

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

-----X  
CAROLYN LE BEL, as Executrix of the Estate of  
Marya Lenn Yee,

Plaintiff,

-against-

MARY A. DONOVAN and DONOVAN & YEE,  
LLP,

Defendants.  
-----X

: Index No.  
652200/10

: IAS 3 (Bransten, J.)

: Motion Sequence  
No. 4

**DEFENDANTS' MEMORANDUM OF LAW  
ON MOTIONS FOR SUMMARY JUDGMENT**

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## **TABLE OF CONTENTS**

Table of Authorities .....	ii
DEFENDANTS' MEMORANDUM OF LAW ON MOTIONS FOR SUMMARY JUDGMENT .....	1
The Pleadings .....	2
Point I: THE AGREEMENT REMAINS IN FORCE .....	5
A. The Firm Did Not Terminate, Because It Provided Otherwise .....	6
B. Section 6.8(a) Does Not Say What Plaintiff Claims It Says .....	7
C. In Context, Plaintiff's Proposed Construction Is Absurd .....	8
D. The Calvaruso Agreement Was Not Sham .....	10
Point II: PLAINTIFF'S SURVIVING CAUSES OF ACTION ARE WITHOUT MERIT AS A MATTER OF LAW .....	13
A. The First Cause of Action Should Be Dismissed .....	13
B. The Fifth Cause of Action Should Be Dismissed .....	14
C. The Second Cause of Action Should Be Dismissed .....	15
D. The Fourth Cause of Action Should Be Dismissed .....	17
E. The Sixth Cause of Action Should Be Dismissed .....	18
CONCLUSION .....	20

## **Table of Authorities**

<u>Burger, Kurzman, Kaplan &amp; Stuchin v. Kurzman</u> , 139 A.D.2d 422 (1 <sup>st</sup> Dept. 1988) ....	5
<u>Credit Suisse First Boston v. Utrecht-America Finance Co.</u> , 80 A.D.3d 485 (1 <sup>st</sup> Dept. 2011) .....	10
<u>Forbes v. Six-S Country Club</u> , 12 A.D.3d 1049 (4 <sup>th</sup> Dept. 2004) .....	5
<u>Gessin Electrical Contractors v. 95 Wall Associates</u> , 74 A.D.3d 516 (1 <sup>st</sup> Dept. 2010) .....	8
<u>God’s Battalion of Prayer Pentecostal Church v</u> <u>Miele Associates</u> , 6 N.Y.3d 37 (2009) .....	8
<u>Goth, Estate of v. Tremble</u> , 59 A.D.3d 839 (3d Dept. 2009) .....	18n
<u>Israel v. Chabra</u> , 12 N.Y.3d 158 (2009) .....	8
<u>Lauriello v. Gollotta</u> , 59 A.D.3d 497 (2d Dept. 2009) .....	18n
<u>Marine Midland Trust Co., In re [Wells’s Will]</u> , 36 A.D.2d 471 (4 <sup>th</sup> Dept. 1971), <u>aff’d. on op’n. below</u> , 29 N.Y.2d 931 (1972) .....	10
<u>NYCTL 1996-1 Trust v. EM-ESS Petroleum Corp.</u> , 57 A.D.3d 304 (1 <sup>st</sup> Dept. 2008) .....	10
<u>Peirez v. Queens P.E.P. Associates Corp.</u> , 148 A.D.2d 59 (2d Dept. 1989) .....	5
<u>Perl binder v. Board of Managers</u> , 65 A.D.3d 985 (1 <sup>st</sup> Dept. 2009) .....	8
<u>Phillips v. Joseph Kantor &amp; Co.</u> , 31 N.Y.2d 307 (1972) .....	18n
<u>Port Parties v. Merchandise Mart Properties</u> , 102 A.D.3d 539 (1 <sup>st</sup> Dept. 2013) .....	15
<u>Rocanova v. Equitable Life Assur. Soc’y</u> , 83 N.Y.2d 603 (1994) .....	16

<u>Rosmarin, Matter of</u> , 107 A.D.2d 689 (2d Dept. 1985) .....	6
<u>Sunrise Mall Associates v. Import Alley</u> , 211 A.D.2d 711 (2d Dept. 1995) .....	9
<u>Two Guys from Harrison v. S.F.R. Realty Associates</u> , 63 N.Y.2d 396 (1984) .....	8
<u>Vinson v. Marton &amp; Associates</u> , 159 Ariz. 1, 764 P.2d 736 (Ct. App. 1988) .....	6
<u>Wagner v. Etoll</u> , 46 A.D.2d 990 (3d Dept. 1974) .....	5

### **Statutes**

CPLR 3016(b) .....	15
CPLR 4519 .....	18n
Partnership Law § 10 .....	10
Partnership Law § 62(4) .....	5, 6
Uniform Partnership Law § 31(4) .....	6

### **Other Authorities**

Bromberg and Ribstein, <u>Partnership</u> § 2.07(c) (2013) .....	12n
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**DEFENDANTS' MEMORANDUM OF LAW  
ON MOTIONS FOR SUMMARY JUDGMENT**

This Memorandum of Law is submitted on behalf of defendants, Mary A. Donovan ("Donovan") and Donovan & Yee, LLP (the "Firm"), (i) in support of their motion for summary judgment, and (ii) in opposition to the motion by plaintiff, Carolyn Le Bel, as Executrix of the Estate of Marya Lenn Yee ("Yee"), for summary judgment.

Yee is Donovan's former partner. Yee died in 2008 as the result of injuries sustained in a plane crash. This action, which plaintiff characterized in the Note of Issue herein as a contract action (the First Cause of Action indeed is labeled by the complaint as one in contract), turns upon the proper interpretation of that contract, namely the 1997 Partnership Agreement (the "Agreement", Exhibit "B" to the Donovan Affidavit) between Yee and Donovan (There was at the time also a third partner who withdrew from the Firm shortly thereafter). The Agreement remained in effect at the time of Yee's death.

As will be demonstrated thereafter, plaintiff's contract construction argument is absurd on the face of the document, contrary to all canons of contract construction, and belied by the contemporaneous evidence of what the parties intended. Furthermore, as will be demonstrated, under the Agreement as amended, Yee's two sons, the beneficiaries of the plaintiff estate, received \$500,000 in satisfaction of any financial obligation of the Firm to Yee. The complaint is therefore without merit, and defendants are entitled to summary judgment accordingly.

### **The Pleadings<sup>1</sup>**

The complaint begins (Pars. 1-2) with argumentative assertions as to the nature of the action, and commences its substantive allegations (Pars. 3-5) with the assertions that plaintiff is the Yee estate executrix, recites the citizenship of Donovan, and the existence of the Partnership. It continues (Par. 6) with the assertion that Yee was, and Donovan is, a lawyer specializing in the field of intellectual property, and that they, together with a third attorney, Bela Amladi, entered into a Partnership Agreement dated as of July 15, 1997, which is annexed to the complaint (here Exh. "B" to the Donovan Affidavit). Amladi left the firm shortly thereafter, and the firm continued under the name Donovan & Yee, LLP, with just two partners.

The complaint continues (Par. 7) with an assertion of Yee's injury in a plane crash on November 30, 2008, causing her death the following day. Paragraph 8 contains a quote from the Agreement, and Paragraph 9 contains a conclusion of law (of which more later), none of which advances the story the complaint seeks to tell.

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<sup>1</sup>The pleadings are exhibits to the Donovan Affidavit. The complaint (exhibits omitted) is Exhibit "A"; the two exhibits to the complaint are Exhibits "B" and "C"; and the answer is Exhibit "D".

Paragraph 10 recites the existence of what it terms the “Calvaruso Employment Agreement”, which is annexed to the complaint (the document itself, here Exh. “C” to the Donovan Affidavit, characterizes itself otherwise). The rest of the paragraph is devoted to quoting selected excerpts from that agreement, and the legal conclusion the complaint draws therefrom, that Andrea Calvaruso, Esq., supposedly did not thereby become a partner of the Partnership. “Accordingly”, the complaint continues (Par. 11), upon Yee’s death, the Partnership “dissolved as a matter of law, as Donovan was the only remaining partner”.

The complaint continues (Par. 12.) with a quotation of one clause from the Agreement concerning the consequences of the death of a partner, and then (Par. 13) refers to (but does not quote from) another clause of the Agreement, which the complaint declares makes the first clause inoperative. After an assertion (Par. 14) that no additional partner was thereafter admitted (a demonstrably false assertion, see Point IA, infra), the pleading then continues (Par. 15) with the assertion that Donovan has refused to acknowledge the dissolution of the partnership.

The pleading continues (Par. 16) with averments as to the alleged insufficiency of financial statements admittedly provided to plaintiff by Donovan, and that Donovan has refused to acknowledge the Estate’s entitlement to, and has failed to pay plaintiff, the sum claimed, namely some \$207,000 (Pars. 17-18). It further alleges a refusal to cease use of Yee’s name (Par. 19), and also (Par. 20) gratuitously asserts (the allegations form no basis for any relief claimed in any cause of action), that Donovan “improperly and prematurely cancelled the medical insurance covering Yee”.

After the assertion (Par. 21) that “Donovan’s actions left plaintiff with no choice but to commence this action”, the complaint begins its recitation of its six causes of action. The First Cause of Action (all characterizations are the complaint’s) purports to sound in “Breach of Contract”; the Second in “Breach of Fiduciary Duty”; the Third in “Unjust Enrichment, Money Had and Received, and Constructive Trust” (This count was struck by this Court upon earlier motion, and is no longer in the case); the Fourth for an “Accounting”; the Fifth for “Declaratory Relief”; and the Sixth for “Injunctive Relief”.

Defendants’ answer (Donovan Aff. Exh. “D”) denies the material allegations of the complaint, and asserts affirmative defenses discussed below.

The parties now both move for summary judgment on the five causes of action remaining in the case. As will be demonstrated, defendants’ motion is meritorious, and plaintiff’s is not. The motions should therefore be decided accordingly, and the complaint dismissed.

Point I

**THE AGREEMENT REMAINS IN FORCE**

**A. The Agreement Did Not Terminate, Because It Provided Otherwise.**

The rule as to the effect a death of a partner has upon a partnership is correctly stated by plaintiff's own verified complaint. Paragraph 9 of plaintiff's pleading alleges in full that "Under New York law, a limited liability partnership is automatically dissolved as a matter of law when there remains only one partner in the partnership, absent contractual agreement to the contrary" (emphasis supplied). That a contractual agreement to the contrary changes the consequence to the partnership of a partner's death is well recognized in the case law. Thus, New York Partnership Law § 62 provides in relevant part that in any partnership, whether it has two partners or two thousand, "Dissolution is caused ... (4) by the death of any partner". However, the case law makes clear that a contractual agreement to the contrary overrides this provision (Emphases added in all quotations):

"A partnership is dissolved by the death of any partner, absent a specific agreement to the contrary (Partnership Law § 62[4] ...)" (Burger, Kurzman, Kaplan & Stuchin v. Kurzman, 139 A.D.2d 422, 423-4 [1<sup>st</sup> Dept. 1988]).

"[I]n the absence of a partnership agreement to the contrary, the partnership was dissolved upon the death of Marcia [a partner] (see Partnership Law § 62 ...[4])" (Forbes v. Six-S Country Club, 12 A.D.3d 1049, 1051 [4<sup>th</sup> Dept. 2004]).

"Absent specific agreement to the contrary, a partnership or a joint venture to which the partnership was a party dissolves upon the death of a partner ... (see, Partnership Law § 62[4])" (Peirez v. Queens P.E.P. Associates Corp., 148 A.D.2d 596, 597 [2d Dept. 1989]).

"[T]he intervening death of one of the partners in 1968 resulted in the dissolution of the partnership by operation of law since there was no agreement to the contrary (Partnership Law § 62, subd. 4)" (Wagner v. Etoll, 46 A.D.2d 990, 990 [3d Dept. 1974])."

It should also be noted that New York's Partnership Law is the Uniform Partnership Act; that § 62 of the New York statute is § 31 of that Uniform Act; and that § 31(4) of the Uniform Act has been construed everywhere in the same manner. See, e.g., Vinson v. Marton & Associates, 159 Ariz. 1, 7, 764 P.2d 736, 742 (Ct. App. 1988) ("The rule that a partnership agreement controls over the Uniform Partnership Act has been acknowledged specifically with respect to death provisions in such an agreement", citing to Matter of Rosmarin, 107 A.D.2d 689 [2d Dept. 1985]).

In the case at bar, in the absence of contractual agreement to the contrary, Yee's death would have dissolved the Firm. However, there was indeed express contractual agreement to the contrary. The Agreement (Donovan Aff. Exh. "B") provided in § 6.8(b) in relevant part as follows (emphasis supplied):

"The death, retirement, disability, withdrawal or expulsion of any Partner shall not cause the dissolution of the Partnership, unless following such death, retirement, disability, withdrawal or expulsion only one Partner shall remain in the Partnership and no additional Partner shall be admitted within ninety (90) days following such death, retirement, disability, withdrawal or expulsion. The remaining Partners, together with any new Partners, shall have the right, but not the obligation to continue the use of the Partnership Name ...."

Such an additional partner was indeed admitted within ninety days -- Andrea Calvaruso became an equity partner within that time period. See Donovan Aff. Par. 13, and the restated Partnership Agreement, Donovan Aff. Exh. "J".

The partnership therefore did not dissolve, and all plaintiff's arguments, predicated as they all are on the supposed dissolution of the Firm, are entirely without merit.

**B. Section 6.8(a) Does Not Say What Plaintiff Claims It Says .**

In her attempt to avoid the conclusion that by reason of the clear language of § 6.8(b) the Firm did not dissolve, plaintiff relies entirely on § 6.8(a) of the Agreement. That provision provides in pertinent part as follows:

“(a) Priority Among Provisions. A voluntary dissolution (including any dissolution by law resulting from only one Partner remaining in the Partnership following the death, retirement, expulsion or withdrawal of the other Partner(s)) and termination of the Partnership shall override any of the provisions of this Article VI then in effect ....”

Plaintiff offers no argument other than one based upon her interpretation of § 6.8(a), nor, in contrast to defendants, does she offer any extrinsic evidence to interpret that subsection should her argument not be found unambiguous on the face of the contract. Therefore, plaintiff’s argument stands or falls on whether the clause in question unambiguously means what plaintiff (who, unlike defendants, was not a party to the Agreement and has no personal knowledge) claims that it means.

Plaintiff’s interpretation of § 6.8(a) is that it means (i) the death of one of two partners necessarily results in the dissolution of the partnership, and (ii) that this clause overrides § 6.8(b). But that is not what the section says. According to the section, if there is a dissolution caused by, inter alia, the death of one of two partners, then the provisions of Article VI are overridden. It does not, however, say or mean that the death of one of two partners necessarily causes a dissolution. It would have to be a dissolution by law resulting from such a fact. However, in this case, by reason of the very next subsection, § 6.8(b), and the law as expressed in the cases cited in Subpoint

A, supra, there is no dissolution by law resulting from the death of one of the two partners, because a third partner was permissibly added within the time limit.

Priority among provisions is relevant only if there is a conflict. Contracts are properly construed in a manner which eliminates conflicts among provisions ( Israel v. Chabra, 12 N.Y.3d 158, 167 [2009]; Gessin Electrical Contractors v. 95 Wall Associates, 74 A.D.3d 516, 518 [1<sup>st</sup> Dept. 2010] [“The courts should construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms”]; Perlbiner v. Board of Managers, 65 A.D.3d 985, 986-7 [1<sup>st</sup> Dept. 2009]). Here not only does plaintiff’s construction unnecessarily strain the language of Subsection (a), which does not say that the partnership necessarily dissolves, but such construction creates an unnecessary conflict with Subsection (b).

Plaintiff’s construction is untenable. Under the correct construction, the Firm did not dissolve, and all plaintiff’s arguments must fall.

**C. In Context, Plaintiff’s Proposed Construction Is Absurd.**

In addition to violating the rule of construing contracts to avoid conflicts between provisions (Subpoint A, supra), plaintiff’s proposed construction of the contract violates a number of other principles used by the Courts in interpreting contracts. Thus, “In construing a contract, one of a court’s goals is to avoid an interpretation that would leave contractual clauses meaningless” (Two Guys from Harrison v. S.F.R. Realty Associates, 63 N.Y.2d 396, 403 [1984]). “A contract ‘should be read to give effect to all its provisions’” (God’s Battalion of Prayer Pentecostal Church v. Miele Associates, 6 N.Y.3d 371, 371 [2009], quoting Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 63 [1995]). “[A] court should not adopt an interpretation which would leave any

provision without force and effect” (Sunrise Mall Associates v. Import Alley, 211 A.D.2d 711, 711 [2d Dept. 1995]). In the case at bar, however, plaintiff’s proposed construction of §6.8(a) would mean that § 6.8(b)’s provision for preserving the partnership if a partner is added would never come into play, because, says plaintiff, it is always overridden by § 6.8(a).

Perhaps the worst offense of plaintiff’s proposed construction, however, is that it ignores the intent of the parties evidenced by the Agreement. The parties were forming a partnership, and entered into an Agreement (Donovan Aff. Exh. “B”), devoting ten articles, covering eighteen single-spaced pages excluding schedules, to setting forth the rules governing their relationship. Among the rules they set forth were what was to happen in the case of a death of a partner. § 6.2, entitled “Death”, has an introductory paragraph and five lettered paragraphs, covering more than a single-spaced page. Obviously, the parties did not intend to leave the consequences of the death of a partner to the default rules of the Partnership Law. However, under plaintiff’s interpretation of § 6.8(a), that is exactly what happens in the case of the death of one of two partners, even though the parties in § 6.8(b) thought they were significantly limiting that possibility. According to plaintiff, the parties left a lacuna in their contract, failed to provide the governing rules for, inter alia, the death of a partner, and instead defaulted to the provisions of the Partnership Law and the common law. There is, according to plaintiff, no contract provision governing the relative rights of the estate and the partnership in this case.

Such a conclusion is absurd. A contract or contract provision is not to be construed so that it is illusory (Credit Suisse First Boston v. Utrecht-America Finance

Co., 80 A.D.3d 485, 489 [1<sup>st</sup> Dept. 2011]; NYCTL 1996-1 Trust v. EM-ESS Petroleum Corp., 57 A.D.3d 304, 306 [1<sup>st</sup> Dept. 2008]). There is no basis for believing that the parties, who carefully made provisions for virtually every other possible eventuality, here intended to make no provision which would govern in this case. A construction which yields that conclusion must be rejected. See the accompanying Affirmation of A. Douglas P. Craig, of the firm drafting the Agreement, that such was not the intent.

Plaintiff's strained reading of § 6.8(a) cannot be favored over the simple reading of the section, namely that it applies only if the partnership dissolves, not to make it dissolve. The Agreement thus provides the terms for the financial consequences of the death of one of two partners, as it does in all other cases.

Plaintiff's proposed construction of the Agreement must accordingly fail.

**D. The Calvaruso Agreement Was Not Sham.**

Plaintiff argues (Br. 5-6) that the agreement making Calvaruso an equity partner was a sham, asserting that she received no share in the profits and was not involved in the management of the Firm. While the argument is demonstrably factually false, as is demonstrated by the Donovan and Ferber Affidavits and the documents annexed thereto, the contention is in any event legally irrelevant.

"A partnership is an association of two or more persons to carry on as co-owners a business for profit and includes for all purposes of the laws of this state, a registered limited liability partnership" (Partnership Law § 10). The indispensable essentials of a partnership are "a mutual promise to share the profits and an undertaking to assume the burden of making good the losses" (In re Marine Midland Trust Co. [Wells's Will], 36 A.D.2d 471, 475 [4<sup>th</sup> Dept. 1971], aff'd. on op'n. below, 29

N.Y.2d 931 [1972]). Here those mutual promises are found in § 5.2 of the Agreement (Donovan Aff. Exh. “ J”), which provides that:

“Net profits and net losses shall be shared among the Partners on the basis of units of participation. Each Partner’s share of the net profits or losses shall be in direct proportion to the ratio of his units of participation to the total number of units of participation of all the Partners.”

As can be seen elsewhere in the 2009 Agreement (§ 5.4), Donovan had 95 units of participation, and Calvaruso had 5. They had thus agreed to share profits and losses in that ratio, and the agreement they entered in 2009 is a true partnership agreement.

It turned out that there were no profits to share (in the ratio of 95 to 5). That was because the guaranteed payments (shared in a ratio of only 7 to 5, see § 5.4, and thus far more favorable to Calvaruso) exhausted the profits of the Firm. That, however, does not mean that the agreement lacks mutual promises to share in the profits, if there were any. Similarly, that the Firm met all its obligations, and the partners were not called upon to pay creditors of the Firm personally, also does not mean that the Partners had not agreed to share in losses. See, generally, Donovan Aff. Par. 16.

The essence of a partnership is the agreement to share profits and losses, which was here present. The contention that Calvaruso did not participate in management, besides being demonstrably false (see Donovan Aff. Par. 18, and Exhs.

L, M and N; and Ferber Aff. Par. 7) is irrelevant.<sup>2</sup> There is nothing to suggest that the 2009 Agreement was not enforceable against the Firm and any Partner as it was written, either by the other Partner, or, if it came to that, by a creditor who could reach a partner.

The Firm did therefore not dissolve. Since all plaintiff's claims are based on the incorrect premise that it did dissolve (Point II, infra), those arguments are all without merit.

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<sup>2</sup> “[I]t is clear that one may be a partner without exercising control over the firm” (Bromberg and Ribstein, Partnership § 2.07[c] [2013]) This Court can take judicial notice of the practice of most large firms in this City, which have an Executive or Management Committee, which does all the management. In some firms, the Committee is elected by partners, in some it is self-perpetuating, and in some the Partnership Agreement itself names the members. In none of those cases, however, does it mean that a junior partner who is not a member of the Committee is not a partner. It is agreed that he or she shares in profits and losses; that is what makes him or her a partner. Lack of involvement in management is irrelevant.

## Point II

### **PLAINTIFF'S SURVIVING CAUSES OF ACTION ARE WITHOUT MERIT AS A MATTER OF LAW.**

As was noted above, plaintiff sought to plead six causes of action. One of these (the Third) has already been dismissed by this Court. The five surviving causes of action may now also be shown to be defective as a matter of law, and should be dismissed.

While all five of the remaining causes of action suffer from the defect next discussed, the First and Fifth Causes of Action are addressed first. The Second, Fourth and Sixth Causes of Action each suffers from a different additional defect, and those three counts are therefore addressed separately thereafter.

#### **A. The First Cause Of Action Should Be Dismissed.**<sup>3</sup>

The First Cause of Action, says the complaint, sounds in "Breach of Contract." The breach, apparently (plaintiff merely incorporates twenty-five paragraphs of preamble), is that defendants have not paid her the sum plaintiff claims is owing, namely (Par. 25) \$207,760, which is about one-half (it is not exactly so apparently because of an arithmetic error by plaintiff) of the \$415,820 she asserts (Par. 18) is the "amount of Partners' Capital indicated in the financial statements provided to plaintiff." That the latter amount is based on an accrual basis of accounting, while the Agreement expressly provides for the computation to be based on a cash basis, does not faze plaintiff.

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<sup>3</sup> It should be noted that, in the highly unlikely event that plaintiff prevails on her summary judgment motion, her causes of action are inconsistent. She would be required to elect, as she would at trial. However, there is time enough to worry about that.

Plaintiff's argument depends on the assumption that she has proved, or could prove, a breach, namely that the Firm has dissolved and defendants must account according to the rules plaintiff would prefer to impose, rather than according to those the Agreement prescribes. As has been demonstrated, however, the Partnership has not dissolved, and its terms remain in force and govern the rights of the parties. There is thus no basis for plaintiff to claim damages for breach of the contract, because she has not established, and cannot establish, a breach.

The First Cause of Action is thus fatally defective.

**B. The Fifth Cause of Action Should Be Dismissed.**

The Fifth Cause of Action is labeled as one for "Declaratory Relief." The justiciable controversy claimed (Par. 40) is that

"Plaintiff contends that Donovan & Yee dissolved, as a matter of contractual agreement and law, upon Yee's death on December 1, 2008. Donovan, in contrast, denies the dissolution of Donovan & Yee."

The complaint correctly frames the controversy between the parties (albeit it is not just defendant Donovan, but also the defendant Firm, that denies the dissolution). The problem with plaintiff's argument, of course, is that, as has been demonstrated, as a matter of law upon the undisputed facts the Firm did not dissolve.

Plaintiff's claim is thus without merit, and should be dismissed. The proper procedure upon a determination that a plaintiff seeking a declaratory judgment is not entitled to the relief she seeks is to issue a declaration opposite to that which plaintiff sought:

"[A] complaint seeking a declaratory judgment should not be dismissed even though the court determines that the plaintiff is not entitled to the declaration sought (Lanza v. Wagner, 11 NY2d 317, 334 [1962] appeal dismissed, 371 US 74 [1962], cert denied 371 US 901 [1962]).

Where, as here, a decision is rendered on the merits, the court should issue a declaration (Hirsch v. Lindor Realty Corp., 63 NY2d 878, 881 [1984]; see also Dealey v. M/S Capital NY LLC, 44 AD3d 313, 315 [1<sup>st</sup> Dept. 2007])” (Port Parties v. Merchandise Mart Properties, 102 A.D.3d 539, 541 [1<sup>st</sup> Dept. 2013]).

Therefore, the Court, while dismissing the other causes of action, should enter judgment on this count declaring that the Firm did not dissolve upon Yee’s death.

**C. The Second Cause of Action Should Be Dismissed.**

The Second Cause of Action is labeled as one for “Breach of Fiduciary Duty.” The count does not specify what it is that defendants did or failed to do that allegedly constituted a breach of fiduciary duty. The count does incorporate by reference the general allegations of the complaint, but the only possible relevant allegation that plaintiff in fact asserts in those incorporated paragraphs is (Par. 16) the purported failure to account, or, more precisely, since the complaint admits receiving the financial statements (id.), failing to account according to plaintiff’s theory as to what is owed, and to pay what would be owed if plaintiff’s theory had been correct.

The same remains true on this motion. There is no affidavit on the merits from one with personal knowledge of the facts, identifying the alleged breach of fiduciary duty or otherwise addressing the merits of this count. Plaintiff has merely submitted the affidavit of her counsel, who does nothing but inventory the exhibits he has annexed.

The only specification thus to be found, either in the complaint or on this motion, of the conduct claimed to constitute breach of fiduciary duty (we do not here even discuss the requirement of CPLR 3016[b], that breach of fiduciary duty must be pleaded in detail), is in plaintiff’s brief, which asserts (p. 16) a breach of fiduciary duty in

that, subsequent to Yee's death, Donovan "refused to recognize the dissolution of the firm and to pay the Estate the monies to which the Estate was entitled given such dissolution" (emphasis supplied). This is consistent with the implication of Par. 16 of the complaint, discussed above, namely that the only breach of fiduciary duty claimed is the "failure" to account and pay in accordance with plaintiff's theory of the case, it being admitted that defendants have accounted according to their theory of the case, which showed nothing owed. Of course, since the Firm did not dissolve (Point I, supra), there was nothing wrongful in the refusal to recognize the non-existent dissolution, or in "failing" to pay monies supposedly owed if it had dissolved. This cause of action thus must fail for the same reason that all plaintiff's surviving counts fail, namely that it is necessarily predicated on the incorrect assumption that the Firm dissolved upon Yee's death.

There is, however, another fault with this cause of action. Plaintiff has taken a claim for breach of contract (her First Cause of Action, and the thrust of her complaint), added no new allegations of wrongdoing at all, and sought to turn it into a claim for breach of fiduciary duty, with its attendant claim for punitive damages (The claim also adds nothing new to the claim for an accounting, Fourth Cause of Action). This is not permitted: "Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights (see, Garrity v. Lyle Stuart, Inc., 40 NY2d 354, 358)" (Rocanova v. Equitable Life Assur. Soc'y., 83 N.Y.2d 603, 613 [1994]). A garden-variety claim for a partnership accounting, with no allegation of wrongdoing other than a refusal to account according to the plaintiff's theory of the contract, cannot be morphed into a claim for breach of

fiduciary duty with a demand for punitive damages. The Second Cause of Action should be dismissed for this reason as well.

**D. The Fourth Cause of Action Should Be Dismissed.**

The Fourth Cause of Action, says the complaint, sounds in “Accounting.” It expressly states (complaint, Par. 34) that it is predicated upon the assumption that the Firm dissolved upon Yee’s death, and that plaintiff prays for “such an accounting” (Par.36). However, that assumption, as has been demonstrated (Point I, supra), is wrong. As noted in Paragraph 6 of the accompanying affidavit of Michael Ferber, the Firm’s (and Yee’s personal) accountant, the Agreement provided for him to make the financial determinations; that his determinations were conclusive; and that his report stood in lieu of and was deemed to fulfill any requirement of law for an accounting (citing to Agreement, § 6.8[c]). That affidavit also notes that this accounting was supplied to plaintiff, which the complaint (Par. 16) admits, although it would differ with the method of accounting because it (incorrectly) contends the Firm dissolved. Plaintiff having received the accounting to which she is entitled, and that accounting showing nothing owed her, her claim for an accounting should be dismissed.

There is, however, another reason (defendants’ Third Affirmative Defense) why the claim for an accounting requires dismissal. As has been demonstrated in the accompanying Donovan and Ferber Affidavits, Yee and Donovan in 2006 confronted the issue that the estate and heirs of a deceased partner would get little to nothing from an accounting under the Agreement as it then stood. After considering a number of alternatives, including changing the formula as to what the estate would get in case of death, they decided instead to substitute insurance proceeds payable directly to the

deceased partners' heirs for any accounting. This change to the Agreement was executed by a change to the policies. In the case of the policy on Yee's life, owned and paid for by Donovan, the beneficiary for half the proceeds was changed from the Firm to Yee's two sons. After Yee's death, they received slightly over \$500,000 as the proceeds of that policy, in lieu of (i) the policy being payable to the Firm, (ii) the Firm then accounting to the Estate under some revised formula, and (iii) the Estate then paying out to the heirs.

By reason of the arrangement the parties put in place in lieu of any obligation to account, Yee's heirs, the beneficiaries of her Estate, received over twice the amount plaintiff claims would be due even under her construction of the Agreement. The result the parties intended in the case of the death of a party, in lieu of an accounting, has been realized. This is yet another reason why a claim for an accounting must be dismissed.<sup>4</sup>

#### **E. The Sixth Cause of Action Should Be Dismissed.**

The Sixth Cause of Action, says the complaint, sounds in "Injunctive Relief." It seeks to enjoin the continuing use of Yee's name in the partnership name.

This count suffers from the same infirmity as all the other counts, in that it assumes that the Firm dissolved, and that Article 6 thereof is of no force. However, as has been demonstrated, that is incorrect. Section 6.8(b) of the Agreement (Donovan Aff. Exh. "B"), after providing that the partnership shall not dissolve by reason of, inter

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<sup>4</sup> Plaintiff may seek to argue that Donovan's testimony is precluded by reason of the "Dead Man's Statute", CPLR 4519. While it is submitted that the exhibits to her affidavit, and the affidavit and exhibits of Michael Ferber, are enough to prove Donovan's point, and to grant defendants summary judgment, it must be noted that, in any event, CPLR 4519 would not exclude her testimony insofar as it is also offered to defeat plaintiff's motion for summary judgment (Phillips v. Joseph Kantor & Co., 31 N.Y.2d 307, 314 [1972]; Estate of Goth v. Tremble, 59 A.D.3d 839, 841 [3d Dept. 2009]; Lauriello v. Gollotta, 59 A.D.3d 497, 498 [2d Dept. 2009]).

alia, the death of a partner, expressly states that “The remaining Partners, together with any new Partners, shall have the right, but not the obligation[,] to continue the Partnership name ....” Since this clause remains in full force and effect, the use of the name is rightful, and plaintiff is not entitled to an injunction precluding that use (This is pleaded as defendants’ Fifth Affirmative Defense).

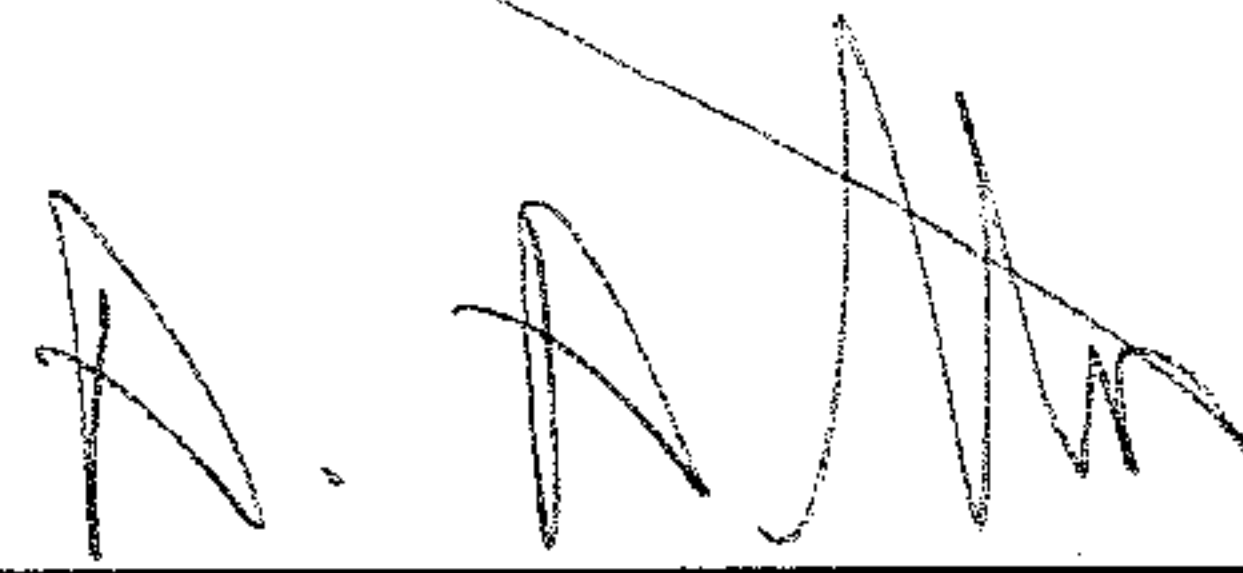
There is, moreover, another reason why the Sixth Cause of Action should be dismissed. As defendants’ Fourth Affirmative Defense notes, Carolyn Le Bel, as Executrix of Yee’s estate, lacks standing to assert this cause of action. There is no claim that the Estate has suffered any financial or other cognizable harm by reason of the Firm continuing to use its old name. Any aesthetic objection to the use of the decedent’s name would be personal to the decedent, and there is no basis (certainly none has been suggested) for believing that Yee would have objected (Indeed, she expressly consented in the Agreement to such use). In any event, if there were a basis for objection, it would fall to Yee’s sons personally, and not to the Estate, to raise this “issue.”

The Sixth Cause of Action, like the other four remaining claims, thus requires dismissal on the law and undisputed facts. Defendants’ motion for summary judgment should therefore be granted, and plaintiff’s motion denied.

### **Conclusion**

As has been demonstrated, there is no merit to plaintiff's motion, while defendants' motion is meritorious. Plaintiff's motion must therefore be denied, defendants' motion granted, and the complaint dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Alter', written over a horizontal line.

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