

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

GREGORY BEAUCHAMP, in his individual capacity, and as a member of Port and Passage, LLC, a company organized under the laws of the State of New York,

Plaintiff,

-against-

JEREMY JOHNSTONE, in his individual capacity, and a member of Port and Passage, LLC, a company organized under the laws of the State of New York,

Defendant.

**AFFIRMATION IN OPPOSITION TO  
PLAINTIFF’S MOTION TO DISMISS  
COUNTERCLAIMS**

INDEX NO.: 653372/2012

I, Andrew J. Bayne, Esq., an attorney admitted to the practice of law before the courts of the State of New York, affirms the following to be true under penalties of perjury:

1. I am the attorney for Defendant Jeremy Johnstone, and I am familiar with the facts surrounding this matter.
2. I make this affirmation in opposition to Plaintiff’s motion to dismiss Defendant’s first and second counterclaims.

**Summary**

3. We respectfully submit that Plaintiff’s motion to dismiss should be denied. Viewed in the light most favorable to Defendant, the sole handwritten document upon which the entirety of Plaintiff’s premature motion is based does not, itself, represent a meeting of the minds either on its face or certainly in the context of events in which the draft handwriting was

prepared. The draft itself is ambiguous as to material facts and fails to integrate several key commercial terms upon which the parties have yet to come to an understanding in order for Defendant to effectively waive his rights and interests in the subject New York limited liability company, Port and Passage, LLC (“Company”), of which he is a full member under the law. Notably, Plaintiff’s subsequent act of forwarding a proposed formal agreement, an action not disclosed by Plaintiff in his moving papers to this Court, shows that any discussion between the parties about the separation and relinquishment of Defendant’s rights in the Company were, at best, incomplete and required significant further clarity and legal input of the parties’ respective counsel. The actual, unsigned, proposed agreement submitted by the Plaintiff to Defendant on May 18, 2012 is attached as Defendant’s Exhibit A.

4. Plaintiff’s moving papers fail to state that Defendant did not sign the proposed formal agreement, which Plaintiff presented to Defendant. That purportedly integrated and legally-drafted document proposed the crucial and necessary material terms to such an agreement that were completely absent from the handwritten draft. Plaintiff’s submission of the formal proposed agreement, Exhibit A, is evidence itself of Plaintiff’s own understanding at that time that the parties had not reached any final binding agreement at all, but that they legally required a clear document memorializing their discussion points. Exhibit A is evidence of Plaintiff knowing that a real agreement was required to create a proper novation, which distinguished all rights, title and interests to the assets of the Company in order to eventually arrive at a proper and mutual separation under New York law. The new proposal, in addition to including the necessary caveats, such as waiver of counsel and other terms of finality detailed herein and in Exhibit A, sought to itemize Plaintiff’s true and unambiguous intentions. These set forth a completely new set of terms both solely in Plaintiff’s favor, and to the material detriment of

Defendant Johnstone. *See infra*, ¶¶ 13-15; Defendant’s Affidavit ¶¶ 11-13. Because Defendant did not agree with the terms of the Agreement, he refused to sign Exhibit A.

5. Because this Court must accept Defendant’s factual allegations as true, and because these allegations amply support Defendant’s claim that the parties did not reach a mutual assent, we respectfully request that this Court permit Defendant to proceed on his breach of fiduciary claim and other counterclaims against this Plaintiff. Considering these disputed material facts, the issue of whether the parties reached such mutual assent and the merits of Defendant’s counterclaims should be adjudicated before a fact finder. Accordingly, the motion to dismiss Defendant’s counterclaims should be denied at this time.

#### **Factual Background**

6. Defendant hereby incorporates by reference his statement of facts in support of his counterclaim, see Defendant’s Answer at 8-9, as well as the Affidavit of Defendant Jeremy Johnstone, which is attached.

#### **Legal Argument**

**I. Defendant’s factual assertions contained in the Answer and the accompanying Affidavit should be viewed by the Court as true for purposes of this motion. Plaintiff’s failure to include necessary incontrovertible facts, in light of his burden at this stage, warrants denial of Plaintiff’s motion at this juncture.**

7. As the subject of a motion to dismiss, Defendant’s counterclaim is entitled to a liberal construction. (CPLR 3026; *Leon v. Martinez*, 84 NY2d 83, 87 [(1994)]. All of the facts in the pleading are accepted as true. Id. The pleader is provided “the benefit of every possible favorable inference,” and the court determines if the facts can fit “any cognizable legal theory.” Id. Whether a pleader “can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]).

**II. Absent a meeting of the minds, the handwritten draft is unenforceable, and Defendant is entitled to a hearing before a fact finder.**

8. The court aims for “a realization of reasonable expectations” through a practical interpretation of the language at issue. (*Sutton v. East River Sav. Bank*, 55 NY2d 550, 450 NYS2d 460, 463 [1982]) (internal quotations omitted). Even when parties have signed a purported contractual document, it is unenforceable absent a meeting of the minds. (*Brands v. Urban*, 182 AD2d 287, 289 [2d Dept. 1992]). Particularly, “if a material element of a contemplated contract is left for future negotiations, there is no contract enforceable under the statute of frauds or otherwise.” (*Willmott v. Giarraputo*, 5 NY2d 250, 253 [1959]) (internal quotations omitted).

9. The courts will not enforce a contract when the language is “so obscure and ambiguous,” “it is impossible to ascertain with any reasonable degree of certainty the intention of the parties.” (*Brands*, 182 AD2d at 289). An agreement will only be considered integrated when it “represents the entire understanding of the parties to the transaction.” (*4Kids Entm’t, Inc. v. Upper Deck Co.*, 797 F. Supp. 2d 236, 245 [S.D.N.Y. 2011]).

10. Here, by forwarding a proposed formal agreement (Exhibit A), Plaintiff acknowledged that the initial draft handwritten document (Plaintiff’s Complaint, Exhibit 1) was wholly deficient. It neither represented a complete understanding nor a meeting of the minds. Exhibit A offered terms completely different from the prior discussions of the parties.

11. For example, Exhibit A purported to be an agreement between Johnstone and “the Company,” which, it turns out, included the Company’s members then unknown to Johnstone. See Exhibit A; Defendant’s Affidavit ¶ 9. The proposed agreement provided for a detailed elaboration of Defendant’s separation from the entity rather than from the Plaintiff:

1. Separation from the Company. Johnstone and the Company acknowledge and agree that Johnstone's association with the Company will terminate as of May 18, 2012 (the "Separation Date"). Johnstone further acknowledges that Johnstone has received all compensation and benefits to which Johnstone is entitled as a result of Johnstone's association with the Company, except as otherwise provided in this Agreement. Johnstone hereby acknowledges and agrees that any and all powers, positions and authority that Johnstone held or holds with respect to, or on behalf of the Company, in any capacity, including (without limitation) as a shareholder, officer, director or employee of the Company, and any authorized signatory status that Johnstone may have with respect to the accounts of the Company is terminated as of the Separation Date. Johnstone further agrees and acknowledges that Johnstone does not hold any capital stock, security or equity interest in the Company or any predecessors or successor thereof, or any rights to acquire or receive, directly or indirectly from the Company or any predecessors or successor thereof, any capital stock, security or equity interest in the Company or any predecessor or successor thereof.

(Exhibit A ¶ 1).

12. Unlike the handwritten draft, Exhibit A urged that Defendant was "hereby advised and encouraged...to consult with [Defendant's] own independent legal counsel before signing this Agreement."

14. Opportunity For Review. **Johnstone is hereby advised and encouraged by the Company to consult with Johnstone's own independent counsel before signing this Agreement.** Johnstone represents and warrants that Johnstone (a) has had sufficient opportunity to consider this Agreement, (b) has read this Agreement, (c) understands all the terms and conditions hereof, (d) is not incompetent or had a guardian, conservator or trustee appointed for Johnstone, (e) has entered into this Agreement of Johnstone's own free will and volition, (f) has duly executed and delivered this Agreement, (g) understands that Johnstone is responsible for Johnstone's own attorneys' fees and costs, (h) has been advised and encouraged by the Company to consult with Johnstone's own independent counsel before signing this Agreement, (i) has had the opportunity to review this Agreement with counsel of Johnstone's choice or has chosen voluntarily not to do so, (j) understands that

Johnstone has been given a reasonable opportunity to review this Agreement before signing it and that if Johnstone does not sign and return this Agreement to the Company (Attn: Greg Beauchamp) within the time frame provided, the Company shall have no obligation to enter into this Agreement, Johnstone shall not be entitled to receive the consideration provided for under Section 5 of this Agreement, and the Separation Date shall be unaltered, and (k) understands that this Agreement is valid, binding, and enforceable against the parties hereto in accordance with its terms

(Exhibit A ¶ 14).

13. Moreover, Exhibit A provided that Defendant acknowledge that the Company loaned him certain funds:

2. Johnstone's Outstanding Loan Obligations. Johnstone acknowledges and agrees that the Company provided him with a loan in the amount of \$14,500 (the "Loan"), and that as of the Separation Date Johnstone has not repaid this Loan to the Company and is responsible for repaying the Loan to the Company in the amount of \$14,500 (the "Remaining Loan Balance").

(Exhibit A ¶ 2).

14. Importantly, the new proposed agreement included that Defendant provide a lengthy release, covenant not to sue, and a non-disparagement and confidentiality provision, all of which crucial and material provisions, were not at all included in the draft note relied so heavily upon by Plaintiff as an apparent final and binding relinquishment of Defendant's rights and interests in the Company that he co-built with Plaintiff. (Exhibit A ¶¶ 3, 4, 8).

15. Amidst the complexities of understanding the relative contributions of the members to the Company, the contract proposed by Plaintiff now attempted to reflect Plaintiff's wishes that all of Defendant's personal portfolio and intellectual property be exclusively allocated to the Company and that the Defendant be treated as a mere employee:

All Inventions...are solely and exclusively the property of the Company. All Inventions are deemed "work made for hire" as that term is used...and belong solely to the Company from conception, whether or not such conception occurred prior to the formation of the Company. [Defendant] expressly disclaims any and all rights and interest in all Inventions.

(Exhibit A, ¶ 9; *see also* Defendant's Affidavit ¶ 13).

16. In Defendant's view, Plaintiff, by proposing Exhibit A, abandoned any discussions that they previously had and attempted to create a final separation of the assets of the Company, which would deprive the Defendant of his continuing interest in the assets of the Company against his wishes. (Defendant's Affidavit ¶ 13).

17. Thus, the handwritten document relied upon by Plaintiff, without any reference to the subsequently proposed legal separation contract, cannot be viewed to represent any mutual assent to the relinquishment of this Defendant's legal and equitable interest in the Company. By proposing Exhibit A, Plaintiff proposed essentially new and manifestly different terms to the parties' prior discussions. As in *Brands*, the handwritten document in this context fails to demonstrate, with any degree of certainty, the intention of the parties.

18. According to Defendant, Plaintiff pressured and coerced Defendant into signing the handwritten document. (Defendant's Affidavit ¶ 8). Defendant stated that he was "extremely intimidated" in this very uncomfortable situation. Id. Further, Defendant asserted that Plaintiff bullied him into signing this hastily-created, abbreviated, handwritten document. Id.

19. The handwritten document is non-integrated on its face, and the pervasive ambiguity throughout the whole document, especially in light of the subsequent formal contract Plaintiff himself proposed, renders it ineffective. In the absence of a mutual assent, the parties never reached a meeting of the minds. Thus, Defendant's counterclaim against Plaintiff for damages due to Plaintiff's diverting business away from the company, in breach of his fiduciary duty to Defendant, should proceed. Defendant is entitled to a fully plenary hearing of the facts before the Court can rule on the assertions raised by Plaintiff.

20. Contrary to Plaintiff's arguments, he has failed to conclusively establish any right to relief. The allegations in the counterclaim, coupled with the affidavit of Defendant, abundantly demonstrates, with particularity, the pertinent factual allegations in support of Defendant's claim for breach of fiduciary duty. If necessary, Defendant requests the opportunity

to amend its counterclaim to incorporate Defendant's affidavit. Under CPLR 3025(b), leave to amend a pleading "shall be freely given."

**III. Because Defendant is entitled to present alternative claims for relief, Count II of Defendant's Counterclaim should not be dismissed.**

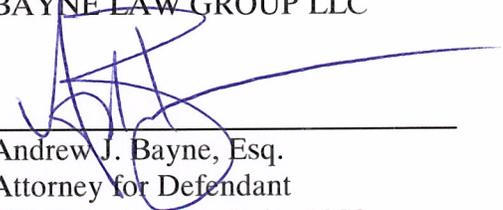
21. In response to Plaintiff's final attempt to undermine Defendant's rights to avail himself of the courts by characterizing Count II of Defendant's Counterclaim as duplicative, Defendant's cause of action under the New York Limited Liability Company Law remains intact. A party may plead alternative theories of liability even if the underlying allegations contradict each other. (*Raglan Realty Corp. v. Tudor Hotel Corp.*, 149 AD2d 373 [1<sup>st</sup> Dept. 1989]). This Court has allowed alternative theories to proceed in the context of a commercial dispute involving an alleged breach of fiduciary duty and a breach of contract claims governed under the LLC Law. (*Oldfield Realty Group, Inc. v Passions Restaurant Group, LLC*, 2007 NY Slip Op 31620(U) [Sup. Ct., NY County 2007]). Here, Defendant may proceed on alternative theories of breach of Plaintiff's fiduciary duty along with a violation of the New York LLC Law.

22. In New York, a member of an LLC owes a fiduciary duty to his fellow members. (Limited Liability Company Law §401(a); §409). To state a claim for a breach of fiduciary duty, the party must allege "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." (*Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 807 [2d Dept 2011]).

23. Defendant is entitled to his day in court and a hearing on the facts. As an equal member of the Company, Defendant is entitled to a formal accounting of his interests in the Company. (*East Quogue Jet, LLC v. East Quogue Members, LLC*, 50 AD3d 1089, 1091 [2d Dept. 2008]). For the foregoing reasons, Plaintiff's motion should be denied.

Dated: May 7, 2013

THE BAYNE LAW GROUP LLC

By: 

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