At an IAS Term, Part 10 of the Supreme Court of the State of New York held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of May, 2022.

PRESENT: **Larry D. Martin, J.S.C.**

SCOTT EPSTEIN, individually and as a partner of CANTOR, EPSTEIN & MAZZOLA, LLP,

Plaintiff,

-against-

ROBERT I. CANTOR, ROBERT I. CANTOR PLLC, BRYAN J. MAZZOLA, W. TODD BOYD, BOYD RICHARDS PARKER COLONELLI, P.L., and BOYD RICHARDS NY, LLC,

Defendants.

No. 506730/19

DECISION & ORDER
Motion Nos. 10, 11, 12

The underlying dispute arises from a New York law firm's dissolution. A number of Plaintiffs' theories of liability require this Court to determine whether the firm was a partnership, and whether Plaintiff was a partner at the firm. Ruling in the negative, by Decision and Order dated December 11, 2020 ("Decision I"), this Court dismissed the bulk of Plaintiff's claims pursuant to CPLR § 3211.[1] Seeking their reinstatement, Plaintiff moved for reargument and renewal pursuant to CPLR § 2221(d), (e), respectively.[2] Holding at bay two subsequently filed motions and the question of renewal, this Court offered the parties leave to brief an apparent conflict between the Court of Appeals' decisions in *Steinbeck v. Gerosa*, 4 NY2d 302 (1958) and *Congel v. Malfitano*, 31 NY3d 272 (2018).

I.

By all accounts, Plaintiff Scott Epstein and Defendant Robert I. Cantor were involved in a law practice at the firm of Cantor, Epstein & Mazzola, LLP ("CEM") since 1995.[3] In or around 2019, Plaintiff sued individually, and as an alleged partner of now-dissolved CEM, charging that, without his consent, Cantor formed his own firm[4] (together, the "Cantor Defendants") and

1 Decision I, Doc. 157.
2 Motion 10, Doc. 171.
3 CEM was then called Cantor & Epstein LLC. *See* Certificate of Registration, Doc. 70.
4 The firm, Robert I. Cantor PLLC, is also a defendant in this suit.

transferred nearly all of CEM's clients to the law firms of Boyd, Richards Parker Colonelli, P.L. and Boyd Richards NY, LLC, with the assistance of W. Todd Boyd and a former CEM "partner," Bryan J. Mazzola (collectively, the "Boyd Defendants").

Plaintiff thus claimed (1) breach of contract against Cantor, (2) breach of fiduciary duty against Cantor and Mazzola, (3) violation of Partnership Law § 20(3) against Cantor and Mazzola, (4) entitlement to an accounting from CEM, (5) conversion against Cantor, (6) faithless servant and (7) unjust enrichment against Mazzola; and, as against the Boyd Defendants, (8) corporate raiding, (9) aiding and abetting Cantor's breach of fiduciary duty, (10) unfair competition, and (11) tortious interference with contract.[5] The Cantor Defendants moved to dismiss Plaintiff's second, third, and fourth claims arguing that CEM was not a partnership, and that Plaintiff and Cantor were never partners.[6] The Boyd Defendants moved to dismiss the Complaint in its entirety arguing that Cantor was CEM's sole principal, CEM was not a partnership, and that neither Plaintiff nor Mazzola was a partner thereof.[7]

In Decision I, adhering to Court of Appeals' precedent in *Steinbeck*, which held that "[a]n indispensable essential of a contract of partnership . . . both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses," NY2d at 317, this Court dismissed Plaintiff's second through eleventh claims (the "Dismissed Claims") reasoning that, despite an agreement with Cantor naming CEM a partnership and Plaintiff its partner (the "Agreement"), because it allocated profits and losses solely to Cantor,[8] CEM could not, as a matter of law, have been a partnership and Plaintiff could not have been a partner.

Thereafter, the Defendants moved pursuant to CPLR 2304 to quash and, pursuant to CPLR 3103, for a protective order from, Plaintiff's judicial subpoena *ad testificandum* on Mazzola on October 06, 2021 (the "Subpoena") alleging that it was improperly served.[9] In addition, Defendants moved for costs and attorney fees pursuant to 22 NYCRR § 130-1.1 arguing that

5 Amended Compl., Doc. 18.
6 Motion 2, Doc. 23.
7 Motion 3, Doc. 29.
8 "All net profits and losses generated by [CEM] shall be allocable to Cantor except that [Plaintiff] shall be entitled to an interest in certain portions of the gross income generated." Agreement, § 6.1, Doc. 189.
9 Motion 11, Doc. 187.

Plaintiff's and his attorney's conduct have been frivolous.[10] The former was subsequently withdrawn.[11]

In moving for reargument and renewal, Plaintiff pointed this Court to a 2018 Court of Appeals decision that seemed to abrogate its holding in *Steinbeck*. *See Congel*, 31 NY3d at 288 ("The partners of either a general or limited partnership, as between themselves, may include in the partnership articles any agreement they wish concerning the sharing of profits and losses."). Temporarily declining to rule on renewal and sanctions, by Decision and Order dated March 14, 2022 ("Decision II"), this Court requested supplemental memoranda "reconciling Court of Appeals precedent as to the indispensability of profit and loss sharing" to the formation of a partnership.[12]

II.

A.

Motions for leave to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" but must "not include any matters of fact not offered on the prior motion." CPLR 2221(d)(2). While the determination lies within the sound discretion of this Court, the motion is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." *Ahmed v. Pannone*, 116 AD3d 802, 805 (2d Dept 2014).

Here, as an initial matter, Plaintiff's claims against Mazzola, which hinge on Mazzola having been a partner at CEM at the time of the alleged unlawful conduct, must fail. As reflected in a January 2013 agreement between Plaintiff, Cantor, Mazzola, and non-party Gary Ehrlich (the "2013 Agreement"), in or about 2007, Mazzola obtained a minor equity interest in CEM and the option, after five years, to buy Cantor's interest, which he ultimately did not to exercise. In the 2013 Agreement, Plaintiff expressly acknowledged that Mazzola had no equity interest in CEM, and that Mazzola (and Ehrlich) were solely W-2 employees.[13] Thus, this Court does not disturb its determinations in Decision I with respect to Plaintiff's SIXTH and SEVENTH claims, as well as his SECOND and THIRD claims as against Mazzola. They remain dismissed.

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10 Motion 12, Doc. 198.
11 Withdrawal, Doc. 197.
12 Decision II, Doc. 221.
13 Boyd Ex. B, Doc. 32.

B.

Attempting to reconcile Court of Appeals precedents, Defendants unavailingly argue that, in *Congel*, the Court merely quoted its own decision years from 79 years earlier, wherein it first announced the rule that "partners of either a general or limited partnership, as between themselves, may include in the partnership articles any agreement they wish concerning the sharing of profits and losses." *Lanier v. Bowdoin*, 282 NY 32, 38 (1939). In contrast, the Court's decision in *Steinbeck*—that profit and loss sharing is an "indispensable essential of a contract of partnership"—was rendered 20 years after *Lanier*. Thus, the argument goes, last in time should prevail. But affirming a principle nearly 80 years later only indicates, if anything, that it has endured.

On the other hand, Plaintiff asserts that there are actually two lines of cases: one in which there is *no* written partnership agreement and one in which there *is*. Where there is no written partnership agreement, *Steinbeck* controls. In the *Steinbeck* line, courts "must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties" by looking to certain indicia of formation. *Saibou v. Alidu*, 187 AD3d 810, 810 (2d Dept 2020); *see Delidimitropoulos v. Karantinidis*, 186 AD3d 1489, 1490 (2d Dept 2020).[14] In that calculus, profit and loss sharing is an "indispensable essential of a contract of partnership." *Steinbeck*, NY2d at 317.

But where, as here, there is a written partnership agreement, *Congel* controls. In the *Congel* line, "[i]n the agreement establishing a partnership, the partners can chart their own course." *Congel*, 31 NY3d at 278–79. In that calculus, "Partnership Law's provisions are . . . default requirements that come into play in the absence of an agreement." *Id.* at 287 (quoting *Ederer v. Gursky*, 9 NY3d 514, 526 (2007)). That is, Partnership Law "applies only when there is either no partnership agreement governing the partnership's affairs, the agreement is silent on a particular point, or the agreement contains provisions contrary to law." *Ibid.* But "[w]here an agreement addresses a particular issue, the terms of the agreement control, and the rights and obligations of the parties are determined by reference to principles of contract law." *Ibid.* Thus, because partners

14 "When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties. Factors to be considered in determining the existence of a partnership include (1) sharing of profits, (2) sharing of losses, (3) ownership of partnership assets, (4) joint management and control, (5) joint liability to creditors, (6) intention of the parties, (7) compensation, (8) contribution of capital, and (9) loans to the organization."

may make "*any* agreement they wish concerning the sharing of profits and losses," partners may agree to *not* share profits and losses. *Id.* at 288 (emphasis added).

In rebuttal, Defendants points to cases to suggest that, in the years since *Congel*, New York courts have not hesitated to apply *Steinbeck*'s rule even where a written agreement governs the parties' relationship. *See, e.g., Shionogi Inc. v. Andrx Labs, LLC*, 187 AD3d 422 (1st Dept 2020) (joint venture not formed where written agreement lacked "provision for loss-sharing"); *Toretto v. Donnelley Fin. Sols., Inc.*, 1:20-CV-2667-GHW, 2022 WL 348412, at *7 (SDNY Feb 4, 2022) (quoting *Steinbeck*, 4 NY2d at 317–18) ("[I]t is not enough that two parties have agreed together to act in concert to achieve some stated economic objective. Such agreement, by itself, creates no more than a contractual obligation, otherwise every stockholders' agreement would give rise to a joint venture."); *see also Kidz Cloz, Inc. v. Officially For Kids, Inc.*, 320 F Supp 2d 164, 171–72, 2004 WL 1278068 (SDNY 2004) ("If there was no agreement as to the manner in which the parties were to share in the profits and the losses, the agreement did not create a joint venture or a partnership.").

Compellingly, sounding in *dictum*, Defendants further argue that, in *Congel*, as in *Lanier*, none of the parties disputed the existence of a partnership; none of the subject agreements provided that *no* profits and losses would be shared; thus, none required determining whether a partnership was formed, as is the question before this Court. Instead, those cases turned on whether an agreement's terms prevailed over conflicting provisions of Partnership Law. The standard for *dicta* remains that "expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Arkansas Game & Fish Commn. v. United States*, 568 US 23, 35 (2012) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L Ed 257 (1821); *see also Crane v. Bennett*, 177 NY 106, 112 (1904) ("A judicial opinion . . . is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance."). In such a jurisprudential framework, it is unclear that *Congel* controls when the *very* issue is whether a partnership was formed or whether a partnership agreement can include that *no* profits and losses would be shared.

C.

This Court must thus engage the indicia of partnership formation outlined in *Steinbeck* and its progeny. *See Brodsky v. Stadlen*, 138 AD2d 662, 663 (2d Dept 1988) ("Case law reveals a series of factors to be considered in determining whether or not there is a partnership: (1) sharing

of profits, (2) sharing of losses, (3) ownership of partnership assets, (4) joint management and control, (5) joint liability to creditors, (6) intention of the parties, (7) compensation, (8) contribution of capital, and (9) loans to the organization."). And here, CEM duly registered as a limited liability partnership with the Secretary of State.[15] CEM consistently held Plaintiff out to the public and to clients as a founding partner of CEM.[16] The attorney who drafted the Agreement affirmed that the parties intended their arrangement to comprise a partnership.[17] Plaintiff did not contribute startup capital in the form of money but did contribute in the form of a client base.[18] Cantor was contractually barred from eliminating any area of practice required to service CEM's clients without Plaintiff's consent.[19] On the other hand, year after year, CEM filed tax returns with the IRS wherein Schedule B1 shows that Cantor owned 100% of CEM and K-1 shows that Cantor owned 100% of CEM's capital.[20] Only Cantor could sign CEM bank account checks.[21] Only Cantor was responsible for maintaining CEM's books and records.[22] The admission of any new partner required only Cantor's consent.[23] Lastly, implying that he was not one, the Agreement afforded Plaintiff the right of election to become "a full and equal partner," which Plaintiff did not exercise.[24] In short, issues of fact abound sufficient to warrant reinstating the claims against the Cantor Defendants.

In Decision II, this Court did not reach the question of renewal reasoning that "the law alone seem[ed] to warrant reinstating the Dismissed Claims." Renewal must be based "upon new facts not offered on the prior motion" or a "change in the law" that "would change the prior determination." CPLR 2221(e)(2).[25] In support of its motion, Plaintiff proffers a transcript of

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15 Pl.'s Ex. 1, Doc. 70.
16 Pl's Ex. 6, Doc. 75.
17 Isaac Aff., Doc. 56.
18 Plaintiff "agrees to use his best efforts to bring to [CEM] Chubb/Federal Insurance Company and its insureds." Agreement, § 5.2.
19 *Id.* at Art. 2.
20 Pl.'s Ex. 2, Docs. 71; Docs. 87–89.
21 Agreement, § 7.3.
22 *Id.* at § 7.3.
23 *Id.* at § 10.
24 *Id.* at § 7.2.
25 Plaintiff submits for the first time on renewal an affidavit of a former CEM "non-equity partner" who attests that Plaintiff furnished CEM with most of its clients and had significant control of management, overruling Mr. Cantor on hiring and even the firm's name. *See* Bailey Aff., Doc. 174. However, a motion for renewal must "contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(3). The instant motion lacks "reasonable justification" for failure to procure and present Bailey's affidavit in the first instance. This Court, thus, does not consider the same.

Cantor's deposition in a related case wherein Cantor concedes that "CEM was a partnership" and that Plaintiff was a "non-equity partner" at CEM.[26] But, as a matter of law and text alike, "[a] partnership is an association of *two or more persons* to carry on as co-owners [of] a business for profit . . . ." P'ship Law § 10 (emphasis added). If, as set forth above, Mazzola and Ehrlich were not partners at CEM, but CEM *was* a partnership, it is unclear who else, but Plaintiff, could have been a partner thereof. Nonetheless, Defendants contend that nothing here is new since, in the absence of profit and loss sharing, merely referring to Plaintiff as a "partner" or "calling an organization a partnership does not make it one." *Brodsky*, 138 AD2d at 663. While that may very well be the case, it is clear is that, as a matter of reargument, Plaintiff's claims against the Cantor Defendants—TWO, THREE, FOUR, FIVE—are ill-suited for pre-discovery dismissal.

D.

This Court does not, however, find occasion to disturb its determinations as to Plaintiff's claims against the Boyd Defendants—EIGHT, NINE, TEN, and ELEVEN. As to Defendants motion for costs and attorney fees pursuant to 22 NYCRR § 130-1.1, this Court does not find that Plaintiff's attorney's conduct rises to the level of frivolity.

III.

Accordingly, it is hereby

ORDERED, as to MOTION 10, upon reargument, Plaintiff's FOURTH and FIFTH claims are **reinstated**; Plaintiff's SECOND and THIRD claims are **reinstated** as **against Cantor only**; Plaintiff's SIXTH, SEVENTH, EIGHTH, NINTH, TENTH, and ELEVENTH claims remain **dismissed**. That branch of MOTION 10, which was for renewal, is **denied**. MOTION 12 is **denied**. The Clerk of the Part is directed to note that MOTION 11 was **withdrawn**.

Dated: August 19, 2022
Brooklyn, New York

Hon. Larry D. Martin
Supreme Court of the State of New York

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

26 Cantor Dep. Tr. 291–92, Doc. 173.