TABLE OF CONTENTS

PRELIMINARY STATEMENT

In this action for declaratory judgment and specific performance of a certain unperfected, unrecorded and secret collateralization agreement, Plaintiff-Appellant Julius Behrend sought to enforce a purported claim on the unvested future membership interests of defaulting Defendant Joseph Klein in and to the Defendant-Respondent The New Windsor Group LLC ("Windsor Group") and as against Defendant-Respondent Andrew Perkal ("Perkal"). It was undisputed before the Court below that the purported December 31, 2007 collateralization agreement, itself based upon an indeterminate debt, which made its first debut to the Defendants-Respondents at the instant of the April 2012 commencement of this action, was never perfected, recorded, or otherwise transmitted to the Defendants-Respondents; and this action itself was not commenced until two days before defaulting Defendant Joseph Klein signed the quit-claim transfer documents for his unvested membership interest over to Defendant-Respondent Perkal, pursuant to a Supreme Court Order and under threat of a Warrant for his Arrest for contempt of Court.

After the completion of discovery, the parties moved and cross-moved before the Court below for summary judgment. The Defendants-Respondents averred to the Court below that, assuming, *arguendo*, the veracity of the purported collateralization agreement, there were/are nevertheless no questions of material fact that defaulting Defendant Klein never actually held an interest in Defendant-Respondent Windsor

Group, and, even if he did, the Operating Agreement and New York Limited Liability Company Law prevent him from transferring and/or collateralizing his interest(s). Furthermore, defaulting Defendant Klein lost any actual or prospective interest he had in Defendant-Respondent New Windsor Group by August 23, 2010, if not sooner by June 19, 2009, when he was ordered by the Supreme Court to transfer whatever interest he may have to Defendant-Respondent Perkal pursuant to a June 19, 2009 Arbitration Award. There is no question that Plaintiff-Appellant, admittingly, failed to perfect his purported interest in Defendant-Respondent Windsor Group prior to the June 19, 2009 Arbitration Award and prior to the August 23, 2010 Supreme Court Order. Finally, Plaintiff-Appellant's attempt in this matter at strict foreclosure of the purported collateralization Agreement was and remains fatally flawed where he failed to notice Defendants-Respondents that he intended to accept the purported collateral in full satisfaction of defaulting Defendant Klein's indeterminate debt/interest.

The Court below found, *inter alia*, that the purported ambiguous collateralization agreement did not in fact act to transfer Klein's future unvested membership interest in Defendant-Respondent Windsor-Group's LLC to the Plaintiff-Appellant, but, rather, at most, gave Plaintiff-Appellant an unperfected and unenforceable security interest in whatever it was that Klein had. The Court below held that Plaintiff-Appellant has no membership or other interest in the Defendants-Respondents and dismissed the balance of the action. This appeal ensued.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Q1. WAS DEFAULTING DEFENDANT JOSEPH KLEIN A MEMBER OF DEFENDANT-RESPONDENT NEW WINDSOR GROUP LLC OR DID HE AT MOST HAVE A FUTURE UNVESTED MEMBERSHIP INTEREST IN SAID LLC?

A1. THE COURT BELOW DECLINED TO DETERMINE THIS ISSUE, FINDING INSTEAD THAT SINCE KLEIN AT MOST TRANSFERRED A SECURITY INTEREST IN THE LLC THE COURT NEED NOT DETERMINE HIS MEMBERSHIP INTEREST STATUS.

Q2. ARE PLAINTIFF-APPELLANT'S CLAIMS BARRED BY THE PRIOR ARBITRATION AWARD PURSUANT TO THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL, IN THAT PLAINTIFF-APPELLANT CLAIMS TO HAVE BEEN IN PRIVITY OF CONTRACT WITH DEFAULTING DEFENDANT KLEIN AT THE TIME AND AS RELATES TO THE ISSUES LITIGATED IN THE ARBITRATION PROCEEDING?

A2. THE COURT BELOW ANSWERED IN THE NEGATIVE IN THAT PLAINTIFF-APPELLANT WAS NOT A PARTY TO THE ARBITRATION PROCEEDINGS.

Q3. IS THE PURPORTED COLLATERAL AGREEMENT AT ISSUE, ASSUMING ITS VERACITY, INVALID AND UNENFORCEABLE FOR LACK OF CONSIDERATION, FOR FATAL AMBIGUITIES, AND FOR BEING CONTRARY TO N.Y. LIMITED LIABILITY LAW AND THE DEFENDANT-RESPONDENT LLC'S OPERATING AGREEMENT?

A3. THE COURT BELOW ANSWERED IN THE AFFIRMATIVE IN PART AND DID NOT ADDRESS THE BALANCE OF THESE ARGUMENTS.

Q4. DID PLAINTIFF-APPELLANT PERFECT HIS INTEREST, IF ANY, SUCH AS IT MAY HAVE BEEN, IN AND TO THE DEFENDANT-RESPONDENT WINDSOR GROUP LLC?

A4. THE COURT BELOW DETERMINED THAT PLAINTIFF-APPELLANT DID NOT PERFECT HIS ALLEGED CLAIM OR SECURITY INTEREST.

COUNTER-STATEMENT OF FACTS

Background

Defendant-Respondent The New Windsor Group, LLC (hereinafter "Windsor Group") was formed in 2004 and its members were Defendant-Respondent Andrew Perkal and his wife Barbara Perkal. (R.541, 549-561). Windsor Group was created to purchase a shopping center located in New Windsor, New York and Defendant Andrew Perkal was the majority member, as well as the managing member. (R.549-561). The Operating Agreement was never amended. (R.541, ¶4).

Defaulting Defendant Joseph Klein, was not listed as a member in the Operating Agreement (R.549-561), however, Defendant-Respondent Perkal agreed that Klein would have a prospective interest in Windsor Group because Klein had insufficient funds to actually purchase an interest. (R.541, ¶5-6). In order to facilitate Klein eventually becoming a member, Perkal loaned Klein $650,000.00. (R.541, ¶5-6). Upon purchasing the shopping center, Windsor Group also took out a mortgage against the property. (R.541, ¶6, 563-581) Even though Klein was not a member of the Defendant-Respondent Windsor Group, he signed as a guarantee on the mortgage[1] as part of the deal to facilitate Klein eventually becoming a member of the LLC. (R.541-542). The agreement was that Klein would be solely responsible for the

[1] Defendant-Respondent Perkal signed the note and mortgage as "member" of Windsor Group, while Klein signed only as a "guarantor" on the guaranty's signature lines. (R.541, ¶6; 580).

mortgage and once he satisfied the mortgage and paid back the $650,000.00 loan from Defendant-Respondent Perkal, he would become a 50% member of Defendant-Respondent Windsor Group. (R.542).

However, Klein never satisfied the mortgage and he never repaid the $650,000.00 loan from Defendant-Respondent Perkal. (R.542). Defendant-Respondent Perkal, in turn, never granted membership status in Defendant-Respondent Windsor Group to Klein. (R.542). In order to resolve the issue of Klein's status and his failure to meet his financial obligations, Klein and Defendant-Respondent Perkal agreed to submit to arbitration, before a Jewish Rabbinical Court, in June 2008. (R.543, 600).

Arbitration

In June 2009, the Rabbinical Court held that Klein only had a prospective membership interest in Defendant-Respondent Windsor Group, which was conditioned on Klein paying the $650,000.00 loan and removing the $1.6 million mortgage. (R.543, 602-604). Pursuant to the Arbitration Award, Klein was ordered to repay the $650,000.00 loan to Defendant-Respondent Perkal and to remove the mortgage on the property within seven and thirty days, respectively. (R.543, 602-604). If Klein timely complied then he would effectively perfect and obtain a 50% membership interest in Defendant-Respondent Windsor Group; and if he failed, he

had nothing, and, moreover, was required to "transfer or cause to be transferred any and all interests he has or may have in ... the New Windsor property to [Defendant-Respondent] Perkal ... within 10 days of the date of default..." (R.543, 602-604).

Pursuant to CPLR Article 75, the Arbitration Award was confirmed on August 23, 2010 by New York State Supreme Court in Queens County (*Perkal v. Klein*, Index No. 29507/2009). (R.544, 608-610). The August 23, 2010 Decision and Order held that Klein "is enjoined and required to forthwith transfer and/or convey, or cause to be transferred and/or conveyed, to Petitioner Perkal or Petitioner Perkal's designees, any and all interests he has or may have in and to (i) the New Windsor Group, LLC, (ii) its real property (the New Windsor Commons) located at 436 Blooming Grove Turnpike, New Windsor, New York 12553..." (R.544, 608-610). The Order was entered in the Queens County Clerk's Office on August 25, 2010. (R.608-610). Notably, Klein never alleged in or during the arbitration or in the proceeding to confirm the arbitration that he had entered into a purported agreement with Plaintiff-Appellant or that he may have encumbered his prospective interest in Defendant-Respondent Windsor Group. (R.544, ¶15).

Klein failed to transfer his interests as directed by the August 23, 2010 Order and Defendant-Respondent Perkal was forced to bring a contempt motion on January 31, 2011. Queens Supreme Court found Klein in contempt of court and compelled him to transfer whatever interest he had in Defendant-Respondent Windsor Group to

Defendant-Respondent Perkal on pain of arrest. (R.544, ¶16-17; 612-620). Klein continued to intentionally delay the transfer of his unvested interest, forcing Defendant-Respondent Perkal to apply for an arrest warrant from Queens Supreme Court. A warrant for Klein's arrest was issued on January 26, 2012. (R.544, ¶18; 622). Finally, on April 26, 2012, Klein executed the documents necessary to transfer any interest he may have had in Defendant-Respondent Windsor Group to Defendant-Respondent Perkal. (R.544, ¶19; 624-639).

Case at Bar

On April 24, 2012, just two days before Klein finally executed the documents he was required to do since August 2010, Plaintiff-Appellant commenced the instant action in Orange County by the filing of a Summons and unverified Complaint. (R.35-50). It should be noted that the complaint was not served on any of the Defendant-Respondents until after April 26, 2012. (R.50). Plaintiff-Appellant claimed in this action, and now on appeal, that Klein had collateralized his prospective interest in Defendant-Respondent Windsor Group to Plaintiff-Appellant by a document dated December 21, 2007 (hereinafter the "Collateral Agreement" or "Security Agreement). (R.382-383).

Under the alleged Security Agreement, Klein had 24 months to repay an

indeterminate sum of money[2] to Plaintiff-Appellant. If he failed to do so, Plaintiff-Appellant could then enforce the Security Agreement and assert that Klein's

> "interests in the above mentioned entities shall be considered an additional security on the outstanding debt owed to Gmach Beth Joel - Joseph Behrend, and his option to redeem and buy back same will be extinguished forever, ..." (R.383, ¶ Seventh).

Having allegedly transferred and conveyed his future-interest in the entities as security for his indebtedness (if such a thing can even be legally accomplished) (R.382, ¶¶ First through Fifth), Klein in this agreement purports to then consent to an acceleration of sorts, of Appellant and non-party entity Gmach Beth Joel - Julius Behrend to foreclose and perfect whatever interest he was purportedly holding as security. This is confirmed by the closing paragraph "Ninth" of the Security Agreement, (R.383), which unequivocally clarifies the intent of the parties:

> "It is clearly understood that Gmach Beth Joel - Julius Behrend does not accept the transfer of the interests in the above mentioned Real Estate entities in lieu of the outstanding balance, but is purely accepting them as an additional security on the outstanding debt."

---

[2] The opening sentence of the Collateral Agreement asserts that "Whereas Joseph Klein hereby acknowledges that he owes the sum of two million two hundred and ninety thousand dollars ($2,290,000), plus any interest due and outstanding to Gmach Beth Joel - Julius Behrend." However, nowhere else in the document is "plus any interest due and outstanding" at the time of the agreement defined, nor is the debt, which was admittedly a consolidation of indeterminate debts (R.660-661, 678, 719-721), delineated as to amounts in default as of when and at what interest rate, nor even reference made to other documents of indebtedness. Nor does the document delineate how much is owed to the entity Gmach Beth Joel (for which Appellant signs as "Pres") and how much to the individual Appellant (for which Appellant signs separately and individually).

Regardless, no action was taken, no notice was given, and no paper was filed to evidence or otherwise record that any transfer of interest had taken place, from the date of the purported signing of the Security Agreement until the date the instant complaint was filed, five (5) years later. Plaintiff-Appellant unequivocally testified during his deposition and in his First Bill of Particulars that prior to commencing this action, he never contacted the Defendants-Respondents to assert his purported interest in Defendant-Respondent Windsor Group. (R. 751-752). Moreover, Plaintiff-Appellant admitted that he did not conduct an investigation nor make any due diligence efforts to ascertain if Klein even had a valid and subsisting membership interest in Defendant-Respondent Windsor Group, and if so, what the nature of that interest was. (R. 744-745).

Nevertheless, Plaintiff-Appellant asserts time and again that Klein, by signing the Security Agreement, conveyed an actual membership interest to him. Despite the characterization of the agreement in the second paragraph "as an additional security to secure the outstanding debt obligation," and the third paragraph indicating that the interests of Klein are accepted "as additional security," and again in the paragraph numbered "seventh" indicating that after 2 years of nonpayment the security could no longer be redeemed and would remain permanently as "additional security," and finally in the paragraph numbered "ninth" indicating that the interests of Klein, such as they were, were being transferred as "additional security" and not "in lieu of the

outstanding balance." (R.382-383). Additional security that Plaintiff-Appellant never took any action on, to perfect. Additional security that Plaintiff-Appellant now seeks to "harmonize" into a song of conveyance without consideration or release of debt.

The Defendants-Respondents filed and served an Answer with Crossclaims and Counterclaims. (R.51-62). The instant litigation was eventually transferred, on motion, from Orange County Supreme Court to Queens County Supreme Court and assigned the current Index Number of 16809/2013. (R.75-76). The parties conducted discovery, and upon its completion, moved and cross-moved for summary judgment. The Court below awarded summary judgment declaring that Plaintiff-Appellant owned no interest in Defendant-Respondent Windsor Group, and dismissing the balance of Plaintiff-Appellant's claims. (R.3-17). This appeal ensued.

ARGUMENT

POINT I

JOSEPH KLEIN WAS NOT A MEMBER OF THE NEW WINDSOR GROUP, LLC

On June 18, 2004, Defendant-Respondent Perkal and his wife Barbara Perkal executed an Operating Agreement for the organization and establishment of Defendant-Respondent The New Windsor Group, LLC. (R.549-561). Section 6.1 of the Agreement states that "The Members have contributed in the Company in exchange for their membership interests, the cash and other property as set forth in Schedule A, annexed hereto." (R.554). Schedule A to the Agreement lists only Defendant-Respondent Andrew Perkal and Barbara Perkal as members and lists their capital contributions each as "Cash," with Defendant-Respondent Perkal having a 51% interest and Barbara having a 49% interest in the LLC. (R.561). No other member is listed anywhere in the Operating Agreement and no amendment was ever made to add another member. (R.541, ¶3-4).

During his deposition, Defendant-Respondent Perkal was questioned extensively about the business arrangement he had with Joseph Klein regarding Defendant-Respondent Windsor Group and the property acquired and owned by Defendant-Respondent Windsor Group.(R.137-295). Defendant-Respondent Perkal testified that when Defendant-Respondent Windsor Group was formed, Klein did not

have the cash to make a capital contribution to be included as a member. (R.244-245). As consideration for his assistance in management of the property and his guaranty on a $1.6 million construction loan/mortgage, Defendant-Respondent Perkal gave Klein a prospective 50% interest in Defendant-Respondent Windsor Group. (R.244-247). After Klein would pay back a $650,000.00 personal loan to Defendant-Respondent Perkal and satisfy the mortgage/construction loan he would then become a member. (R.244-247). In other words there were conditions precedent that had to be met and satisfied before Klein had any membership interest in Defendant-Respondent New Windsor. Those conditions precedent were never met.

In *KSI Rockville, LLC v. Eichengrun*, 305 AD2d 681 (2d Dept. 2003), the managing member of the LLC, Eichengrun, was listed as a member in the LLC's operating agreement, but failed to contribute the requisite cash capital contribution. Eichengrun argued that his contribution was satisfied by his services to the LLC, but the Operating Agreement specifically called for cash or property capital contributions. *KSI Rockville, LLC, supra* at 682. Thus, Eichengrun was found to not have made his capital contribution and had no interest in the assets of the LLC or in any distribution of said assets. *KSI Rockville, LLC, supra* at 682.

In the case at bar, Joseph Klein is akin to the Defendant-Respondent in *KSI Rockville, LLC v. Eichengrun*, in that he has failed to make the requisite capital contribution to Defendant-Respondent Windsor Group as required under the

Operating Agreement by failing to pay back the $650,000 loan from Defendant-Respondent Perkal and by failing to satisfy the construction loan/mortgage.

Contrary to Plaintiff-Appellant's protestations, Defendant-Respondent Perkal's accepted position before the Rabbinical Court on arbitration was not that Klein was a then-member of the Windsor Group, but rather that he had not met his conditions precedent as Perkal's partner to effectuate and become a vested member in the limited liability company. In June 2009 the Rabbinical Court held that Klein had only a prospective membership interest in Defendant New Windsor Group that was conditioned on him paying back loans. (R.602-604).

Additionally, contrary to Plaintiff-Appellant's argument, the Rabbinical Court did not order or adjudge that Defendant-Respondent Perkal and Klein were "partners," instead the Rabbinical Court casually referred to the parties general relationship as a partnership. (R.602-604). The Rabbinical Court actually recognized that Klein was not a full fledged member of the LLC because the determination specifically stated that only when Klein paid Defendant-Respondent Perkal back the $650,000.00 and removed the first mortgage from the subject property would he [Klein] be "adjudged full and equal partners" in the subject property. (R.540, 603-604).

Klein, like the defendant in *KSI Rockville, LLC, supra*, had what the Internal Revenue Service (IRS) refers to as an "unvested capital interest" in the LLC, which

is nontransferable or is subject to a substantial risk of forfeiture. *See generally* IRC §83. An unvested capital interest, like Klein's, is subject to a substantial risk of forfeiture if the member's right to the vested interest is conditioned upon a future performance, like Klein's duty to pay back a personal loan and satisfy a mortgage. Generally a member with an unvested capital interest is not taxed on the receipt of a restricted or conditional interest in an LLC until the restriction lapses, i.e. the membership interest becomes vested, unless the member makes an IRC §83(b) election. An 83(b) election allows the member, like Klein, to treat the receipt of the unvested interest as an immediately taxable event, even though the interest is unvested.

However, IRS Revenue Procedure (Rev. Proc.) 2001-43 indicates that it may be unnecessary for the unvested member to actually make the 83(b) election. In effect the LLC and the unvested member are treated as if the unvested member made the election and valued the profits interest at zero. Rev. Proc. 2001-43 does require the allocation of the LLC's gains and losses to the unvested member from the date that unvested interest was granted and consistent tax treatment by the LLC and the unvested member. It should be noted that for tax purposes an LLC is treated as a partnership.

Plaintiff-Appellant claims (Brief at p.12-13) that Defendants-Respondents acknowledged Klein's membership interest on its tax returns, based on Plaintiff-

Appellant's allegation that Klein received a K-1 from the Defendant-Respondent Windsor Group LLC (R.388-393, uncertified schedule K-1 documents).

However, as explained in detail by Defendant-Respondent Perkal in his affidavit submitted below, and pursuant to what is permitted by the IRS, Klein was issued a K-1 each year he was an unvested member, by Defendant-Respondent Windsor Group, and Klein was attributed the profits and losses of the LLC based on his unvested/prospective interest, up until 2011 when the returns reflected the "zero-ing out" of his cancelled unvested interest pursuant to the arbitration award.(R.542-¶8, 545-¶20, 643).

Thus, it was respectfully submitted to the Court below that Defendants-Respondents' tax returns and the K-1s issued to Klein were not the "smoking gun" that Plaintiff-Appellant purported them to be. There was nothing improper about allocating Defendant-Respondent Windsor Group's profits and losses to Klein based on his unvested interest in the LLC.

Klein never had a vested interest in Defendant-Respondent Windsor Group, therefore, any agreement he made with Plaintiff-Appellant to assign this unvested interest to Plaintiff-Appellant is a nullity because an unvested interest is nontransferable and Klein never had anything to assign.

POINT II

PLAINTIFF-APPELLANT'S CLAIMS ARE BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

Assuming, *arguendo*, that Klein had some kind of unvested interest in Defendant-Respondent Windsor Group, all of his interest was extinguished by the Arbitration award issued on June 19, 2009, that directed Klein to transfer any and all of his interest in Defendant-Respondent Windsor Group to Defendant-Respondent Perkal. (R.602-604). The Collateral Agreement between Plaintiff-Appellant and Klein did not mature (by its own terms) until January 1, 2010. (R.382-383). Therefore, the doctrines of res judicata and collateral estoppel apply preventing Plaintiff-Appellant from now claiming that 1) Klein had an interest in Defendant-Respondent Windsor Group and 2) that Plaintiff-Appellant, together with non-party entity Gmach Beth Joel, now owns that interest after their Collateral Agreement matured on January 1, 2010.

It is well settled in New York that the doctrines of res judicata and collateral estoppel apply to arbitration awards with the same force and effect as they apply to judgments of courts. *Clemens v. Apple*, 65 NY2d 746 (1985); *Matter of American Ins. Co.,* 43 NY2d 184, 191 (1977); *Rembrandt Ind. v. Hodges Int.,* 38 NY2d 502 (1976); *Luppo v. Waldbaum, Inc.*, 131 AD2d 443, 445 (2d Dept. 1987). These doctrines even apply to arbitration awards not judicially confirmed. *In re Pinnacle Environmental*

Systems, Inc., 305 AD2d 897 (3d Dept. 2003); *McMenemy v. Goord*, 273 AD2d 665, 667 (3d Dept. 2000).

While one of the considerations when determining the applicability of res judicata and collateral estoppel is whether the opposing party had a full and fair opportunity to adjudicate its claims in the prior proceeding, a nonparty to the prior proceeding that was in privity to one or more of the parties is still subject to the doctrines of res judicata and collateral estoppel on the subsequent proceeding. *Green v. Santa Fe Indus.,* 70 NY2d 244, 253 (1987); *Watts v. Swiss Bank Corp.*, 27 NY2d 270, 277 (1970); *Slocum on Behalf of Nathan A. v. Joseph B.*, 183 AD2d 102 (3d Dept. 1992). As noted in *Green, supra* at 254, the concept of privity as employed in res judicata doctrine is not limited to "conventional privity." *see also Slocum, supra* at 104. Further, the Court of Appeals has also held that "collateral estoppel is a doctrine based on general notions of fairness involving a *practical inquiry* into the *realities of litigation*...it should never be rigidly or mechanically applied." *Matter of Halyalker v. Board of Regents of State of N.Y.*, 72 NY2d 261, 268-269 (1988) [emphasis added].

In the case at bar, Plaintiff-Appellant and Klein, as alleged by Plaintiff-Appellant in his complaint, were in privity of contract with one another, when they both allegedly executed the Collateral Agreement. (R.35-50). The Collateral Agreement, according to its own terms and assuming the veracity thereof, clearly did

not purport to transfer Klein's alleged interest in Defendant-Respondent Windsor Group upon its alleged execution on December 31, 2007 -- as the Ninth Paragraph to the Agreement states that Plaintiff-Appellant was not accepting transfer of Klein's interests in lieu of the debt owed to him by Klein, but is accepting Klein's interests "purely" as additional security. (R.383)[3]

In June 2008, Defendant-Respondent Perkal and Klein agreed to submit their dispute regarding Klein's alleged interest in Defendant-Respondent Windsor Group and his failure to fulfill his financial obligations to arbitration. (R.600). On June 19, 2009 the Rabbinical Court Igud Harabanim Rabbinical Court of the Rabbinical Alliance of America at 305 Church Avenue, Brooklyn, New York entered an arbitration decision and order that found Klein owed Defendant-Respondent Perkal $650,000.00 and that Klein was required to fulfill his obligation to satisfy the $1.6 million construction loan/mortgage on Defendant-Respondent New Windsor's property. (R.602). If Klein failed to satisfy all of his obligations within seven days, then Klein's future interest in the Defendant-Respondent Windsor Group remained unvested and he was ordered to transfer any remaining unvested interest he had in the

[3] To the extent that this Ninth Paragraph may conflict with any other provision within the Collateral Agreement, any ambiguity created by the conflicting provisions is to be construed against the drafter, which in this case is Plaintiff-Appellant. *See Uribe v. Merchants Bank of New York,* 91 NY2d 336, 341 (1998). Therefore, since the Collateral Agreement is clear that Plaintiff-Appellant was not accepting transfer of Klein's purported interest and that it was just an agreement for additional security, the intent of the parties to this Agreement can be found within the four corners of the agreement. *See Correnti v. Allstate Properties, LLC*, 38 AD3d 588 (2d Dept. 2007).

Windsor Group to Defendant-Respondent Perkal within ten days. (R.603-604). Klein never paid back the loan to Defendant-Respondent Perkal and never satisfied the $1.6 million construction loan/mortgage, thus, by operation of the Rabbinical Court Decision and Order, Klein was required to transfer any interest whatsoever he had in Defendant-Respondent Windsor Group on July 6, 2009. (R.602-604). At that point, Klein no longer had any interest, future, unvested, or otherwise, in Defendant-Respondent Windsor Group. [4]

Klein is certainly estopped pursuant to the doctrines of res judicata and collateral estoppel from asserting any interest or claim in Defendant-Respondent Windsor Group. Given the privity between Klein and Plaintiff-Appellant regarding the same interest and/or claim in Defendant-Respondent Windsor Group, Plaintiff-Appellant is hence also precluded from asserting any interest in and/or to Defendant-Respondent New Windsor Group. *Green, supra* at 253. Given Plaintiff-Appellant and Klein's relationship, their mutuality of interests and their alleged Collateral Agreement, Plaintiff-Appellant's interests were actually represented in the prior arbitration proceeding and as a non-party Plaintiff-Appellant previously had his "vicarious day in court." *See Slocum, supra* at 104.

Moreover, even giving every favorable inference to Plaintiff-Appellant,

[4] Moreover, per the Operating Agreement, as the arbitrators found that the loan was never paid and the mortgage was never satisfied, Klein at that point in fact had no interest and thus the language of the arbitration award "any interest he may have" is given proper effect of being a catch-all just in case.

according to the alleged Collateral Agreement itself (R.383), at paragraph ninth, Plaintiff was not accepting a transfer of Klein's interest in the LLC in lieu of payment, but was "purely accepting them as an additional security on the outstanding debt." No actual transfer occurred on December 31, 2007, when Klein allegedly signed this Collateral Agreement. A transfer, if any, and of whatever kind, would only occur 24 months later when Klein failed to pay back the over $2 million he allegedly owed Plaintiff-Appellant.

Plaintiff-Appellant contends that the purported Collateral Agreement at paragraph fifth conveys Klein's alleged interest in Defendant-Respondent Windsor Group when the Agreement was apparently executed on December 31, 2007. (R.382).

If Plaintiff-Appellant's interpretation of Paragraph fifth of the Collateral Agreement is correct, there is a conflict between Paragraph fifth and Paragraph ninth. When there are conflicting provisions within a contract that are unambiguous in their meaning, a latent ambiguity is created by the conflict. *See Hudson v. Allstate Ins. Co.*, 25 AD3d 654, 655 (2d Dept. 2006); *Rodriguez v. Nationwide Ins. Co.*, 97 AD2d 817 (2d Dept. 1983).

Whether an agreement is ambiguous is a question of law for the Court and ambiguity is determined by looking within the four corners of the document, not to outside sources. *See Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 (2009); *Kass v. Kass*, 91 NY2d 554, 566 (1998).

Additionally, it is well-settled in New York that when an agreement is ambiguous the ambiguity is resolved and the agreement construed strictly against those for whose benefit the provisions are reserved, i.e. the drafter of the agreement. *See Garvey v. Phoenix Preferred Acc. Ins. Co. of Detroit, Mich.*, 123 AD 106 (4th Dept. 1908); *Wilson v. English Co. v. New York Cent. R. Co.*, 240 AD 479, 483 (2d Dept. 1934); *Uribe v. Merchants Bank of New York*, 91 NY2d 336, 341 (1998).

In the case at bar, Plaintiff-Appellant drafted the Collateral Agreement and is the party for whose benefit the provisions of the Agreement are asserted, thus, the ambiguity created by the conflicting provisions in Paragraphs fifth and ninth should be construed against him. Assuming, *arguendo*, that the purported Collateral Agreement is valid, Klein only pledged any interest he had in Defendant-Respondent Windsor Group to Plaintiff-Appellant as additional security for monies Klein allegedly owed Plaintiff-Appellant, and no transfer of any interest took place on December 31, 2007.

Since under the alleged Collateral Agreement no transfer to Plaintiff-Appellant of Klein's interest, if any, in Defendant-Respondent Windsor Group could take place until January 1, 2010, no transfer actually took place because on January 1, 2010, Klein had already lost any interest he may have had pursuant to the June 19, 2009 Arbitration Award directing that any interest be transferred to Defendant Perkal. (R.602, 624-639). It is, after all, undisputed that notice, or related UCC filing, of

Plaintiff-Appellant's existence or interest was given to anyone other than Klein until the commencement of the instant action, five years later, in 2012. (R.751-752).

Thus, it is respectfully submitted that Plaintiff-Appellant is precluded from asserting any ownership and/or interest in or to Defendant-Respondent New Windsor Group, as any interest he may have claim to was previously adjudicated to belong to Defendant-Respondent Perkal, before even Plaintiff-Appellant's claim matured according to his own document, and the Decision of the Court below should be affirmed in its entirety.

POINT III

THE COLLATERAL AGREEMENT BETWEEN PLAINTIFF-APPELLANT AND JOSEPH KLEIN IS INVALID AND DOES NOT CONVEY ANY INTEREST TO PLAINTIFF-APPELLANT.

A. Lack of Consideration

It is a fundamental law of contracts, that in order for a contract to be binding and enforceable there must be valid consideration. *See Church v. Brown*, 21 NY 315 (1860); *Umscheid v. Simnacher,* 106 AD2d 380 (2d Dept. 1984). The general rule is that past consideration is not consideration and a promise supported by past consideration is unenforceable because the detriment did not induce the promise.

Umscheid, supra at 381; *Nassau County v. New York State Urban Development Corp.*, 48 Misc3d 248, 257-258 (Nassau Co. 2015).

In the case at bar the Collateral Agreement between Klein and Plaintiff-Appellant contains no consideration. (R.382-383). It was not an agreement whereby Plaintiff-Appellant agreed to loan Klein a sum certain amount of money in exchange for a security/collateral interest in Klein's interest in various entities. Instead, the Collateral Agreement just merely states that it is a "Memorandum of Understanding Between Joseph Klein and Gmach Beth Joel - Julius Behrend in Respect to Debts Joseph Klein and Some of His Entities Owe to Gmach Beth Joel - Julius Behrend and Transfer of Corporate Stock and Partnership Interests in Real Estate Entities." The amount listed in the Agreement of $2,290,000.00 appears to be a culmination of several loans that Klein allegedly owed or owes Plaintiff-Appellant and not one singular loan. (R.660-661, 678, 719-721). However, the Agreement fails to itemize the $2,290,000.00 or give dates when the money was allegedly extended to Klein or defaulted upon by Klein.

It is respectfully submitted that Plaintiff-Appellant had already received consideration for at least some of the $2,290,000.00 listed in the purported Collateral Agreement. In 2005 Klein and Plaintiff-Appellant entered into an arrangement whereby Plaintiff-Appellant was the owner of real property located in Spring Valley and which Klein desired to purchase the property, so Plaintiff-Appellant had loaned

Klein funds towards purchasing the property. (R.703-705). Plaintiff-Appellant testified at his deposition that this property was a vacant lot and was one of the properties that Klein failed to pay to him and what Klein owed him was part of the calculation of the $2,290,000.00. (R.660, 719-721). However, pursuant to their arrangement, Plaintiff-Appellant actually owned, and still owns, the property and was paid at least $57,000.00 by Klein. (R.720-721).

Plaintiff-Appellant further testified during his deposition that Klein purchased property with an address of 995 and 997 Broadway and Plaintiff-Appellant had loaned Klein $265,000 towards the purchase. (R.673, 678). Klein paid off over half of the $265,000 promissory note and that all that remained was a balance of $150,000.00. (R.678). Plaintiff-Appellant acknowledged that he had not yet foreclosed on this property, but that he could. (R.682). Again, it is respectfully submitted that Plaintiff-Appellant has received consideration for this debt allegedly owed by Klein and it should not have been included in the $2,290,000.00 calculation, as Plaintiff-Appellant does not get to double dip.

As a matter of fact, at his deposition Plaintiff-Appellant could not articulate at all how the calculation of $2,290,000.00 was made that was listed in the purported collateral agreement. Plaintiff-Appellant testified that this amount included monies owed by Klein for the following properties: $370,000.00 for 995-997 Broadway, $350,000.00 for Eckerson, $465,000.00 for Ewing, $275,000.00 for Madison Avenue,

and $205,000.00 for Washington. (R.660). However, this total equals only $1,665,000.00 not $2,290,000.00. The amount listed in the purported collateral agreement appears to have no reasonable basis and is just a figure estimated by Plaintiff-Appellant. Furthermore, it is clear that Klein paid Plaintiff-Appellant some of the money he [Klein] owed him, therefore, any monies already paid by Klein cannot be included in the calculation of the amount listed on the Collateral Agreement. Plaintiff-Appellant's lack of a basis for the amount in the Collateral Agreement and his deposition testimony calls into question the authenticity as well as the validity and enforceability of the Collateral Agreement itself. (R.382-383).

The bottom line is that the purported Collateral Agreement between Klein and Plaintiff-Appellant is suspect, not just on its face as to time, parties and signatures, but almost certainly is also questionable as to the amounts and the fact that there was simply no valid consideration given. Therefore, the Collateral Agreement, even if legitimate, is nevertheless unenforceable and the dismissal of the complaint by the Court below should be affirmed.

B. The Collateral Agreement is invalid under NY Limited Liability Company Law and the LLC's Operating Agreement

Section 603(a)(2) of the New York Limited Liability Company Law states:

> an assignment of a membership interest does not dissolve a limited liability company or entitle the assignee to participate in the

> management and affairs of the limited liability company or to become or exercise any rights or powers of a member;

Section 603(a)(3) states that except as provided in the operating agreement:

> the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled.

Section 603(a)(4) further states:

> ...Unless otherwise provided in the operating agreement, the pledge of, or the granting of a security interest, lien or other encumbrance in or against, any or all of the membership interest of a member shall not cause the member to cease to be a member or to cease to have the power to exercise any rights or powers of a member.

Section 604(a) entitled "Rights of assignee to become a member" states:

> Except as provided in the operating agreement, an assignee of a membership interest may not become a member without the vote or written consent of at least a majority in interest of the members, other than the member who assigned or propose to assign such membership interest.

Section 607(b) states that "no creditor or member shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company."

The Limited Liability Company Law divides a membership interest in an LLC into two parts: 1) the management, voting and membership rights or the non-economic interest; and 2) rights to distributions, profits and losses or the economic interest. *See* LLCL §603; *Greenstreet Financial, L.P. v. CS-Graces, LLC*, 2011 WL 7555324 (SDNY 2011). Unless otherwise provided for in the operating agreement only the economic interest is freely transferrable.

A plain reading of Sections 603, 604 and 607 of the Limited Liability Company Law makes it clear that, at best, a creditor may only obtain an interest in a member's share of the profits and losses of a limited liability company, ***not*** the membership interest itself. *See Born to Build, LLC v. Saleh*, 43 Misc3d 1213(A) (Nassau Co. 2014). In the case at bar, Plaintiff-Appellant is at best a creditor of Klein and assuming *arguendo* that Klein had interests in Defendant-Respondent Windsor Group to assign to a creditor, under the Limited Liability Company Law, Klein cannot assign the actual interest in the LLC. Therefore, Plaintiff-Appellant's causes of action for Declaratory Judgment that he has a 50% interest in Defendant-Respondent Windsor Group, for Specific Performance to assign 50% of the interest to Plaintiff-Appellant and for injunctive relief were properly dismissed. The aforementioned causes of action require a finding and/or declaration that Plaintiff-Appellant has a membership interest in Defendant-Respondent Windsor Group which is prohibited by the Limited Liability Company Law.

Additionally, assuming *arguendo* that Plaintiff-Appellant was transferred Klein's economic interest in the Defendant-Respondent Windsor Group as of January 1, 2010 when Klein defaulted on his Collateral Agreement with Plaintiff-Appellant, Plaintiff-Appellant would ***only*** be entitled to the profits and losses to which Klein would have been entitled. LLCL §603(a)(3); *see also In re Abbale*, 475 B.R. 334, 341 (EDNY 2012). As of July 6, 2009, when Klein was required to transfer any and all interest he had to Defendant-Respondent Perkal, Klein's right to profits and losses terminated. Thus, it is respectfully submitted that Plaintiff-Appellant was never entitled to any profits and losses and the remaining causes of action in the complaint as against the Defendants-Respondents were properly dismissed.

Furthermore, Plaintiff-Appellant and Klein never complied with Defendant-Respondent Windsor Group's Operating Agreement for the transfer of Klein's economic interest, if any, in the LLC to Plaintiff-Appellant. The Operating Agreement in section 9.1 explicitly requires the "unanimous consent of the other Members either in writing or at a meeting" before any Member may transfer his interest in the LLC. (R.556). It is undisputed that there was never any consent by the members of Defendant-Respondent Windsor Group for Klein's alleged transfer of his interest to Plaintiff-Appellant. As a matter of fact, Defendant-Respondent Perkal testified at his deposition that he had never previously met or even known of Plaintiff-Appellant until the instant litigation had commenced. (R.210-211, 264-265).

Thus, Defendant-Respondent Windsor Group and Defendant-Respondent Perkal need not recognize the arrangement between Plaintiff-Appellant and his debtor, Klein. *See In re Abbale*, *supra* at 340-341. Similar to the debtor in *In re Abbale, supra* at 341, Klein's informal alleged assignment of his economic interest in Defendant-Respondent Windsor Group existed only between he and Plaintiff-Appellant and did not invoke any obligation on the part of Defendant-Respondent Windsor Group or Defendant-Respondent Perkal to issue share certificates to Plaintiff-Appellant or to make payments to Plaintiff-Appellant directly with respect to his arrangement with Klein. *In re Abbale, supra* at 341.

Based on the foregoing, Plaintiff-Appellant's alleged Collateral Agreement with Klein is void under the New York Limited Liability Company Law and Defendant-Respondent Windsor Group's Operating Agreement. Therefore, it is respectfully submitted that Plaintiff-Appellant has no enforceable claims thereunder and decision of the Court below should be affirmed.

POINT IV

PLAINTIFF-APPELLANT NEVER PERFECTED HIS INTEREST, IF ANY, IN DEFENDANT-RESPONDENT WINDSOR GROUP LLC

Section 9-620 of the Uniform Commercial Code governs strict foreclosure, which is a procedure through which a secured creditor may retain its collateral in full or partial satisfaction of its claim. This remedy of retaining collateral is only available if the debtor consents to strict foreclosure *after* he has defaulted. A debtor cannot consent to strict foreclosure in anticipation of a future default at the time he enters into a transaction and creates the debt and security interest. *In re CBGB Holdings, LLC,* 439 B.R. 551, 554-555 (SDNY 2010). A purported secured party, like the Plaintiff-Appellant in the case at bar, must provide written notice to the defaulting debtor of an election to retain collateral in satisfaction of the debt. *Gilligan v. Briar Hill Lanes, Inc.*, 250 AD2d 809 (2d Dept. 1998).

Plaintiff-Appellant's claims for specific performance of a contract to which the Defendants-Respondents were not a party, is predicated upon the acceptance of the collateral offered by Klein. However, Plaintiff-Appellant has failed to comply with UCC §9-620, which requires a notice to Klein that Plaintiff-Appellant proposed to accept the collateral in full or partial satisfaction of Klein's obligations to Plaintiff-

Appellant, and that Klein either consented to the proposal or failed to timely respond.[5] In as much as Plaintiff-Appellant has failed to even allege that he so notified Klein, any claims here based upon Plaintiff-Appellant's acceptance of collateral in full or partial satisfaction of Klein's obligations must fail as a matter of law.

Additionally, it should be noted that it is without question that no prior notice or demand was served on or provided to the Defendants-Respondents prior to Plaintiff-Appellant's commencement of this action. (R.751-752). Plaintiff-Appellant's failure to provide the requisite written notice means that he never became the legal owner of Klein's interest in Defendant-Respondent Windsor Group, which was allegedly pledged by Klein as collateral for debt. *See Gilligan, supra*; UCC 9-620.

Furthermore, in order for a security interest to be valid and enforceable against the debtor and third parties, the debtor must sign a document describing the collateral, the security interest must attach, and it then must be perfected. *Lashua v. La Duke*, 272 AD2d 750, 751 (3d Dept. 2000). Perfection is completed by the filing of a UCC-1 statement. Plaintiff-Appellant never filed a UCC-1 statement. (R.750-752).

---

[5] Plaintiff-Appellant testified during his deposition that he never contacted anyone, that he never sent anyone any demands or notices, and that he did nothing until filing and commencing this lawsuit. (R.751-752). The Collateral Agreement itself, at paragraph seventh, specifically delineated that, upon a future default, after 24 months, Klein would lose his "option to redeem" and the interests would permanently become "additional security on the outstanding debt" - which at best gave Plaintiff-Appellant a right to foreclose *after* the default *if* he followed the procedures outlined in §9-620 of the U.C.C., which he admittedly did not do.

Thus, it is respectfully submitted that Plaintiff-Appellant never had possession of the collateral – Klein's alleged interest in Defendant-Respondent Windsor Group. Not only did Plaintiff-Appellant never perfect his interest/possession, but Klein had no stock certificates or any other indication of membership to Defendant-Respondent Windsor Group, nor did Klein produce any indicia of membership to Plaintiff-Appellant, up to and including, the Operating Agreement. *See* UCC §9-313. Plaintiff-Appellant admitted at his deposition that he conducted no due diligence regarding Klein and his purported interest in Defendant-Respondent New Windsor Group. R.737-738, 745).

Finally, it is respectfully submitted that Klein did not pledge a security interest in Defendant-Respondent Windsor Group to Plaintiff-Appellant. "An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this Article [UCC 8-103], or it is an investment company security." *See* UCC 8-103. The Operating Agreement for Defendant-Respondent Windsor Group in Section 1.1(I) provides that member's interest in the LLC may only be a security if it meets the criteria of UCC 8-103, otherwise a member's interest is deemed to be "a general intangible asset." (R.550). Contrary to the contention of Plaintiff-Appellant, by attempting to foreclose on the alleged security interest assigned to him by Klein, he does in fact ***not*** stand in the shoes of Klein. *See*

Greenstreet Financial, L.P., supra. No assignment of Klein's alleged membership interest occurred here, at best, only a "general intangible asset," that Klein no longer possessed after the arbitration award and decision ordering any interest held by Klein to be transferred to Defendant-Respondent Andrew Perkal. (R.602-604).

Assuming, *arguendo*, that the purported Collateral Agreement had any validity to it, Plaintiff-Appellant failed to perfect any interest he would have been entitled to in Defendant-Respondent Windsor Group and cannot now, after over five years of doing nothing, suddenly come forward with an alleged Collateral Agreement that cannot be and has not been verified by Klein, claiming to own fifty percent of Defendant-Respondent Windsor Group.

Plaintiff-Appellant argues, in Point II of his Brief on Appeal, that it matters not that he failed to perfect his purported security interest because Defendant-Respondent Perkal also failed to perfect his security interest. However, Plaintiff-Appellant declines to explain how Defendant-Respondent's undisputed membership interest in any way equates to the nebulous security interest created by Plaintiff-Appellant's secret Security Agreement. Nor does Plaintiff-Appellant address the fact that, in any event, whatever tenuous unvested future interest Klein ever actually had, it was lawfully transferred by Klein in 2012 by Order of the Supreme Court (R.608-639), before any notice of Plaintiff-Appellant's secret Security Agreement was given to any relevant party or recorded pursuant to any relevant Law. Defendant-Respondent

Perkal never claimed to own a security interest in Klein's interest, whatever it was. It was Klein that claimed to have a future unvested membership interest in the LLC. Plaintiff-Appellant claimed to have a security interest in Klein's unvested interest. To argue that it is Defendant Perkal, and not Plaintiff-Appellant, who failed to perfect a security interest is absurd and puts the facts upside down on its head.

CONCLUSION

For all the foregoing reasons, as well as the learned reasoning of the Court below in its decision on appeal herein, it is respectfully submitted that the decision and order of the Court below should be affirmed, in its entirety, the Plaintiff-Appellant be declared not to have any interest whatsoever in the Defendant-Respondent Windsor Group, the balance of the complaint remain dismissed, and the Court grant such other, further and different relief as it may deem to be just, proper and equitable.

Dated: November 8, 2017
Brooklyn, New York

Respectfully submitted,

David M. Berger, Esq.

TENENBAUM BERGER & SHIVERS LLP
Attorneys for Defendants-Respondents
The New Windsor Group, LLC
and Andrew Perkal
26 Court Street, Penthouse
Brooklyn, New York 11242
(718) 596-3800 ext. 26
db@tbsllp.com

PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer with Corel WordPerfect X7 word processor, using Times New Roman 14 point font, and for footnotes, 12 point font. The line spacing is double spaced except as allowed by the rules for quotations, footnotes and point headings, which are single spaced. According to the software, the portions of the brief included in a word count, pursuant to 22 NYCRR §670.10(a)(3), contain 7879 words.

Dated: November 8, 2017
Brooklyn, New York

David M. Berger, Esq.

TENENBAUM BERGER & SHIVERS LLP
Attorneys for Defendants-Respondents
The New Windsor Group, LLC
and Andrew Perkal
26 Court Street, Penthouse
Brooklyn, New York 11242
(718) 596-3800 ext. 26
db@tbsllp.com