Docket: **SUCV2016-03325-BLS2**
Date: **March 19, 2019**
Parties: **AMERICA'S TEST KITCHEN INC., as the Sole General Partner of America's Test Kitchen Limited Partnership, Plaintiff vs. CHRISTOPHER KIMBALL, CPK MEDIA, LLC, MELISSA BALDINO, CHRISTINE GORDON, DEBORAH BROIDE, CPK HOLDCO, LLC, and WILLIAM THORNDIKE, JR., Defendants / CHRISTOPHER KIMBALL and CPK MEDIA, LLC, Counterclaim-Plaintiffs vs. AMERICA'S TEST KITCHEN INC., as General Partner of America's Test Kitchen Limited Partnership, and AMERICA'S TEST KITCHEN LIMITED PARTNERSHIP, Counterclaim-Defendants**
Judge: **/s/Janet L. Sanders**

MEMORANDUM OF DECISION AND ORDER ON COUNTERCLAIM-DEFENDANTS AMERICA'S TEST KITCHEN INC.'S AND AMERICA'S TEST KITCHEN LIMITED PARTNERSHIP'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This memorandum addresses one of six summary judgment motions filed in litigation that arises from the departure of Christopher Kimball from the television and radio show "America's Test Kitchen." Kimball's former employer, America's Test Kitchen, Inc. (ATK), filed suit against him and others following that departure, with the various defendants responding with claims of their own. ATK and a related entity, America's Test Kitchen Limited Partnership (ATK LP), now move for partial summary judgment on certain of the counterclaims asserted against them by Kimball and CPK Media, LLC (CPK), the entity that Kimball formed to operate Christopher Kimball's Milk Street Kitchen, a cooking show in competition with America's Test Kitchen. This Court concludes that the Motion must be DENIED.[1]

Those counts in Kimball's and CPK's Second Amended Counterclaim (the Counterclaim) that are the subject of ATK's Motion are: defamation/libel (Count I); tortious interference with advantageous business relations (Count II); violation of G.L. c. 93A, § 11 (Count III); breach of 2002 Limited Partnership Agreement (Count V); breach of fiduciary duty (Count VI) and requests for declaratory relief (Counts VII and part of Count IV). All of these counts relate to the circumstances surrounding Kimball's departure from ATK: those circumstances have already been set forth in this Court's decision on Kimball's Motion for Partial Summary Judgment and will not be repeated here. However, certain additional facts are necessary to understand this Court's ruling on the instant motion. The Court will therefore discuss each count separately, including in that discussion those facts relevant to this Court's decision.

A. Defamation (Count I)

This Count arises from ATK's decision to post on its website certain information about this lawsuit the day after the lawsuit was filed. Specifically, ATK posted on the website a copy of its Complaint in this case, a statement from ATK, a chronology of events, emails written by Kimball, and a section on frequently asked questions. In moving for summary judgment on this Count, ATK contends that because Kimball is a "public figure," he will have to prove by clear and convincing evidence that ATK acted with malice, and that as a consequence, he has no reasonable expectation of proving this claim. This Court disagrees.

In support of its position that Kimball is a public figure, ATK points to the following facts. Kimball hosted ATK's two television programs, America's Test Kitchen and Cook's Country, from their inception through the 2016 season, both shows averaging a combined four million viewers per week. Kimball has personally appeared on the Today Show, Rachel Ray, Fresh Air, and Morning Edition; he has also received coverage in the New York Times, the Wall Street Journal, USA Today, and other media outlets. This Court concludes that these facts do not support the conclusion that Kimball is a public figure as that term has been defined by the case law.

Courts have determined that a plaintiff in a defamation action is a public figure where he or she has acquired such fame or notoriety as to be "a household name on a national scale." Bowman v. Heller, 420 Mass. 517, 522-523 (1995) (internal quotation marks omitted). See Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C. Cir.), cert. denied, 484 U.S. 870 (1987) (although plaintiff was prominent in business circles, "his celebrity in society at large does not approach that of a well-known athlete or entertainer—apparently the archetypes of the general purpose public figure"). Clearly, Kimball is not a public figure in this sense. Courts, have also regarded an individual to be a public figure even absent such general notoriety where he or she has played a central role in a public controversy or matter of public concern which is the subject of plaintiff's claim. Bowman v. Heller, 420 Mass. at 523. See LaChance v. Boston Herald, 78 Mass. App. Ct. 910, 911 (2011), quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). In the instant case, the defamation counterclaim concerns statements that ATK posted on its website about this litigation, which arises from a dispute between a private company and its former employee—hardly a matter of public concern or the subject of public controversy. Because ATK's motion regarding this Count depends on this Court finding that Kimball is a public figure, it necessarily follows that the motion must be denied as to Count I.[2]

B. Tortious Interference Claim (Count II)

Count II of the Counterclaim alleges that ATK interfered with CPK's relationship with potential investors and/or businesses, including the following entities: Hearst Media, WGBH, PRX (a radio programming distributor and promotor), APT (radio distributor and station), Fisher Paykel (a kitchen appliance manufacturer), Home Depot, Ankarsrum (high-end kitchen mixer manufacturer), Catrine Kelty (a food stylist), and unidentified customers. This Count also alleges that ATK took steps to prevent Kimball himself from investing in CPK and that, in pursuing baseless claims against both Kimball and CPK, ATK has improperly impeded their lawful competition. Having reviewed the summary judgment record, this Court concludes that there are genuine disputes of fact as to whether such interference has occurred, as described at pages fifteen through nineteen of the Memorandum in Opposition to this Motion.

C. Violation of Chapter 93A (Count III)

Count III alleges a violation of G.L. c. 93A §11 and relies on the same factual allegations underlying Counts I and II. Because this Court concludes that those counts survive summary judgment, it necessarily follows that the Chapter 93A claim also survives.

D. 2002 Partnership Agreement and the 2016 Amendment (Counts V and VII)

Counts V and VII of the Counterclaim depend on this Court's interpretation of provisions in a Third Amended and Restated Limited Partnership Agreement dated June 1, 2002 (the 2002 LPA) and whether a 2016 amendment of that agreement is valid. The facts relevant to this issue are as follows.

The 2002 LPA sets forth the respective rights and responsibilities of both the limited partners and the general partner of ATK Limited Partnership (ATK LP).[3] ATK LP was formed for the purpose of operating America's Test Kitchen and related programming through its sole general partner, which is ATK, Inc. ATK, Inc. is, in turn, owned and controlled by three people, Eliot Wadsworth, John Halpern and George Denny (the Majority Partners), who hold an equal number of shares. The Majority Partners, either as individuals or through entities under their control, own over fifty percent of ATK LP. Kimball is and has been at all relevant times a limited partner in ATK LP.

The 2002 LPA expressly permitted ATK LP partners to "engage in and possess interests in other business ventures and investment opportunities of every kind and description, independently or with others, including serving as general partner of other partnerships . . . ." Section 4.05 of 2002 LPA, Exhibit A-2 of the Joint Appendix. When Kimball was officially terminated from ATK, Inc. in November 2015, he had signed no agreement restricting his competition with the company, despite attempts by those within ATK to

convince him to do so. Moreover, Section 4.05 of the 2002 LPA was still very much in effect and by its terms, did not prevent him from engaging in any competing business venture. That changed once this litigation began.

In May 2016, Kimball formally unveiled Christopher Kimball's Milk Street, which was owned and operated by Kimball's new company, CPK, and was in direct competition with America's Test Kitchen. On October 31, 2016, ATK instituted this lawsuit. Kimball responded with counterclaims filed on December 1, 2016. On December 2, 2016, Notice was sent to ATK LP partners that, effective December 1, 2016, the 2002 LPA had been amended and replaced with the Fourth Amended Limited Partnership Agreement (the 2016 LPA), Exhibit A-1 of Joint Appendix. Specifically, a provision was added that expressly prevented any partner from engaging in any activity anywhere in the United States in competition with the "Business of the Partnership," defined as "any Business engaged in by the Partnership or any of its Affiliates." Section 10.02 of 2016 LPA. This prohibition would continue for a period a two years after that person was no longer a partner. The provision did permit a partner to "passively own" a very small percentage of a competing business and also allowed a partner to continue ownership in any business venture he or she had at the time he became partner, but this narrow exception to the overall prohibition against competition did not apply to Kimball or CPK. Thus, as of the date of December 1, 2016, Kimball would be in violation of the 2016 LPA unless he immediately divested himself of any ownership interest in CPK. Indeed, pursuant to Section 7.06 of the 2016 LPA, the General Partner could force Kimball to redeem his interest in ATK LP, since a breach of the new restrictive covenants provision constituted a "Bad Act" that would trigger this section. See Article XII of 2016 LPA, defining "Bad Act" and "Bad Actor."

The purported authority for this amendment was Section 11.08 of the 2002 LPA. That Section stated: "[e]xcept as otherwise specifically provided herein, this Agreement may be amended or modified only by the General Partner with the Consent of the Limited Partners." (emphasis added). The 2016 LPA was signed by the secretary and treasurer of ATK, Inc. on behalf of the General Partner, as well as those limited partners who together held more than a seventy percent interest in ATK LP. Section 11.08 must be read together with Section 11.09 of the 2002 LPA, however. That section permits the General Partner to act as "attorney-in-fact" for each of the Limited Partners and to execute all instruments required to carry out the purpose of the 2002 LPA, including "any and all amendments" to the LPA affecting the rights and duties of the partners, with one important proviso: "[n]o General Partner shall take any action as attorney-in-fact for any Limited Partner which would in any way increase the liability of the Limited Partner beyond the liability set forth in this Agreement." Exhibit A2 at 22 (emphasis added).

This Court concludes that in executing the 2016 LPA, ATK, Inc., as General Partner, increased Kimball's liability significantly. Prior to the 2016 LPA, Kimball was free to compete with ATK: indeed, much of the negotiations preceding Kimball's formal departure in November 2015 consisted of attempts to get him to agree to noncompetition and nonsolicitation provisions. Having rejected those limitations, Kimball was free to open up a competing enterprise, which he did in May 2016. Nothing in the 2002 LPA prevented him from doing that. Then on October 31, 2016, ATK filed this lawsuit. Upon learning that Kimball intended to release a "Milk Street" television show in the fall of 2017, ATK's attorneys on January 9, 2017 sent his lawyers a "cease and desist" letter, pointedly stating that this would be in breach of the new restrictive covenants that were part of the 2016 LPA, which would in turn, trigger the power of the Partnership to force redemption of Kimball's shares. See Exhibit A-120 of Joint Appendix.

Count V of the Counterclaim alleges that ATK breached the 2002 LPA by enacting the 2016 LPA; included within this Count is a claim that, even if permitted by the express terms of the 2002 LPA, ATK breached the covenant of good faith and fair dealing. Count VII seeks a declaration that the 2016

amendment regarding the restrictive covenant is invalid. Clearly, ATK is not entitled to summary judgment on these counts, based on the analysis above. Kimball has not himself moved for summary judgment on these counts, and because there may very well be additional facts necessary for a final determination on these issues, this Court declines to enter summary judgment in Kimball's favor on its own. Nevertheless, reading the 2002 LPA as a whole, the conclusion seems unavoidable that the new provisions regarding restrictive covenants cannot be enforced. See JRY Corp. v. LeRoux, 18 Mass. App. Ct. 153, 159-162 (1984).

E. Counts IV and VI

The remainder of ATK's Motion requires little discussion. Count VI of the Counterclaim alleges that ATK breached its fiduciary obligations, in large part because of the way in which it amended the 2002 LPA. Even if those amendments were permissible, ATK would not be entitled to summary judgment on this Count, since its actions may very well be determined to have been made in bad faith and as part of an effort to freeze Kimball out of ATK entirely. Count IV requests, among other things, a declaratory judgment that Kimball is entitled to a "profits interest." For reasons set forth on page twenty of the Opposition, this Court concludes that ATK's Motion with respect to this Count must also be denied.

/s/Janet L. Sanders
Justice of the Superior Court

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[1] As noted in a separate decision issued today concerning Kimball's Partially Dispositive Motion, none of the parties complied with the Business Litigation Session's Procedural Order Regarding Partially Dispositive Motions. This Motion is a prime example of why that Order is important: substantial resources have gone into litigating this and other motions, with little benefit to show for it.

[2] ATK also argues that Kimball and CPK will be unable to prove that they suffered economic harm. This is an issue that is better resolved at trial by way of a motion for directed verdict.

[3] In 2002, that partnership went by a different name; no party has suggested that this has any relevance to the issues before the court, however.