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NORFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 02-01179

HEIDI HARTUNG,
Plaintiff

vs.

SANTIAGO VILLANUEVA, et al,
Defendants

and

SANTIAGO VILLANUEVA,
Counterclaim Plaintiff and Third-Party Plaintiff

vs.

HARBAR CORPORATION and MAZORCA REALTY CORPORATION,
Third Party Defendants

**MEMORANDUM AND ORDER ON
MOTION OF PLAINTIFF AND THIRD PARTY DEFENDANTS
TO DISMISS COUNTERCLAIMS AND THIRD PARTY COMPLAINT**

Counts I - III of Santiago Villanueva's counterclaim proceeds on the theory that plaintiff Heidi Hartung and Villanueva entered into a partnership agreement in 1994, the purpose of which was to engage in the marketing, manufacture, sale and distribution of tortillas and flatbreads. At the time, there was an existing corporation, Harbar Corporation (Harbar), exclusively owned by Hartung, whose business was exactly the same. For the next several years, the counterclaims alleges, Hartung and Villanueva worked to improve Harbar's business. Villanueva worked initially as an unpaid

consultant to Harbar, and in 1997 he became an employee of Harbar. From 1997 to 2000, Hartung and Villanueva received equal salary, benefits and bonuses from Harbar. In 1998, Hartung and Villanueva organized a new corporation, Old Bowling Alley Realty Corporation (Old Bowling Alley), to purchase a new location for Harbar and to lease the property to it. Hartung and Villanueva became equal shareholders in Old Bowling Alley. Hartung and Villanueva personally guaranteed the loans and leases of Old Bowling Alley and Harbar. They executed a cross purchase agreement by which they acknowledged that they were equal shareholders in Old Bowling Alley, and that Hartung owned all of the shares of Harbar, and provided in the event of the death of one, the other would be required to purchase the shares of the other. Finally, the counterclaim alleges that Hartung breached her fiduciary duty to Villanueva by unilaterally excluding him from the partnership. He seeks a declaration and accounting of the partnership, a declaration that Villanueva is entitled to one-half of the net profits of Harbar since January 2000.

In Counts IV and V, Villanueva seeks damages from Hartung for intentional infliction of emotional distress, and against Harbar for bad faith termination of employment. Counts VI and VII seek injunctive relief with respect to a proposed relocation of Harbar's business. Count VIII is brought pursuant to Chapter 93A, § 11, against Harbar and Mazorca Realty Corporation, for their actions in connection with the alleged relocation.

The partnership counts (I - III) must be Dismissed. The business entities through which Hartung and Villanueva chose to do business were corporations, Old Bowling Alley and Harbar. The counterclaim is illogical and contradictory in alleging that Hartung and Villanueva formed a partnership to run a corporation (Harbar) of which Hartung was the sole shareholder, and Villanueva was an employee. Such an arrangement would be redundant, pointless, and would multiply

unnecessarily the required filings and record keeping. The counterclaim provides no details as to how this partnership was formed. It is in my view an inadequately stated claim which should be dismissed.

Count IV for intentional infliction of emotional distress shall also be dismissed. It states nothing more than a garden variety business dispute not rising to the level of conduct “utterly intolerable in a civilized community”. Agis v. Howard Johnson, 371 Mass. 140 (1976).

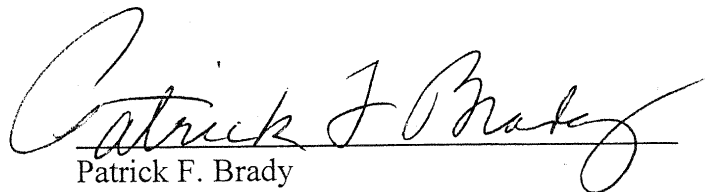
Count V, as I read it, basically proceeds on the theory first articulated in Fortune v. National Cash Register Co., 373 Mass. 96 (1977) of a bad faith termination of an at-will employment contract to deprive the employee of benefits earned or almost earned by the prior rendering of substantial services. I do not read the references in Count V to a “long-term employment contract” as stating a sufficiently specific claim for recovery on the basis of a contract for a specified term. See Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 4 (1908). In that regard, the claim is inadequately pled and will be dismissed.

Counts VI and VII for injunctive relief against Harbar Corporation and Mazorca Realty Corporation (another entity formed by Hartung), must be dismissed as moot. The court denied Villanueva’s request for preliminary injunction against Harbar leaving its property to move to property owned by Mazorca.


Count VIII is a claim by Villanueva against Harbar Corporation and Mazorca Realty Corporation for violation of G.L. c. 93A, § 11. The count alleges that Villanueva has suffered damages in capacity as shareholder of Old Bowling Alley. The count, although vaguely pled, appears to be a derivative action which must be brought by Old Bowling Alley rather than Villanueva as a shareholder thereof.

ORDER

The motion to dismiss is **ALLOWED** as to Counts I, II, III, IV, VI, VII and VIII. The motion to dismiss is **DENIED** with respect Count V, insofar as that count proceeds on the basis of the bad faith termination of an at-will employment contract. The motion is **ALLOWED** insofar as Count V seeks recovery on a contract for a specified term.


Patrick F. Brady
Justice of the Superior Court

DATED: October 24, 2003

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Attest: 
Deputy Assistant Clerk 11/3/03