a document that characterized the repayment or partial repayment of that alleged obligation as, instead, a loan indebting Defendant, to Plaintiff?

The documents Defendant points to to establish the claim are completely unpersuasive: D-1, D-2, D-3. None of these documents even reference the note. The document referencing a $35,000 "Key Money" obligation on the part of Plaintiff is denominated a "proposal" from Defendant to Plaintiff and is signed by neither Plaintiff nor Defendant (D-3). The subsequent-in-time "Memorandum of Understanding" is likewise signed by neither party and contains no reference to any $35,000 obligation on the part of Plaintiff. (D-2). The only document relied

upon by Defendant actually signed by the parties (D-1, signed January 9, 2012) is entitled "Letter of Intent". It evidences the parties' intent to form a company to conduct a fencing club operation in Springfield, New Jersey, and to split the profits 75% (Defendant) and 25% (Plaintiff). It is to be named "FSC of Springfield". It says nothing about any financial obligation of Plaintiff to Defendant (or to the company) and contains no mention of the promissory note, "Key Money" or $35,000. Nor does it incorporate or even reference the unsigned Proposal (D-3) or the unsigned Memorandum of Understanding (D-2).

Under these circumstances, there is no evidence supporting Defendant's claim that the promissory note is anything but exactly what it purports to be: an acknowledgment by Defendant of receipt of $20,000 from Plaintiff, and a promise to pay him back. It was never intended as a deposit towards any obligation of Plaintiff, as Plaintiff never agreed that he owed any money to Defendant or the venture.

It is true that the Letter of Intent was sent to Plaintiff (December 13, 2011) and signed by the parties (January 9, 2012) very close in time to the signing of the promissory note (January 4, 2012). That is the sole fact suggesting that the loan could possibly be related to the business venture and not, as Plaintiff claims, a purely personal loan to help a friend with a child's tuition payments. But the near simultaneous execution of the personal note and the business Letter of Intent, without more, is entirely insufficient to overcome the plain language of the note. The utter absence of any document signed by either party suggesting that the note was somehow tethered to any alleged obligation of Plaintiff to pay $35,000 further undermines Defendant's claim. No meeting of the minds other than that evidenced by the four corners of the note itself has been proven. The note is a stand-alone obligation of the Defendant to the Plaintiff.

Judgment will be entered on Count One of the Complaint in favor of Plaintiff, against Defendant, for $20,000, plus interest and plus attorney's fees, all as per the terms of that instrument.

What remains are the counterclaims of the Defendant. Much depends on what the relationship was between Plaintiff and Defendant with respect to the opening and conduct of the fencing club in Springfield.

The court finds insufficient evidence that the Plaintiff ever agree to contribute $35,000, or indeed any funds, to the Springfield venture. The only documentary reference to that concept is in the initial proposal prepared by Defendant, which Plaintiff disavows ever seeing prior to the initial of this litigation and which, in any event, is not signed by either party, nor embodied in the subsequent, also unsigned, also disavowed Memorandum of Understanding. There is likewise no reference in the signed Letter of Intent (D-1) to any $35,000 financial obligation, nor indeed any financial obligation, owed by Plaintiff to Defendant or by Plaintiff to the company. The court determines that Plaintiff assumed no financial obligation with respect to the entity the parties contemplated being launched, and then actually launched in Springfield. Accordingly, all claims relating to the alleged failure to contribute the full $35,000, or any portion of that $35,000, fail because the obligation itself has not been proven to exist.

Likewise, the claim that Plaintiff assumed obligations with respect to cleaning of the premises, renovations to the premises and/or utilities and supplies has evidentiary no support beyond the initial Proposal (D-3) prepared by Defendant, never signed by either party. Those concepts are not incorporated into the subsequent Memorandum of Understanding (D-2) (also unsigned), and not incorporated into the signed Letter of Intent (D-1). The idea that all these documents are cumulative is not supported by the documents themselves, and no other document exists from throughout the parties' relationship, including upon its demise, supporting the

litigation counter-claim that Plaintiff assumed responsibility for labor/expenses as to renovations, utilities, etc., or that he failed to meet any such responsibility.

Upon this record, the court finds that at no time did the parties' agree that Plaintiff would be responsible for **any** financial obligation — neither for buying in for $35,000 nor contributing labor of expenses of renovation, repair, supplies or utilities.

What Plaintiff brought to the relationship was his name, upon which the parties hoped to build a lucrative brand. Plaintiff is a two (2) time Olympic silver medalist in fencing. He has numerous other credentials widely known and respected in fencing circles. He would lend his name and presence to the operation, and youngsters and adults would have an opportunity to be taught by the master. There is no persuasive evidence that Plaintiff failed to deliver in this regard.

A primary bone of contention seems to be the vacations Plaintiff took in July and August and Christmas-time.

The parties do not seem to have reached any specific pre-agreement as to how much time Plaintiff would devote to the club, or how many days a week or weeks a year Plaintiff would work at the club. It is not disproven that Plaintiff took off the same time periods when he operated his own private club – Maestro – and there is no document supporting the idea that his vacation – taking was contrary to any understanding or agreement, or even that it was an issue between the parties prior to the termination of their relationship.

The tape recording introduced as evidence I find to be unilluminating and to whether an agreement or understanding ever existed with respect to Plaintiff taking vacations.

Accordingly, the court can not conclude that the Plaintiff breached any agreement or fiduciary obligation by taking the vacation time he did.

Likewise, the timing of Plaintiff's complete transition from his venture Maestro to the new business with Defendant coincided with the end of Maestro's lease obligations and breached no understanding or fiduciary obligation.

Accordingly, the court must dismiss with prejudice the following counts of Defendant's Counterclaim:

1. Breach of Contract;

2. Breach of Impled Duty of Good Faith and Fair Dealing;

7. Common Law Fraud;

8. Equitable Fraud;

9. Negligent Misrepresentation;

10. Quantum Merit;

11. Unjust Enrichment;

12. Minority Shareholder Oppression;

13. Libel, Slander, Defamation

What remains to be addressed are Defendant's claims that Plaintiff misappropriated and wrongfully exploited a client contact list that belonged to the company. The remaining counts of the counterclaim must be addressed with respect to the client list claim:

3. Breach of Fiduciary Duty;

4. Trover and Conversion;

5. Tortious Interference with Prospective Economic Advantage;

6. Tortious Interference with Contractual Relations.

Here, it is established that soon after Defendant terminated Plaintiff, Plaintiff sent out an e-mail to students and their parents advising that "due to the fact that [Defendant] has not been paying [Plaintiff] properly for the past two years, [Plaintiff] is forced to move his practices to NJFA in Maplewood". A schedule of practice dates and times was also included in the e-mail. D-27. Defendant responded with an e-mail to the students and the parents explaining matters from the perspective of the Club. Defendant asserts that Plaintiff had no right to keep and exploit this client contact list and is answerable in money damages.

I start with the recognition that customer lists of services business — such as a fencing instruction club — have been afforded protection as trade secrets. LaMorte Burns & Co., Inc. v. Walters, 167 N.J. 286, 298-299 (2001). While Plaintiff and his spouse were given these materials in order to carry out their responsibilities to the club, the court will assume arguendo that a co-owner of a company has no right to use the company's client list to divert customers from the company to the co-owner. The court will also assume arguendo that Plaintiff was a co-owner of the club.

Nevertheless, the court finds no basis for an award of damages in favor of Defendant. Under the scenario sketched above, the list belonged to the "company", not to Plaintiff, but also not to Defendant. The damage, if any, was to the non-party company, not to Defendant. The cause of action for any damages flowing from Plaintiff's utilization of the customer list belongs to the company, not to Defendant. The company did not survive bankruptcy. Finally, and dispositively, there is no proof that any customer was actually diverted from the company, and

no quantification of any claimed financial loss to the company or to Defendant. In the absence of any proof of financial loss, no damages can be awarded.

Accordingly, counts 3, 4, 5 and 6 will be dismissed with prejudice.

Much of the trial was spent trying to decipher the identity and form of the actual company co-owned by the litigants. One might think this should be an easy task. One would be wrong. There is evidence the two parties owned, or intended to own "The Fencing Center Corporation". D-38 Certificate of Incorporation. There is evidence of an intent to form a corporation named "FSC of Springfield". D-2, Letter of Intent. There is no evidence any shares were ever actually issued to the supposed members of any corporation, nor that any officers were ever appointed, nor corporate meetings held, nor tax returns filed. In short, there is no evidence of adherence to any of the formalities attendant to conducting business in corporate form, beyond the Certificate of Formation of the "Fencing Center Corporation", which Plaintiff credibly claims he had nothing to do with. The court considers it unnecessary to pinpoint when if ever the parties operated under the corporate form. The court notes that Defendant "Fencing Sport Center Corporation" is bankrupt, and never filed a pleading. Plaintiff's successful note count (Count 1) is not dependent on judicial resolution of the nomenclature under which the parties operated a club. Defendant's claims have been dismissed after the court has assumed arguendo, for Defendant's benefit, that the parties were actually co-owners of the corporation that was intended to be the vehicle by which the club was to be conducted.

SUMMARY

In summary, Counts 2, 3, 4 and 5 of the Complaint are dismissed with prejudice. Judgment will be entered in favor of Plaintiff against Defendant on the promissory note (Count

1), in the amount of $20,000.00, plus interest to be determined, plus costs of collection, including attorney's fees.

All Counts (1-13) of the Counterclaim are dismissed with prejudice.

Defendant shall respond to Plaintiff's fee and interest submission by August 21, 2017.

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ROBERT P. CONTILLO, P.J.CH.