STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 25, 2016)

RONALD A. KRUPINSKI, Individually and Derivatively on Behalf of SCHARNHORST, INC.	:	
Plaintiff,	:	
v.	:	**C.A. No. PB 07-3484**
WILLIAM A. DEYESSO, SCHARNHORST, INC., and RICHARD P. MCCABE,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court for decision is Defendant William A. Deyesso's (Defendant or Deyesso) Motion for Summary Judgment as to Count I of Plaintiff Ronald A. Krupinski's (Plaintiff or Krupinski) Third Amended Complaint and Jury Demand[1] pursuant to Super. R. Civ. P. 56(c). Under Count I of the Complaint, Krupinski alleges Deyesso breached a series of agreements by (i) requiring Krupinski to pay a certain amount by way of a promissory note to receive his already granted shareholder interest in Defendant Scharnhorst, Inc. (Scharnhorst); (ii) by firing Krupinski from his position as a manager of an adult entertainment club in Providence, Rhode Island without cause; (iii) by failing to find Krupinski another position in the company; and (iv) by failing to provide Krupinski with an equity interest in certain additional clubs opened and operated in Massachusetts.

[1] Based on actions heretofore taken, the only operative claims are those set forth in Count I of the Third Amended Complaint and Jury Demand (hereinafter referred to as the Complaint).

I

Facts and Travel

The Court in two previous written decisions has set forth the pertinent facts. See Krupinski v. Deyesso, No. PB 07-3484, 2012 WL 1360869 (R.I. Super. Apr. 12, 2012) (Silverstein, J.) (hereinafter Krupinski I); Krupinski v. Deyesso, No. PB 07-3484, 2013 WL 1562564 (R.I. Super. Apr. 10, 2013) (Silverstein, J.) (hereinafter Krupinski II). The Court will recount only those facts relevant to Plaintiff's instant claim of breach of contract. For purposes of the summary judgment record, those relevant facts are presented below.

In February 1995, Krupinski met with Frank Viola (Viola) and Deyesso to discuss investing in a potential "turnkey opportunity" for an adult entertainment club in Providence, Rhode Island. (Krupinski Aff. ¶¶ 2-3, Dec. 5, 2014; Krupinski Dep. 141:13-23, July 21, 2011). The club, to be named "Centerfolds," would be operated at 521 Eddy Street in Providence, at a location owned by Krupinski's friend, Pasquale Cortellessa (Cortellessa). (Krupinski Aff. ¶ 2). At the meeting, Krupinski claims it was agreed that he was to receive a thirty-three percent ownership interest in Centerfolds. Id. at ¶ 3. Additionally, Krupinski claims the parties agreed that when the club opened he would work as a manager, earning a salary of $52,000 annually plus bonuses. Id. Thereafter, in May 1995, Viola purchased Scharnhorst[2] (which held a liquor license) as the operating entity for the club. Id. at ¶¶ 4-5. Viola, Deyesso, and others became officers and shareholders of Scharnhorst in December 1995 through appropriate corporate action. Id. at ¶ 7. Krupinski was not listed as an officer, director, or shareholder. Id.

Following the purchase, Krupinski began preparing the club for its opening, which officially occurred in February 1996. Id. at ¶ 9. Due to an issue with the adult entertainment

[2] Scharnhorst was incorporated in 1992 by Cortellessa. See Def's. Mot. Summ. J., Ex. E (articles of incorporation).

license or permit, the club was forced to close only a day or two after opening, but eventually reopened in August 1996. Id. at ¶¶ 9-11. Centerfolds operated continuously thereafter until operations ceased in October 2001. Id. at ¶ 11. Deyesso stated in his deposition that he was told at the February 1995 meeting that the business in Providence already had a liquor license and an adult entertainment license. (Deyesso Dep. 36:17-22, Aug. 10, 2011). Deyesso did not investigate whether Scharnhorst actually had an adult entertainment license, id. at 45:16-21; specifically, Deyesso explained:

> "The only person that told me that [the license] existed was Ron. Ron is the one that brought the deal, Ron is the one that guaranteed, you know, not in so many words, that it was ready to go as an adult club. It had a liquor license, and it had an adult license. All he had to do was a little cosmetic, and it was ready to go." Id. at 46:1-7.

As a result of the club's temporary forced closure, Krupinski agreed to reduce his ownership interest in the club to twenty-five percent. (Krupinski Aff. ¶ 12). According to his affidavit, Krupinski again served as a manager of the club when it reopened in August 1996. Id. at ¶ 13. Krupinski served in that capacity until July 1997 when he claims he was terminated without cause and without justification. Id. Krupinski did not have a written employment agreement during his tenure as manager. (Krupinski Dep. 167:6-10, Aug. 12, 2011).

Despite Krupinski's allegations to the contrary, Deyesso claims Krupinski was terminated due to his participation in a purported credit-card scam through the altering of customer receipts, improper conduct with the club's dancers, and excessive drinking. See Def.'s Supplemental Answers to Pl.'s Interrogs. 6. Notwithstanding his employment termination, Krupinski remained a twenty-five percent shareholder of Scharnhorst, but never received any distributions from the company in 1997, despite its profitability that year. See Krupinski Aff.

¶ 20. Krupinski did, however, receive distributions as a shareholder in Scharnhorst from 1998 to 2004.[3] See Hr'g Tr. 204:5-14, 208:3-16, Jan. 18, 2012.

In 1997, Viola conveyed his interest in Scharnhorst to Deyesso. Defendant Richard P. McCabe (McCabe) also became a shareholder of Scharnhorst. (Krupinski Aff. ¶¶ 16-17). Before Krupinski was terminated, Krupinski alleges that Deyesso had identified a club in Worcester, Massachusetts, named "Pudgy's," and intended to acquire that club and to convert it into a new Centerfolds location. The club was ultimately purchased only in McCabe's name in August 1997.[4] Following the purchase of Pudgy's, several other clubs in Massachusetts were purchased by Deyesso and McCabe. Neither Krupinski nor Scharnhorst participated in the ownership or management of these locations.

Krupinski also claims that when he met with Deyesso about his termination, Deyesso orally represented to him that Deyesso would find him another opportunity in the business. Id. at ¶ 21. In August 1997, Krupinski claims that he signed a promissory note for $54,000 under duress, payable to Deyesso, that would vest his interest in Scharnhorst.[5] Id. at ¶ 22. According to Deyesso, the purpose of the promissory note was to essentially reimburse Deyesso for some of the costs incurred from the Providence club's failed opening in February 1996. See Deyesso Dep. 64:4-65:22. Specifically, Deyesso described the purpose of the note at his deposition:

> "I told [Krupinski] that the costs were getting a little bit high now that we were not open, and that I felt that [Krupinski] had put a little bit of skin in the game for the fact that he brought the deal to us, and from a good-faith standpoint, he should pick up a little bit of that loss." Id. at 65:1-6.

[3] For the years 2001 through 2004, Krupinski received the following distributions, respectively: $57,250; $42,500; $42,000; and $3000. (Hr'g. Tr. 207:19-208:16, Jan. 18, 2012).
[4] As part of the purchase, the owner of Pudgy's was given Krupinski's former job at the Centerfolds in Providence.
[5] The promissory note operated to take away Krupinski's voting rights in Scharnhorst.

The site where Providence Centerfolds operated was taken by eminent domain in 2001. As indicated above, once Centerfolds closed and McCabe and Deyesso failed to timely locate a new building, Deyesso and McCabe proceeded to open other clubs in Massachusetts under the name Centerfolds, using some of the tangible property from the Providence club. Krupinski alleges that Deyesso breached the original agreement with him by excluding him from participating in those new, additional clubs. See Compl. ¶ 33.

On October 7, 2005, Scharnhorst's corporate charter was revoked by the Rhode Island Secretary of State due to its failure to file its Annual Report for the year 2005. See Def.'s Mot. Summ. J., Ex. E. Krupinski's original Complaint was filed on July 10, 2007, and the current, operative Complaint was filed on February 8, 2012. On April 12, 2012, the Court issued a Decision dismissing Counts II through VIII of the Complaint, including the dismissal of two additional claims that were first raised therein. The Court subsequently denied Krupinski's motion to reconsider that Decision. See Krupinski II, 2013 WL 1562564. Accordingly, the only remaining cause of action in this matter—which is now the subject of Defendant's summary judgment motion—is Count I setting forth a claim for breach of contract brought individually against Deyesso.

II

Standard of Review

The Rhode Island Supreme Court has consistently stated "[t]he purpose of the summary judgment procedure is issue finding, not issue determination." Indus. Nat'l Bank v. Peloso, 121 R.I. 305, 307, 397 A.2d 1312, 1313 (1979); see also Saltzman v. Atl. Realty Co., 434 A.2d 1343, 1345 (R.I. 1981). It is important for a trial justice ruling on a motion seeking summary judgment to be mindful that it is a drastic remedy that should only be granted when a review of the

pleadings, affidavits, and other discovery materials indicate that no genuine issues of material fact exist in the matter. Superior Boiler Works, Inc. v. R.J. Sanders, Inc., 711 A.2d 628, 631 (R.I. 1998). "[I]f no issues of material fact appear and the moving party is entitled to judgment as a matter of law, the trial justice may enter an order for summary judgment." Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981); see also Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (finding "[s]ummary judgment is proper when there is no ambiguity as a matter of law"). A party opposing a summary judgment motion "'carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" Gliottone v. Ethier, 870 A.2d 1022, 1027 (R.I. 2005) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996)). Indeed, Rule 56 of the Superior Court Rules of Civil Procedure "'requires that the nonmoving party adduce sufficient controverted evidence of material fact(s)—irrespective of its credibility or weight—to require a trial.'" Id. at 1027 (quoting Mitchell v. Mitchell, 756 A.2d 179, 185 (R.I. 2000)).

III

Discussion

Deyesso's motion seeking summary judgment with respect to Count I requires the Court to examine four separate agreements allegedly made by Deyesso. The analysis for the most part centers on the applicability of the Statute of Frauds and the formation of a valid contract. The Court will begin its discussion with an analysis of Krupinski's claims relative to the promissory note.

A

Krupinski's Promissory Note

In paragraph 30 of the Complaint, Krupinski alleges (in addition to his separate claim relating to his termination) that Deyesso breached the original agreement with Krupinski by requiring him to execute, deliver, and pay $54,000 (via a promissory note) to allegedly ensure he would receive his twenty-five percent interest in the corporation. Deyesso argues he is entitled to summary judgment on the basis that the promissory note was to compensate him for the additional expenses in reopening the club after its initial failure. In response, Krupinski claims that the promissory note is illusory and without valid consideration, as he contends he was already entitled to his twenty-five percent share, and that he signed the note under duress. As the issue of consideration goes to the validity of a contract and the issue of duress operates as a defense to an otherwise valid contract, the Court will begin its analysis with a discussion of whether the note in fact contained sufficient consideration to create a valid contract.

Under Massachusetts law,[6] promissory notes are deemed contracts and are analyzed accordingly. See, e.g., Robbins v. Krock, 896 N.E.2d 633, 636 (Mass. App. Ct. 2008). It is well established in that jurisdiction that a valid contract requires "offer, acceptance, consideration, and terms setting forth the rights and obligations of the parties." City of Haverhill v. George

[6] The promissory note here contains a choice of law provision specifying that the applicable law governing the note is to be that of Massachusetts. However, "[The Rhode Island Supreme Court] . . . has adopted the rule that ordinarily the validity of a contract depends upon the law of the place where it is made." Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 192 A. 158, 163 (1937) (citing Hunt v. Jones, 12 R.I. 265, 266 (1879)). Moreover, the Court stated that for purposes of contract validity and interpretation, the contract "is to be interpreted according to the law of the place where the parties, as an actual fact, made and executed the contract, and not that of another place arbitrarily selected by them." Id. In this case, those two locations are one in the same: Massachusetts. The promissory note was signed in Norwell, Massachusetts. See Def's. Mot. Summ. J., Ex. R. Accordingly, Massachusetts law will govern this Court's analysis of the validity of the promissory note.

Brox, Inc., 716 N.E.2d 138, 141 (Mass. App. Ct. 1999). "Where the existence of a contract is in issue, the burden is on the [disputing party] to show it was made." Canney v. New Eng. Tel. & Tel. Co., 228 N.E.2d 723, 727 (Mass. 1967). Moreover, "[t]he law is not concerned with the adequacy of the consideration, as long as it is valuable." Vasconcellos v. Arbella Mut. Ins. Co., 853 N.E.2d 571, 576 (Mass. App. Ct. 2006) (internal quotation marks omitted). Valuable consideration, as required to form a valid contract, is defined by Massachusetts courts as "constituting what each party to a bargain gives up to the other (or at the other's direction) determined at the time of the bargain." Old Colony Trust Co. v. Comm'r of Corps. & Taxation, 195 N.E.2d 332, 335 (Mass. 1964). More specifically, "'[i]n the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration.'" Loranger Constr. Corp. v. E. F. Hauserman Co., 384 N.E.2d 176, 180 (Mass. 1978) (quoting Restatement (Second) of Contracts § 75, Comment B (Tent. Drafts Nos. 1-7, 1973)).

The instant promissory note, Exhibit R to Deyesso's Motion for Summary Judgment, is signed by Krupinski.[7] The note, payable to Deyesso, required Krupinski to pay a sum of $54,000 within two years of the date of the note (August 1, 1997) at an interest rate of ten percent. See Def's. Mot. Summ. J., Ex. R at 1. The note provides, inter alia, as follows:

> "Upon satisfaction and discharge of all Partnership obligations of the Scharnhorst Corporation, a Rhode Island corporation d/b/a "Centerfold", Borrower shall be entitled to receive from Lender **TWENTY FIVE PERCENT (25%)** of the stock ownership benefits of said corporation. If borrower pays all monies due in accordance with this Note, Lender shall transfer title to such stock to Borrower, but Lender shall retain Borrower's proxy in

[7] In his deposition, Deyesso testified that he also signed the promissory note. See Deyesso Dep. 128:2-8, Jan. 7, 2011.

> Schornhorst [sic] Corporation. Borrower shall retain all other rights in accordance with the by-laws and Articles of Organization of Schornhorst [sic] Corporation upon receipt of title to said stock." Id. (emphasis in original).

Krupinski argues that the note should be deemed illusory because, per their original oral agreement, Krupinski was already promised his twenty-five percent interest. According to him, any promissory note purporting to vest him what he already owns lacks the requisite consideration to form a binding contract. Deyesso, by way of affidavit, specifically states that "[t]he shareholder interests at the time Centerfolds opened were: Viola 25%; Deyesso 25%; Krupinski 25%; Nando Sostilio 10%; Alfred Tocchio 5% and William Bennet 10%." (Deyesso Aff. ¶ 22). Whether Deyesso is referring to the February 1996 or August 1996 opening is immaterial as Krupinski arguably was deemed a twenty-five percent shareholder well before the promissory note was signed approximately a year later in August 1997.

Therefore, the issue for the Court is whether the promissory note was in fact void because of insufficient consideration (and thus illusory) or whether, as Deyesso argues, the note actually served as a vehicle to reimburse Deyesso for the failed initial launch of the club. See Graphic Arts Finishers, Inc. v. Boston Redevelopment Auth., 255 N.E.2d 793, 796 (Mass. 1970) ("It is true that a promise that binds one to do nothing at all is illusory and cannot be consideration."). Deyesso argues that the issue of consideration for the note (the sum to reimburse Deyesso for additional expenses due to the failed opening) actually relates back to the issue of whether Krupinski, in fact, promised investors a so-called "turnkey opportunity." Deyesso claims that because Krupinski understated the investment (i.e., what was actually required to get the club operational), he should have shared in some of the expenses the investors incurred as a result of his shortcomings. Despite the note's language appearing to vest Krupinski's twenty-five percent interest upon satisfaction of the note obligation, Deyesso maintains the real purpose behind the

note was to cover those expenses resulting from Krupinski's alleged misrepresentations regarding the status of the club.[8] As to this issue, Krupinski adamantly disputes how much (or, more aptly, how little) work was necessary to open the club. Any question as to whether it was indeed a "turnkey" investment would be, as he argues, a question of fact as to the parties' individual interpretations and expectations.

Based on the parties' competing claims regarding whether Krupinski was obligated to pay additional expenses because of any alleged error and because it is unclear whether those expenses were even included in the agreement, the Court must deny summary judgment at this juncture as to this issue. Deyesso testified that he believed Krupinski should cover some of the expenses incurred from the failed opening because it was alleged to be his fault in misrepresenting the investment. See Deyesso Dep. 64:4-65:22. On the other hand, according to Krupinski, he had to sign the promissory note to receive his distributions as shareholder and attests that he was told the money was needed by Scharnhorst, but that such money was never paid over to the company by Deyesso. See Krupinski Aff. ¶ 22; Compl. ¶ 23.

In Massachusetts' version of the Uniform Commercial Code, section 3-303, governing negotiable instruments, defines "consideration" as "any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration." Mass. Gen. Laws ch. 106, § 3-303. The Comment to § 3-303 provides that "[i]f an instrument is not issued for consideration the issuer has a defense to the obligation to pay the instrument." Id. Currently, "[t]he code does not contain any presumption of consideration." See 17 Mass. Prac., Prima Facie Case § 14.6 (5th ed.) (discussing consideration in context of negotiable instruments in Massachusetts). If Krupinski was already a twenty-five

[8] An ancillary issue may in fact be whether Deyesso is even able to present evidence of additional consideration or whether such evidence is barred under the parol evidence rule.

percent shareholder in Scharnhorst, the note's language does not indicate what new, valuable consideration would have existed for Krupinski's $54,000 obligation. Theoretically, Krupinski would then have a valid defense to the note, i.e., lack of consideration, and, more importantly, a valid argument that Deyesso breached their original agreement by requiring him to sign the promissory note and pay to receive what already was his—twenty-five percent of the shares of the corporation. Under that line of reasoning, Krupinski would have already received the benefit of receiving his shareholder interest and the note would not confer any new benefit in exchange for his performance. However, if the note contemplated some additional consideration between the parties, i.e., a form of a repayment to Deyesso for those added expenses, then the signing of the note would not constitute a breach of the original agreement to give Krupinski a twenty-five percent interest in the company and would not have resulted in his claimed $54,000 in damages. In any event, such a determination must be properly conducted by a fact finder.

In cases discussing a dispute as to the existence or lack of consideration, Massachusetts courts have concluded those issues are factual and must be resolved by a jury.[9] See, e.g., Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 864 N.E.2d 518, 532 (Mass. App. Ct. 2007) ("Except where the evidence is undisputed or consists solely of writings, whether a contract . . . was supported by consideration are issues of fact for determination by the jury."); Bennett v. Corp. Fin. Co., 154 N.E. 835, 838 (Mass. 1927) (holding whether indorsement of promissory note was without consideration was question for jury); Morris v. Bowman, 78 Mass. 467, 467-68 (1859) (affirming judge's jury instructions that whether promissory note lacked consideration was issue of fact for jury because of conflicting testimony in evidence). With this

[9] A similar holding would also likely result if Rhode Island law had instead been found to apply. See Notarianni v. Di Muccio, 58 R.I. 504, 193 A. 617, 617 (1937) (holding issue of whether promissory note was signed for valid consideration was question of fact for jury where plaintiff and defendant provided conflicting testimony).

conclusion, the Court need not and does not reach the issue of whether Krupinski signed the promissory note under duress. Because it cannot be established, as a matter of law, that a valid contract was formed between Deyesso and Krupinski, any discussion of defenses thereto, under Massachusetts law, would be a purely academic endeavor. Therefore, the Court denies Deyesso's Motion for Summary Judgment as to this breach alleged in Count I. There are, however, three other alleged breaches remaining in Krupinski's cause of action that the Court will address.

B

Deyesso's Termination of Krupinski Without Cause

Deyesso argues a number of grounds as to why he did not breach any agreement to employ Krupinski at the Providence Centerfolds when Krupinski was fired without cause. First, Deyesso argues that the oral agreement violated the Statute of Frauds because his performance could not be completed within one year. Second, he argues that he was acting in his corporate capacity and therefore any claim should have been brought directly against Scharnhorst. Finally, he argues that, those arguments notwithstanding, Krupinski was an at-will employee who could be terminated at any time with or without cause.

Notwithstanding Deyesso's arguments, the Court finds that the main question for resolution of this issue is whether Krupinski, as a minority shareholder in a closely held corporation, has a reasonable expectation of continued employment with that entity. If so, the next inquiry—one which ultimately will require the Court to deny summary judgment as to this alleged breach—is whether, despite that expectation, such an employee can nonetheless be terminated if a proper showing of cause has been demonstrated. The Court previously addressed this exact issue in its decision in Grady v. Grady, No. PB 09-0367, 2012 WL 171006 (R.I. Super.

Jan. 17, 2012) (Silverstein, J.). Prior to reaching the discussion of this fundamental question, the Court will address Deyesso's arguments relative to the Statute of Frauds.

1

Statute of Frauds

Our Supreme Court has described the Statute of Frauds as "a venerable doctrine" and "mere allegations of fraud, without accompanying evidence, are insufficient to remove an oral contract from its purview." Brochu v. Santis, 939 A.2d 449, 453 (R.I. 2008). "The purpose of the statute was to prevent perjured testimony with respect to oral contracts. Rhode Island's statute of frauds also is to guard against perjury by one claiming under an alleged agreement." Smith v. Boyd, 553 A.2d 131, 132 (R.I. 1989) (internal citations omitted). Rhode Island's Statute of Frauds, codified at G.L. 1956 § 9-1-4 and adopted from English common law, requires evidence of a writing to enforce certain types of contracts. See 9 Williston on Contracts § 21:1, at 226-28 (4th ed. 2011). The statute provides in pertinent part:

> "No action shall be brought: . . . (5) Whereby to charge any person upon any agreement which is not to be performed within the space of one year from the making thereof . . . . unless the promise or agreement upon which the action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him or her thereunto lawfully authorized." Sec. 9-1-4.

Because Krupinski relies on an oral agreement to employ him as manager of Centerfolds in Providence, Deyesso contends Krupinski's claim for breach stemming from his termination should be barred because his employment was for an uncertain duration and could not be fully performed within one year.

This Court previously discussed § 9-1-4(5), the so-called "one-year" provision, stating that contracts of uncertain duration are not prohibited under the Statute of Frauds, but rather the

provision "'covers only those contracts whose performance cannot possibly be completed within a year.'" Mentor, Inc. v. Lam, No. PB 01-3859, 2008 WL 914382 (R.I. Super. Jan. 29, 2008) (Silverstein, J.) (quoting Restatement (Second) Contracts § 130, com. a). The Rhode Island Supreme Court has addressed agreements for an uncertain duration within the context of employment contracts. In Powless v. Pawtucket Screw Co., the Court was faced with an argument—similar to the one asserted here by Deyesso—that the oral employment agreement upon which the plaintiff's claim for lost wages was based was unenforceable under the one-year provision of § 9-1-4. See 116 R.I. 158, 161, 352 A.2d 643, 646 (1976). The term of the employment agreement was never established. Id. at 162, 352 A.2d at 646. The Powless Court provided the following relevant discussion:

> "The record does disclose that although at one point plaintiff indicated that he had committed himself to the employment for at least 1 year, he subsequently responded to a question posed by the trial justice concerning the term of the oral agreement by saying that '(t)here was no question about whether I was going to stay there for six months or whether I was going to be there for ten years, no.' That reply makes it apparent that even though the time of performance could have been, and indeed was, extended by the parties beyond a year, the duration of the agreement was uncertain. *Such a contract is for an indefinite term, terminable by either party at will, and could by possibility have been fully performed within a year from the time it was made. It is not obnoxious to the statute of frauds*." Id. (emphasis added).

Similarly here, there is no definite term for Krupinski's oral employment contract to serve as manager. Moreover, in arguing the Statute of Frauds should apply to bar the agreement, Deyesso relies only on the fact that there was no written agreement and that any agreement could not have been performed within a year. Assuming for the moment that Krupinski was an at-will employee, however, and in light of Powless, it seems to the Court that Deyesso's position proves fatal to any claim that the Statute of Frauds requires a writing as proof of the instant oral

employment agreement. See DelSignore v. Providence Journal Co., 691 A.2d 1050, 1051 n.5 (R.I. 1997) ("[I]n Rhode Island the general rule is that employees like plaintiff who are hired for an indefinite period with no contractual right to continued employment are at-will employees subject to discharge at any time for any permissible reason or for no reason at all."). The Powless Court made clear that an oral contract for at-will employment of an indefinite duration does not squarely fall within the Statute of Frauds' one-year provision. Arguably, if Krupinski was an at-will employee, Deyesso's Statute of Frauds argument should fail.[10]

Be that as it may, the question of whether the Statute of Frauds should properly preclude evidence of an oral employment agreement for an indefinite term in this case is resolved by whether an admission existed to dispense with the necessity for a writing. See Smith, 553 A.2d at 133 ("[W]e [have] adopted the rule that a complete admission of the contract in court by the party to be charged dispenses with the necessity of any writing." (citing Adams–Riker, Inc. v. Nightingale, 119 R.I. 862, 866–67, 383 A.2d 1042, 1044 (1978) and 2 Corbin on Contracts § 498, at 683 (1950))); see also UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp., 641 A.2d 75, 80 (R.I. 1994) ("A writing that, standing alone, does not comport with § 9–1–4 can nevertheless satisfy the statute of frauds if in-court admissions of the party to be charged supply the missing elements."). In Adams-Riker, the Court adopted Professor Corbin's view[11] and the view of a number of other jurisdictions that "'the admissions of a party in the form of testimony constitute sufficient 'memoranda' or 'writings' under the Statute of Frauds, for recorded testimony is regarded as equivalent to signed depositions,"' Peacock Realty Co. v. E. Thomas Crandall Farm, Inc., 108 R.I. 593, 601, 278 A.2d 405, 409 (1971) (quoting Sealock v. Hackley,

[10] See infra Part III.B.3 for discussion of whether Krupinski was indeed an at-will employee or, as Krupinski argues, could only be terminated for cause due to his expectation of continued employment with Scharnhorst.

[11] 2 Corbin on Contracts § 498, at 683.

186 Md. 49, 52-53, 45 A.2d 744, 746 (1946)).[12] The Sealock Court continued to state that "[a]dmissions of a party in testifying, while evidence in form, are in essence not mere evidence, but make evidence against him unnecessary." Sealock, 186 Md. at 53, 45 A.2d at 746.

As Krupinski states in his affidavit, an oral agreement was reached for his employment as manager once the club opened. See Krupinski Aff. ¶ 3. Indeed, Deyesso seemingly admits as much in his own memorandum, in addition to his assertions that Krupinski was an at-will employee. See Def.'s Mem. in Support of Mot. Summ. J., 9 ("Viola, Deyesso, and Krupinski had an oral agreement that in exchange for Krupinski providing this turnkey investment opportunity that Krupinski would become the manager of the Club when it opened. Krupinski would be an employee of Scharnhorst, the entity that operated the Club."); see also Def.'s Supplemental Answers to Pl.'s Interrogs. 6 at 3 (noting Krupinski performed as manager until he was terminated for misconduct). Furthermore, Krupinski cites to the original, first-filed Complaint and answer in this case as proof of Deyesso's admission. See Pl.'s Opp'n to Mot. Summ. J., Ex. 1 at ¶ 10 (Complaint and Jury Demand).[13] As in Adams-Riker, the answer to the Complaint and Deyesso's testimony here operate as an admission of the existence of an employment agreement as well as an essential term that he would serve as manager. See Adams-Riker, 119 R.I. at 866, 383 A.2d at 1045. As a result, Deyesso cannot now deny the existence of an employment agreement when a substantial portion of his own deposition was devoted to a

[12] Interestingly, the Court elected not to decide Adams-Riker's claim that the employment contract was terminable by either party at will and was for an indefinite term and thus could have been performed fully within a year. See Adams-Riker, 119 R.I. at 866 n.3, 383 A.2d at 1045 n.3 (noting such contracts have been held "not obnoxious to the statute of frauds." (citing Powless, 116 R.I. 158, 352 A.2d 643)).

[13] The original Complaint and Jury Demand at paragraph 10 stated: "As part of the agreement to open Centerfold's, Viola, Deyesso and Krupinski agreed that Krupinski would hold a position operating the club and that he would be compensated $52,000 a year. (Compl. and Jury Demand ¶ 10). Defendants' Answer (attached as Exhibit 2 to Krupinski's opposition), at paragraph 10, stated "Admit." (Answer ¶ 10).

discussion of the motivating factors that led to Krupinski's termination from his employment as a manager.[14] See Deyesso Dep. 34:23-37:25.

As the Court rejects Deyesso's argument, the Court (as stated by our Supreme Court in Adams-Riker) "will not permit a litigant 'to invoke the statute to sanction rather than to prevent an injustice. This, in our judgment, would be wrong.'" Adams-Riker, 119 R.I. at 866, 383 A.2d at 1045 (quoting Peacock, 108 R.I. at 602, 278 A.2d at 410). To allow Deyesso's claimed protection of the Statute of Frauds to excuse his performance of the agreement when he clearly admitted Krupinski was employed as a manager would be an injustice and would not serve to guard against perjurious claims. See Smith, 553 A.2d at 133. With this finding, the Court need not reach the issue of whether, if Deyesso had in fact denied the existence of any agreement, the Court could still find Krupinski had an expectation of continued employment despite the oral agreement arguably violating the Statute of Frauds if Krupinski was not an at-will employee. The Statute of Frauds clearly cannot bar Krupinski's claims for wrongful termination as Deyesso has acknowledged the existence of Krupinski's employment with Scharnhorst on multiple occasions. Thus, the Court now turns to whether any claim for a breach of the agreement to employ Krupinski should have been brought against Deyesso individually or against Scharnhorst.

[14] Deyesso's reliance on Fuller v. Apco Mfg. Co. at the motion hearing is misplaced because, unlike in that case, there was no admission that an oral contract existed. See 51 R.I. 378, 155 A. 351, 352 (1931). Here, there is express testimony regarding Deyesso's wish to terminate Krupinski as a manager, and, by implication, testimony acknowledging his employment. The fact that there was no written agreement and that it was for an uncertain duration does not automatically bring the agreement within the Statute of Frauds to warrant the requirement of a writing as evidence of said agreement.

2

Deyesso's Individual Liability

Deyesso next argues he was acting on behalf of Scharnhorst in his capacity as director when he terminated Krupinski's employment and is thus not personally liable. To that end, Deyesso maintains that Krupinski's employment agreement—as a claimed preincorporation contract—subsequently became the obligation of Scharnhorst when the corporation was purchased. Scharnhorst, according to Deyesso, ratified the employment agreement at the agreed upon salary of $52,000 per year. Krupinski, in response, contends that the oral agreement was entered into with Deyesso personally. Moreover, Krupinski argues that any assumption of the agreement by Scharnhorst does not automatically relieve Deyesso of any personal liability. Essentially, to prevail on summary judgment, Deyesso must prove that he was excused from any and all liability when Scharnhorst assumed the employment agreement.

"[A] preincorporation contract may be adopted, accepted, or ratified by a corporation when properly organized, resulting in corporate liability on the contract." Katz v. Prete, 459 A.2d 81, 86 (R.I. 1983). A corporation impliedly adopts a preincorporation contract when it accepts the benefits of the contract and renders performance in accordance therewith. Id. Adoption of a preincorporation contract results in corporate liability on the contract. Id.

There can be no dispute that an oral agreement was made between Deyesso, Viola, and Krupinski, and that, under the terms of the agreement, Krupinski was to serve as a manager of the club. Additionally, there can be no dispute that Krupinski received compensation from Scharnhorst for services provided in accordance with the terms of the agreement. See Def.'s Mot. Summ. J., Ex. O. Thus, there can be no dispute that Scharnhorst accepted the benefits of the contract and thereby adopted it. In support of his Motion for Summary Judgment, Deyesso

now urges the Court to find that he made the contract as Scharnhorst's promoter, and that he was released from liability upon adoption thereof.

The term "promoter" has been defined in case law as "'every person acting, by whatever name, in the forming and establishing of a company at any period prior to the company becoming fully incorporated.'" Gerffert Co. v. William J. Hirten Co., 815 F. Supp. 2d 521, 528 (D.R.I. 2011) (quoting Dickerman v. N. Trust Co., 176 U.S. 181, 203-04 (1900)). This definition is consistent with the principle that "a corporation should have a full and complete organization and existence as an entity before it can enter into any kind of a contract." Ireland v. Globe Milling & Reduction Co., 20 R.I. 190, 38 A. 116, 117 (1897). Under Gerffert and Ireland, it may be said that a promoter is an individual who makes a contract on behalf of an entity that lacks the capacity to enter into the transaction. Because Deyesso did not make a contract on behalf of Scharnhorst prior to the company becoming fully incorporated, under Gerffert and Ireland, he may not be considered a promoter.

However, according to the Supreme Court of Ohio, the legal principles governing the relationship between a corporation and its promoters are not based upon the principles enunciated in Ireland, but are instead "derived from the law of agency." Ill. Controls, Inc. v. Langham, 70 Ohio St. 3d 512, 522 (1994). Because a corporation may not have agents prior to becoming fully incorporated, see, e.g., Rees v. Mosaic Techs., Inc., 742 F.2d 765, 768 (3d Cir. 1984), under Ill. Controls, a finding that a contract was made on behalf of an entity lacking legal capacity to make contracts is not a condition precedent to a determination that the individual who made the contract was acting as a corporate promoter.

For purposes of the instant dispute, this Court is not required to ascertain the nature of the rules governing Deyesso's claim. Instead, the Court finds that the motion for summary judgment

may be resolved on the basis that "whether a person is actually a promoter is a question of fact to be determined by the trier of fact." McDaniel v. Serv. Feed & Supply, Inc., 271 Md. 371, 376 (1974) (citing 1 Fletcher, Cyclopedia Corporations § 189); see also Peloso, 121 R.I. at 307, 397 A.2d at 1313.

Alternatively, the Court may deny summary judgment on the basis that whether a novation occurred—and Deyesso was thereby relieved of liability—is also an issue to be resolved by the trier of fact. Both parties cite cases that discuss preincorporation agreements between promoters for the future employment of one of the promoters, and also whether a promoter was to be discharged from personal liability by way of a novation. See Randolph Foods, Inc. v. McLaughlin, 115 N.W.2d 868, 872-74 (Iowa 1962); see also Mansfield v. Lang, 200 N.E. 110, 112-15 (Mass. 1936). In Randolph Foods, the owner of an unincorporated enterprise entered into an agreement with the defendant that he would incorporate his business and employ the defendant as an assistant manager at a fixed salary plus a bonus of twenty-five percent of the corporation's net income. Randolph Foods, 115 N.W.2d at 872. The court focused on the fact that, while the defendant would be an employee of the newly-formed corporation, it was the owner of the business who personally entered into the contract. See id. at 872-73. The court found that the amounts to be paid to the defendant were promised by the owner and not the corporation. Id. at 873. As characterized by the court, the agreement was that the owner agreed to employ the defendant as the manager of the corporation to be formed at a set salary and the defendant agreed with the owner to work for the corporation according to the terms of the contract with the owner. Id. In determining whether the defendant agreed to the corporation's liability when the corporation was formed in lieu of the owner's liability, the court ultimately declined to read the contract as constituting a novation. Instead, the court held that the

owner himself was liable for the terms of the employment agreement with the defendant in addition to the corporation. Essentially, the court could not find any intent to release the owner. See id. at 873-74.

In Mansfield, the Massachusetts Supreme Judicial Court failed to find a novation from the facts to release the defendant from liability on a preincorporation agreement providing for the plaintiff to serve as a manager of the new corporation. See Mansfield, 200 N.E. at 112-15. The court noted that "[a] novation would import an assumption of [the defendant's] contractual obligation by the new corporation, an assent by the plaintiff that the new company should carry out the obligation, and a release of [the defendant] from his obligation." Id. at 113. Specifically, the court had no evidence that there was ever a release of the defendant from his liability, despite the fact that the plaintiff received his salary check from the new corporation after it was organized. See id. Similarly here, while Krupinski's Earnings Statement indicates his compensation came from Scharnhorst, the evidence in the record does not conclusively indicate that there was any agreement to release Deyesso from his original agreement with Krupinski to serve as a manager of the club once it opened.

In order to establish a novation, Deyesso is required to prove that Krupinski, in accepting Scharnhorst's fulfillment of the employment responsibilities, "unequivocally agreed to release and discharge" Deyesso from liability. Jewel Co. of Am. v. George, 118 R.I. 372, 376, 373 A.2d 1200, 1202 (1977). "A novation agreement need not be expressly stated but can be shown by inference from the facts and from the conduct of the parties." Id. at 375, 373 A.2d at 1202. Accordingly, although there is no evidence representing an express contract of novation between Deyesso, Scharnhorst, and Krupinski, a fact finder may conclude that the parties implicitly intended the corporation alone to be liable when Scharnhorst assumed the obligations under the

employment agreement. In any event, Deyesso cannot shield himself from the fact that he entered into the agreement personally with Krupinski and would remain so liable until the novation was executed. See Randolph Foods, 115 N.W.2d at 873. Without such a showing, he will remain personally liable despite the fact that Scharnhorst subsequently assumed the employment obligations.

It is true that "[a novation] is never presumed but must be proved by legal and sufficient evidence, and where it is pleaded in defense the defendant has the burden of proof." New Eng. Doll & Novelty Co. v. Del Dio, 95 R.I. 450, 452, 187 A.2d 781, 782 (1963). While the parties disputed whether a novation occurred at the motion hearing,[15] the Court—without specific evidence to the contrary—cannot presume that there was a release of Deyesso from liability. Instead, determining the intent of the parties at the time of Scharnhorst's assumption is properly left to a jury to decide. See Jewel Co., 118 R.I. at 376, 373 A.2d at 1202 ("[T]he state of the evidence is still such that reasonable minds can differ as to conclusions to be drawn from the facts and the question here of novation thus remains one of fact."); Glenda K. Harnad, 66 C.J.S. Novation § 40 (2015) ("Whether it has been the intention of the parties to a particular transaction to effect a novation or not is ordinarily a question of fact for the jury . . . ."). Therefore, in considering the foregoing principles enunciated by various courts, the Court now finds that, because the agreement was entered into with Deyesso personally and Scharnhorst assumed the agreement, evidence of implied intent to substitute Scharnhorst by way of a novation is required. Because such evidence is properly presented to the trier of fact, summary judgment cannot enter in favor of Deyesso at this time.

[15] Deyesso did not plead novation in his Answer.

3

Reasonable Expectation of Continued Employment

As a result of the Court determining that genuine issues of fact exist as to whether Deyesso was personally liable on any agreement between Deyesso and Krupinski for him to serve in the employ of Scharnhorst as a manager of the Providence Centerfolds, the Court need only briefly discuss the nature of Krupinski's employment. The Court disagrees with Deyesso's characterization of Krupinski as only an at-will employee of Scharnhorst. For purposes of this argument, the operative inquiry in determining whether Krupinski was wrongfully terminated is whether Krupinski, as a twenty-five percent shareholder in Scharnhorst, had a reasonable expectation of continuing employment with the company, thus establishing himself as a for-cause employee. As to that issue, assuming Deyesso was personally liable to Krupinski on his employment agreement, whether Krupinski was actually terminated due to a legitimate business reason presents yet another question of material fact.

Usually, the presumption in Rhode Island is that where an employee is hired for an indefinite period with no written agreement for continued employment, that employee is at-will and subject to termination at any time with or without cause. See DelSignore, 691 A.2d at 1051 n.5. Moreover, our Supreme Court has clearly indicated that "'[i]t is not the role of the courts to create rights for persons whom the Legislature has not chosen to protect.'" Galloway v. Roger Williams Univ., 777 A.2d 148, 150 (R.I. 2001) (quoting Pacheo v. Raytheon Co., 623 A.2d 464, 465 (R.I. 1993). Be that as it may, this Court in Grady recognized that minority shareholders in closely held corporations—by sharing partner-like fiduciary duties—had a reasonable expectation of continued employment with the company due to the well-accepted fear of shareholder oppression. See Grady, 2012 WL 171006, at *4 (citing Hendrick v. Hendrick, 755

A.2d 784, 791 (R.I. 2000)); cf. A. Teixeira & Co. v. Texeira, 699 A.2d 1383, 1387 (R.I. 1997) (concluding shareholders, acting as partners, assumed fiduciary duties toward one another and their corporation). "[A]bsent an employment contract, the only protection against termination for an at-will shareholder is whether he or she has a reasonable expectation of continued employment and that expectation was defeated in breach of a fiduciary duty owed to him." Id. at *12.

There, the Court found the plaintiff's ownership interest in the corporation went "hand-in-hand" with his employment and was not used as a form of compensation. See id. at *5. The Court then made a series of findings to determine that the plaintiff's expectations of his employment were in fact reasonable; however, that conclusion did not guarantee the plaintiff employment. See id. at *6-8. Whether the defendants breached their fiduciary duty to the plaintiff by firing him instead relied on a finding of whether the majority could establish a legitimate business purpose for his termination. Id. at *8 (adopting "[t]he Legitimate Business Purpose Test" utilized by courts in several foreign jurisdictions). Indeed, as the Court stated, "[i]mposing such a strict standard upon the majority would severely restrict their ability to make sound management decisions for the good of the corporation, particularly so as to include continued employment to a shareholder whose conduct objectively warrants termination." Id. Importantly, the Court distinguished the differences between "for-cause" employees and the unique protections afforded shareholder-employees by explaining that the defendants did not have to explain to the plaintiff why they fired him—they only had to persuade the Court that his termination was for a legitimate business purpose. See id. at *10. Once such a purpose is established, the minority shareholder may establish that the business purpose could have been

achieved through a less harmful alternative. Id. at *9 (citing Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976)).

In opposing summary judgment, Krupinski relies on the Grady decision to claim that not only was he not an at-will employee, but he had an expectation of continued employment which was violated when Deyesso terminated him without cause. As the Court held in Grady, issues of material fact exist precluding entry of summary judgment in favor of Deyesso because the Court cannot find, as a matter of law, that terminating Krupinski was the least harmful alternative. First, in the Court's opinion, because of the small number of shareholders of Scharnhorst, combined with their active participation in its management, these shareholders assumed the same fiduciary duties as if they were partners. See A. Teixeira & Co., 699 A.2 at 1387. Next, it also appears to the Court that Krupinski had a reasonable expectation of continued employment in Scharnhorst because, as part of the original agreement establishing Krupinski as a shareholder, it was agreed Krupinski would serve as manager of the company. This was not a situation where Krupinski was given his shares as a form of compensation for his employment; Krupinski owned a significant share of the corporate stock and originally expected to be employed as part and parcel to the agreement to open the club. See Gunderson v. Alliance of Computer Prof'ls, 628 N.W.2d 173, 191 (Minn. 2001) (setting forth factors to determine existence of reasonable expectation of employment). Following the principles reviewed above, the record reveals that Deyesso may have had a legitimate business purpose for firing Krupinski because of his alleged misconduct while serving as manager, such as engaging in impropriety with the club's dancers and his alleged involvement in a credit card scam. However, the Court cannot determine that firing Krupinski was the least harmful available alternative. Krupinski adamantly claims he was never provided with a justification for why he was terminated. Furthermore, there is no evidence

in the record that any alternatives, short of termination, were explored by Deyesso or others at the company. Accordingly, because of the lack of evidence now before the Court to conclude as a matter of law that no alternatives were available to Deyesso, the Court must deny summary judgment.[16]

C

Deyesso's Failure to Find Krupinski Future Opportunities

Krupinski additionally argues that there were two other promises alleged to be breached individually by Deyesso. First, he argues Deyesso breached his promise to find him another position within the company and, second, that Deyesso breached his agreement to allow Krupinski to participate in additional clubs opened by any of the Scharnhorst shareholders. See Compl. ¶¶ 13-15, 32-33. Deyesso seeks summary judgment as to both of these allegations, arguing primarily that Deyesso was acting on behalf of Scharnhorst and any claim brought by Krupinski should be brought directly against the company and that both agreements are in violation of the Statute of Frauds. The Court will discuss each allegation in turn.

1

Failure to Find Future Employment

With respect to this alleged breach, Krupinski claims that when he was terminated by Deyesso, it was represented to him that Deyesso would find another opportunity for him in the organization. However, Krupinski was never provided with any such opportunity. In moving for summary judgment, Deyesso contends that the necessary elements of a valid contract were

[16] This of course, is a conclusion that would only be warranted if the Court could have found as a matter of law that Deyesso was personally liable to Krupinski for his termination from employment. If for nothing else, this issue is but only one of many genuine issues of material fact for the jury to resolve at trial.

never established and, moreover, any such agreement would be violative of the Statute of Frauds. Krupinski did not address Deyesso's arguments in his memorandum. As to this breach, Deyesso's arguments carry the day.

Similar to the discussion above regarding Massachusetts law, it is well established in Rhode Island that "a valid contract requires 'competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.'" DeAngelis v. DeAngelis, 923 A.2d 1274, 1279 (R.I. 2007) (quoting R.I. Five v. Med. Assocs. of Bristol Cnty., Inc., 668 A.2d 1250, 1253 (R.I. 1996). Without first addressing whether this claim was brought correctly against Deyesso individually or whether the claim should have been brought against Scharnhorst, it is abundantly clear to the Court that Krupinski, as a matter of law, formed no contract for future employment with Deyesso. In his affidavit, Krupinski states, "Deyesso represented to me that he would find something for me to do in the organization." (Krupinski Aff. ¶ 21). Yet, besides that single statement, there is no other evidence of such an agreement being formed between the parties. Deyesso correctly argues there is an absence of essential terms of the future employment contract, such as the lack of evidence with respect to salary, position, location of employment, et cetera.

This issue is resolved, in the Court's opinion, by looking to the exact nature of the oral promise. This allegedly breached agreement was simply a promise made by Deyesso to find Krupinski another position, sometime after he was terminated. This was not a promise made in exchange for any return promise by Krupinski to serve in a specific role or perform a specific task for Deyesso, as those essential terms were never discussed. Simply, there is no evidence as to what benefit Deyesso had bargained for to serve as consideration for his promise to Krupinski. See DeAngelis, 923 A.2d at 1279 ("In determining whether there was sufficient consideration for

a binding contract to have been formed, we employ the bargained-for exchange test; that test provides that something is bargained for, and therefore constitutes consideration, 'if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.'" (quoting Filippi v. Filippi, 818 A.2d 608, 624 (R.I.2003))). As a fundamental point of contract law, "[i]n addition to mutual assent, a bilateral contract requires mutuality of obligation, which is achieved when both parties are bound legally by the making of reciprocal promises. . . . Mutuality of obligation fulfills the consideration requirement of contracts." Filippi, 818 A.2d at 624 (internal citations omitted). In light of this proposition, it is clear that Krupinski, as the nonmoving party, has not met his burden on summary judgment of demonstrating the existence of genuine issues of material fact as to whether Deyesso's failure to find Krupinski another position constituted an actual breach of contract. See Hudson v. City of Providence, 830 A.2d 1105, 1106 (R.I. 2003). There has been no demonstration of any other promises being exchanged to obligate Deyesso to perform and uphold his promise. Because of the lapse in evidence of any such mutuality of obligation, there can be no enforceable contract. Whether the Statute of Frauds applies is not necessary for the resolution of this issue.

There is also likely no argument that Krupinski detrimentally relied on Deyesso's promise to form the basis of an argument for promissory estoppel. See Daup v. Tower Cellular, Inc., 737 N.E.2d 128, 134 (Ohio Ct. App. 2000) ("[V]ague, indefinite promises of future employment or 'mere representations of future conduct without more specificity' do not form a valid basis for the application of the doctrine of promissory estoppel."); cf. Dellagrotta v. Dellagrotta, 873 A.2d 101, 110 (R.I. 2005) ("To invoke the doctrine of promissory estoppel, a promisee must demonstrate the existence of: 1. A clear and unambiguous promise; 2. Reasonable and justifiable reliance upon the promise; and 3. Detriment to the promisee, caused by his or her

reliance on the promise." (internal quotation marks omitted)). Quite clearly, Krupinski has no basis to maintain any such action against Deyesso relative to this alleged promise. Therefore, the Court grants Deyesso's Motion and summary judgment as to this breach shall enter in favor of Deyesso.

2

Investment in Additional Clubs

Finally, Krupinski alleges that, as part of the original agreement, Viola, Deyesso, and Krupinski would have the opportunity to participate in any additional clubs that would be opened by any one of those three partners. See Compl. ¶ 16. Krupinski also alleges that Deyesso opened additional Centerfolds in Massachusetts but failed to include Krupinski, in breach of that agreement. See id. at ¶¶ 18, 33; Krupinski Aff. ¶ 3. Deyesso argues, however, that a host of reasons exist to bar Krupinski's claim, to wit, inter alia, the doctrine of the law of the case and the Statute of Frauds.

To begin, Deyesso maintains that Krupinski should be barred from asserting any rights under any "Partnership Agreement" because the Court, in its April 12, 2012 Decision, dismissed Count IV of the Third Amended Complaint alleging a breach of partnership duty with respect to the alleged agreement to open additional clubs. In its Decision, the Court determined that Krupinski would not be allowed to assert such a claim—as the claim was first brought in the Third Amended Complaint—because the Court did not permit the amendment of the Complaint to assert new, direct claims against Deyesso.[17] See Krupinski I, 2012 WL 1360869, at *9-10.

[17] In his memorandum, Krupinski again requests leave from this Court to further amend the Complaint and advance the additional claims against Deyesso individually. Krupinski argues that the additional counts were asserted prior to the close of discovery and no prejudice existed to Deyesso when he sought to bring those claims in 2012. As the Court has already ruled on this issue, the Court need not entertain this argument.

Moreover, the Court held that allowing Krupinski to bring such additional claims at that time (four and a half years after the original pleading) would constitute undue delay. See id. at *10. Essentially, Deyesso contends the dismissal of Count IV should operate to bar the same claim under Count I pursuant to the doctrine of the law on the case. Yet, Deyesso has misconstrued the Court's holding. The original Complaint, filed on July 10, 2007, alleged the instant claims for which Deyesso is now seeking summary judgment. The Court, in its prior Decision, did not dismiss the partnership agreement claim because the Court found there was no valid agreement; the Court's holding was only that the new, additional count in the Third Amended Complaint was to be dismissed as untimely. Thus, because the claim in Count I was alleged in Krupinski's original pleading, the Court rejects Deyesso's arguments.

With the Court finding Krupinski may, in fact, proceed to allege a breach of the original agreement, the ultimate inquiry that proves dispositive as to this breach is whether the agreement is in violation of the Statute of Frauds. Similar to the discussion relative to the other alleged breaches, Deyesso again relies on the statute's one-year provision, arguing that any agreement to share in the opportunity to open future clubs could not have been performed within one year. The Court agrees.

As discussed above, supra at 7-8, the purpose of the Statute of Frauds is to guard against perjury with respect to oral contracts and, therefore, operates to require evidence of a writing for contracts that cannot be performed within one year. See § 9-1-4; Bourdon's, Inc. v. Ecin Indus., Inc., 704 A.2d 747, 755 (R.I. 1997). In support of his argument, Deyesso relies mostly on the decisions in Barrand, Inc. v. Whataburger, Inc., 214 S.W.3d 122 (Tex. App. 2006) and Food Fair Stores, Inc. v. Vanguard Inv. Co., 298 So. 2d 515 (Fla. Dist. Ct. App. 1974), wherein those two courts found the disputed oral agreements to be unenforceable under the Statute of Frauds. The

analysis provided by the District Court of Appeal of Florida is helpful in determining whether written evidence of the oral agreement should be required in the present matter. In Food Fair Stores, the court was faced with an oral agreement purportedly entered into by the parties to open a food store in Freeport, Bahamas and that any future stores would be owned and operated jointly on the same basis of the original Freeport store. Food Fair Stores, 298 So. 2d at 516. Specifically, the court noted that the oral agreement, sought to be enforced by the plaintiff, consisted of "continuing obligations and responsibilities in the establishment of future stores," and that the agreement was to remain in effect for as long as the parties were to engage in business in the Bahamas Islands. Id. at 517. Based on that testimony, the court found the contract was not to be performed within one year and consequently barred enforcement of the oral agreement absent appropriate evidence. See id. Additionally, the court stated that while the plaintiff's "greatest contribution" was to secure the initial investment opportunity in Freeport, this would not constitute full performance because of the parties' continuing obligations relative to opening additional stores in the future. Id.

Deyesso correctly posits that the issue presented to the Court here is akin to the facts presented to the court in Food Fair Stores. Krupinski has stated in his affidavit and in other discovery materials that, as part of the original agreement, he would have the opportunity to participate in any club opened in the future by the other two individuals as a twenty-five percent owner. See Krupinski Aff. ¶ 3. However, pursuant to the discussion in Food Fair Stores, such an oral agreement would likewise contemplate continuing obligations of the parties in the establishment of future clubs. The Court thus can conclude that any such agreement could not possibly have been performed within the span of one year. Similarly, Krupinski's greatest contribution here was the opening of the initial adult entertainment club in Providence and, as in

Food Fair Stores, the actual opening of the club cannot be considered the full performance of that initial oral agreement. Because Krupinski has not provided any note or memorandum signed by Deyesso evidencing the agreement to share in the interests of the additional clubs opened in Massachusetts, he has not met his burden to demonstrate genuine issues of material fact. Accordingly, the Court grants Deyesso's Motion for Summary Judgment as to this breach alleged in Count I of the Complaint.

IV

Conclusion

For the foregoing reasons, Deyesso's Motion for Summary Judgment is denied with respect to the breach of contract allegations stemming from Krupinski's signing of the promissory note and his termination as manager because resolution of such issues are factual in nature and improper for the Court to determine on summary judgment. However, Deyesso's Motion is granted with respect to the two other breaches alleged in Count I of the Complaint: Deyesso's failure to find Krupinski another position in the organization and Deyesso's failure to include Krupinski in the opening of additional clubs in Massachusetts.

Counsel for Defendant shall present an order consistent herewith which shall be settled after due notice to counsel for Plaintiff.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Krupinski v. Deyesso, et al.**
CASE NO:	**PB 07-3484**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 25, 2016**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**Andrew J. Tine, Esq.**
For Defendant:	**Christopher A. Murphy, Esq.** **Carl S. Levin, Esq.**