UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FREDERICK F. VILLAR,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**Civil No. 95-73-P-H**
	)	
PETER E. KERNAN,	)	
	)	
DEFENDANT	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial in this case occurred on August 5 and 6, 1996. Based upon the testimony and exhibits admitted at trial, I now make the following findings of fact and conclusions of law.

I find the facts by clear and convincing evidence.

1. In 1988, Frederick Villar of Hopkinton, Massachusetts, and Peter Kernan of Kennebunkport, Maine, agreed to go into the brick oven pizza restaurant business. Villar provided the idea or concept and the access to personnel who could operate such a business; Kernan had access to financing and experience in running small businesses. They agreed that Villar would be responsible for the operations side of the new business and Kernan for the financial side. If their first restaurant proved successful, they contemplated replicating it elsewhere. Although Villar's initial premise was that the first restaurant would open on Long Island, New York, Kernan persuaded him to try the Portland, Maine area instead because it was a tougher consumers' market, and therefore a better prototype, and because Kernan lived nearby. Kernan was to have a bare majority of the stock ownership, on the representation that Kernan could thereby carry forward into the business certain

tax losses from a previous enterprise. Accordingly, when the restaurant corporation, Ricetta's, Inc., was established, Kernan received 51 and Villar 49 shares.

2. In 1988, Villar and Kernan entered into an oral contract in connection with their establishment of the corporation and restaurant business. In Kernan's own words, "there would never be salaries. In other words, as owners we would never get salaries, just distribution." Kernan Dep. at 16. I reach this specific conclusion based upon the deposition testimony of the defendant Peter Kernan; the testimony of the plaintiff Frederick Villar; the confirming testimony of Attorney Paul Bulger reflecting his understanding of what Kernan said at a later meeting of shareholders; and the general circumstances surrounding the formation of this business enterprise and the respective contributions of the two shareholders. I make this finding notwithstanding Kernan's denials that he ever intended this to be a judicially enforceable promise, the testimony of manager and eventually 2 percent shareholder Stephan (at some point Villar and Kernan each transferred one share of stock to Stephan) and another staff member that they were unaware of any such agreement, and the absence of a written document reflecting the agreement. I take note of Kernan's testimony and his out-of-court statement reported by Attorney Bulger and Stephan that Kernan had an assigned role concerning the finances of the corporation, a role likewise nowhere spelled out in articles, bylaws or any written documents. There is no credible evidence that formation of the corporation or its articles or bylaws displaced or fulfilled or amounted to integration of the oral contract.

3. There was consideration for such a contract. Specifically, this was part of the overall business agreement pursuant to which Ricetta's, Inc. was established as a corporation and restaurant enterprise by these two shareholders.

4. There were reciprocal obligations and a meeting of the minds in connection with the establishment of the business enterprise, of which this commitment was a part.

5. This particular term of the obligations was specifically and explicitly perpetual. According to the defendant Kernan's own sworn testimony, "there would *never* be salaries." Kernan Dep. at 16 (emphasis supplied).

6. Over the years, although the business thrived, communications and relations between Villar and Kernan deteriorated. Among other things, the tax benefit promised by Kernan did not materialize; Kernan's divorce caused an unfavorable refinancing; Kernan's move to Florida led to his interest in a restaurant business there; Stephan and Villar attempted to buy Kernan out; without paying, Kernan used recipes and staff assistance from Ricetta's in setting up his Florida restaurant; Villar and Stephan proceeded to lease adjacent space (in their own names "d/b/a Ricetta's, Inc.") for an expansion of Ricetta's without Kernan's consent, on the expectation that they would be successful in buying him out; ultimately their financing was unsuccessful, and Kernan offered Stephan much better terms to ally with him to buy Villar out; Kernan proceeded to offer much less for Villar's stock than Kernan had insisted upon when he was selling; and ultimately Stephan, previously the go-between, joined forces with Kernan, leaving Villar basically frozen out.

7. On March 1, 1994, Kernan entered into a so-called consulting agreement with Ricetta's, Inc. providing for automatic payments to him of $2,000 per week. The agreement was ratified at a subsequent shareholders' and board of directors' meeting at which Villar was not present and of which Villar did not receive notice. The agreement contained no specific obligations on the part of Kernan, but did severely limit the corporation's rights. Under the agreement, for example, Kernan's compensation "may be increased, but not decreased, by majority vote of the Board of

Directors." Joint Ex. 10 at 1. Furthermore, his services could be terminated only for a "criminal violation involving dishonesty, fraud or breach of trust" or for "willful engagement in misconduct in the performance of his duties that materially injures [Ricetta's, Inc.]." Id. at 2. The agreement also provided for the payment of Kernan's expenses. Kernan received so-called consulting fees from the corporation amounting to $90,000 during 1994 and $24,000 during early 1995 that amounted to about 50% of his total income. I find no difference material to this dispute between these so-called consulting fees and the "salaries" prohibited by Villar's and Kernan's oral contract.

8. No material and substantial change within the meaning of Bouchard v. Blunt, 579 A.2d 261, 263 (Me. 1990), occurred after 1988 to justify nonenforcement of the oral contract. Specifically, although Kernan explains that his consulting fees were necessitated by an unauthorized physical expansion of the restaurant premises that required a substantial increase of his time and attention to the business affairs, the original enterprise had been designed as a prototype operation that could lead to the establishment of similar restaurants in other locations that would necessarily likewise require substantial additional work. I find therefore that expansion activities as such did not amount to a material and substantial change. I also observe that Kernan began taking his substantial consulting fees soon after negotiations broke down on Kernan's attempt to buy out Villar and coincided with a prolonged ending of distributions (thus, Villar stopped receiving anything), a failure to communicate with Villar and replacement of Villar as a director.

9. Villar has fully performed his side of the contract to date. Specifically, he provided the initial idea and the initial relationships with personnel that led to establishment of the successful restaurant enterprise. Kernan now professes that Villar had no other particular obligations. In any

event, if there were any such obligations, I find that Villar has met them. I also find that Villar's actions do not amount to anticipatory breach.

10. I have ruled in a previous Order dated June 14, 1996, that an oral contract of this sort may be enforceable by way of specific performance in equity. See Northeast Investment Co. v. Leisure Living Communities, Inc., 351 A.2d 845, 855 (Me. 1976). Since the Law Court has not articulated the factors to consider, I turn to the factors listed in Restatement (Second) of Contracts, § 139(2):

> *The availability and adequacy of other remedies, particularly cancellation and restitution.* There is nothing that can be a subject of restitution in this case inasmuch as Villar's major contribution was the idea and access to appropriate personnel. It is too late to cancel the arrangement. The business enterprise is up and running.
>
> *The definite and substantial character of the action or forbearance in relation to the remedies sought.* Villar has already given Kernan the idea and the access to appropriate personnel. That amounts to definite and substantial action.
>
> *The extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence.* The actions here do not explicitly or specifically corroborate this particular element of the promise, although they clearly corroborate evidence of the overall contractual undertaking. I have found, however, that the making and terms of this particular element are independently established by clear and convincing evidence.

The reasonableness of the action or forbearance. Villar's actions in surrendering the idea and access to personnel were completely reasonable in connection with the agreement entered into with Kernan.

The extent to which the action or forbearance was foreseeable by the promisor. Villar's actions were completely foreseeable by Kernan.

Based on these factors, I conclude that the oral contract should be enforced by specific performance.

11. Because arguments concerning interference with corporate affairs have been made, I make clear that I treat this as a contract simply between the two shareholders.[1] First, the contract does not require the corporation to make distributions or do anything. Second, nothing in these findings restricts the corporation from hiring other consultants. Likewise, nothing prevents Kernan from seeking Villar's agreement to some alteration in their contract. Finally, nothing prevents the corporation from using the services of Kernan without compensation other than the profits he can obtain through distribution. There may be an indirect impact on the corporate affairs if Kernan is the only person with the skills needed and declines to provide them, but that is a consequence of the agreement these two individuals have entered into.

12. In addition to specific performance for the future, Villar also claims monies resulting from the previous payments to Kernan. Kernan maintains that any such recovery would amount to damages and that only specific performance is available because of the Statute of Frauds. Villar therefore seeks to distinguish this request from an action at law for damages based upon breach of contract and to treat it as an action for accounting available at equity notwithstanding the Statute of

[1] I have previously dismissed Villar's claims against both Kernan and Stephan for breach of fiduciary duty with respect to corporate activities, because they were not brought as derivative claims for the corporation. See Order of February 21, 1996.

Frauds. I observe that the Maine case that permitted part performance to justify enforcement of an oral contract not to be performed within a year recognized the availability of both injunctive and damage relief. Northeast Investment Co., 351 A.2d 845 (specific performance of a stock option plus damages). Moreover, although ultimately reduced in part to corporate form, the Villar/Kernan oral contract amounted to a joint venture -- a circumstance appropriate for an equitable accounting. See A. Willmann & Assocs. v. Penseiro, 158 Me. 1, 5, 176 A.2d 739, 741 (Me. 1962); Allen v. Kent, 153 Me. 275, 136 A.2d 540 (1957). Wasserman v. Rosengarden, 406 N.E.2d 131, 133-34 (Ill. 1980); De Boy v. Harris, 113 A.2d 903, 907-09 (Md. 1955); Morrison v. Caspersen, 323 S.W.2d 697, 703 (Mo. 1959); Andrew M. Horton & Peggy L. McGehee, Maine Civil Remedies § 8.2 (rev. ed. 1992). I conclude, therefore, that Villar is entitled to an accounting of payments made to Kernan in breach of the oral agreement.

13. These conclusions are premised upon my earlier ruling that 13 M.R.S.A. § 618 does not preclude enforcement of this oral contract. See Order of February 21, 1996. I found then and find now no clear, controlling precedents in the Maine Law Court's decisions, and I conclude that this issue is an important question for Maine corporate law, specifically whether a shareholders agreement covering employment by shareholders must be in writing to be enforceable even as between the individual shareholders affected. If I am wrong—i.e., if section 618 precludes enforcement—then the statute of frauds provision for contracts that cannot be performed within a year is inapplicable, as is the specific performance discussion in these findings of fact and conclusions of law. Instead, Kernan would be entitled to judgment as a matter of law, a matter determinative of this case. I therefore certify that question of law under section 618 to the Maine Supreme Judicial Court sitting as the Law Court.

14. In addition, although the Law Court has stated that part performance may serve to remove an oral contract not to be performed within one year from the statute of frauds, see Northeast Investment Co., 351 A.2d at 855, it has not specified what factors to consider. I have therefore used the Restatement factors, but the Maine Law Court may choose to use other factors, a matter also determinative of the case. Accordingly, I certify that issue to the Law Court in the event that the Law Court concludes that 13-A M.R.S.A. § 618 does not bar enforcement of the oral contract.

15. The parties shall have until September 6, 1996, to comment on the attached proposed certificate to the Law Court under Me. R. Civ. P. 76B.

16. Judgment shall not be entered until I have received the Law Court's decision.

SO ORDERED.

DATED THIS 23d DAY OF AUGUST, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE