SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

KRISTEN L. EIKENBERRY,

Plaintiff,

- against -

RICHARD JOSEPH LAMSON,

Defendant.

Index No. 516653/2020

Mot. Seq. 002

DEFENDANT RICHARD LAMSON'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT PURSUANT TO CPLR §§ 3211(a)(1) and (7)

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PRELIMINARY STATEMENT

Knowing she is not entitled to equitable distribution or spousal support from her former romantic (but unmarried) partner, plaintiff Kristen Eikenberry ("Plaintiff") manufactures several claims based on an alleged 1996 *oral* agreement to form a business "partnership" with Richard Lamson. Plaintiff seeks an accounting and distributions from that purported partnership, and includes claims for breach of fiduciary duty, breach of contract, fraudulent conveyance, unjust enrichment, and constructive trust. All of the claims in the Complaint stem from the purported oral partnership agreement, and all are facially defective. The Complaint must be dismissed for the simple reason that there was no partnership agreement.

First, even if a business relationship between the parties exists by virtue of Plaintiff being involved in certain companies, the blanket oral partnership agreement that Plaintiff alleges cannot exist as a matter of law. No court has ever certified the existence of an at will partnership trumping companies' corporate structures and the applicable laws governing parties' rights and obligations vis-à-vis those companies. The law is clear that a partnership may not exist where the business is conducted in corporate form. Even if it could, Plaintiff does not plausibly allege the parties' intent to enter into a partnership.

Second, the purported oral contract to form the partnership is unenforceable under the Statute of Frauds. Even if it was not, it fails under the doctrine of definiteness or certainty. A court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to. The purported agreement is completely amorphous, lacking any definite material terms. Further, it is limitless in scope and duration, and is evidenced by nothing but Plaintiff's incredible claim of a vague agreement to share all profits and losses equally for eternity.

Third, Plaintiff's breach of fiduciary duty claim fails because the only duties alleged are those purportedly owed to Plaintiff as a partner in the non-existent partnership. Plaintiff's breach

of fiduciary duty claim is thus not only duplicative of her breach of contract claim, but fails to allege a duty that was breached.

Fourth, Plaintiff's unjust enrichment claim fails for a similar reason—the damages sought therein are identical to her breach of contract and breach of fiduciary duty claims. Fifth, Plaintiff's fraudulent conveyance claim must be dismissed because it fails to allege actual fraud with specificity under CPLR 3016(b), and because Plaintiff is not a creditor.

Fifth, Plaintiff's request for a constructive trust on half of Mr. Lamson's personal assets, including his personal residences, is nothing more than a request for an equitable distribution that would require this Court to treat the parties' relationship as a marriage. This the law does not permit.

For the reasons that follow, Plaintiff's entire Complaint should be dismissed with prejudice, and discovery should be stayed pending the resolution of this motion.

FACTUAL BACKGROUND

A) The Parties' Relationship

Plaintiff and Mr. Lamson first met in 1995, but were only sporadically dating until 1998, when they first moved in together. (Compl. ¶ 17; Affidavit of Richard Lamson, dated November 3, 2020, hereinafter "Lamson Aff." ¶ 10, Dkt. No. 38 (the Lamson Aff is annexed at Exhibit A to the accompanying Affirmation of Martin Krezalek)). Thereafter, the parties maintained a romantic relationship for over twenty years. (Compl. ¶ 4; Lamson Aff." ¶ 10). During the course of their relationship, they had four children (ages 21, 19, 18 and 15). (Compl. ¶ 4; Lamson Aff." ¶ 10). The nature of parties' relationship was always as a family unit. Despite the fact that they lived together as a family for over twenty years, Plaintiff and Mr. Lamson never married. (Compl. ¶ 4; Lamson Aff. ¶ 11).

Plaintiff alleges that Mr. Lamson was simply running a demolition company, living in a one-bedroom rental, and not buying, building, or developing properties when they met. (*See* Compl. ¶¶ 18-19). This characterization of Mr. Lamson's stature at the time the parties met is false. By the time he met Plaintiff, Mr. Lamson had already been operating a profitable demolition company for over sixteen years. (Lamson Aff. ¶¶ 12-16). He had by then also become very successful in real estate development; i.e., buying, renovating and/or fully developing properties, and selling for a profit. (*Id*.) He lived on two acres in East Hampton in a spacious home that he built from the ground up. (*Id*. ¶ 16). While Mr. Lamson was also "renting" a duplex apartment in a West Village building, as the Complaint alleges (Compl. ¶ 18), Plaintiff omits that Mr. Lamson partially owned the building in which the apartment was located. (Lamson Aff. ¶ 16).

Despite having placed Plaintiff's name on certain corporate documents and accounts, under no circumstances did Mr. Lamson ever intend to enter into a "partnership agreement" with Plaintiff, and at no point did he tell Plaintiff that putting her name on the accounts or corporate documents would trump the corporate formalities of the companies associated with those accounts, or somehow make Plaintiff a "partner" in any of his businesses. (*Id*. ¶¶ 83, 94-100). There was never any agreement to split profits and losses from his businesses. (*Id*. ¶ 96). There was never any intent by either party to enter a business partnership together. (*Id*. ¶¶ 97-98). There was no partnership entity that filed or reported taxes as a partnership, and Plaintiff does not allege that she ever received partnership distributions or K-1 statements from any partnership entity. (*Id*. ¶¶ 99-100). There is no writing anywhere that refers to the "EL Partnership" or any "partnership" between Plaintiff and Mr. Lamson.

In 1996, the year that Plaintiff claims the partnership was formed, the parties were not in regular contact. (*Id*. ¶ 17-18, 95). Plaintiff was pregnant with another man's child and was

planning an imminent relocation to England. (*Id*. ¶¶ 18, 95). Plaintiff and Mr. Lamson did not resume contact until just before that child (the parties' first) was born in 1998. (*Id*. ¶¶ 18-19).

For the twenty-plus years that Plaintiff and Mr. Lamson were a family, Mr. Lamson worked tirelessly and bore 100% of the financial responsibilities of the family, providing a comfortable and luxurious life for Plaintiff and the couple's children. Plaintiff has never financially contributed to any of Mr. Lamson's properties, projects, or business endeavors. (Lamson Aff. ¶¶ 91, 104-108).

B) Mr. Lamson's Personal Homes

Mr. Lamson moved the family into a property that he purchased at 297 Pacific Street in downtown Brooklyn ("297 Pacific"). Contrary to Plaintiff's misrepresentation, 297 Pacific is not a business partnership asset—it is Mr. Lamson's primary home. (Lamson Aff. ¶ 23). He is the exclusive owner. (*Id*. ¶ 28; see also Krezalek Aff., Exhibit B). The home was not purchased with "EL Partnership funds" (Compl. ¶ 64), particularly since there is no such thing. Rather 297 Pacific was purchased with a $2.2 million-dollar mortgage that Mr. Lamson secured from a bank. (Lamson Aff. ¶ 24). Only Mr. Lamson's name has ever been on the mortgage and deed to 297 Pacific. (*Id*. ¶¶ 25, 28; *see also* Krezalek Aff., Ex B). Plaintiff did not make a single contribution towards the purchase of this property, nor was she responsible for the mortgage or any other expenses. (Lamson Aff. ¶¶ 25-26). Mr. Lamson alone renovated the property, adding 4,000 square feet of living space, by using earnings he made on properties that predated his relationship with Plaintiff. (Lamson Aff. ¶ 26).

Mr. Lamson also owns a farm in Delhi, New York called Birdsong Farm. (*Id*. ¶ 29). Like 297 Pacific, the farm is a not business partnership asset—it is Mr. Lamson's weekend home and has served as the family's weekend getaway. (Lamson Aff. ¶ 29). Birdsong was purchased around 1996 when its previous owner had fallen significantly behind on property taxes. (*Id*.). To purchase

the farm, Mr. Lamson paid the back taxes that accumulated under the previous owner. (*Id*.). Plaintiff did not contribute any funds towards the purchase of Birdsong Farm, nor did she contribute towards the significant back taxes that Mr. Lamson paid. (Lamson Aff. ¶ 30). Birdsong Farm is owned solely by Mr. Lamson, it is not beneficially owned by the nonexistent "EL Partnership." (Compl. ¶ 53; Lamson Aff. ¶ 30).

C) Mr. Lamson's Business Projects

Plaintiff's Complaint contains fundamental inaccuracies about several projects in Brooklyn—in particular, projects at Schermerhorn Street, Pacific Street Townhouses, and Atlantic Avenue in Brooklyn. (*See* Compl. ¶¶ 74-93). For instance, Plaintiff's Complaint misidentifies three distinct projects as being part of a phased three-lot development, which she calls "The Pacific and 330 Atlantic Developments." (Compl. ¶¶ 74-93). Other than their geographic proximity, the First, Second and Third "Lots" referenced in the Complaint (*Id*.) had nothing to do with each other. (Lamson Aff. ¶ 35).

The Schermerhorn Street deal, referred to in the Complaint as the "First Lot," was simply a land deal that Mr. Lamson arranged. (Compl. ¶ 77). Neither Mr. Lamson nor any of his companies were involved with the "design for the lot's development" of the Schermerhorn Street development contrary to Plaintiff's misrepresentation. (Lamson Aff. ¶ 36). In fact, neither Mr. Lamson or any of his companies ever had any interest in the project or received any compensation. (*Id*.). Plaintiff was not involved in the Schermerhorn Street land deal in any respect. (*Id*.).

The Pacific Street townhouses, located at 319, 321, 323, and 325 Pacific Street in Brooklyn (the "Pacific Street Townhouses"), consist of four luxury townhouses that Mr. Lamson developed and designed with Mr. Philip Mendlow and his team. (Lamson Aff. ¶ 38). While Mr. Mendlow obtained all of the financing to build the Pacific Street Townhouse, Mr. Lamson spent two years working six or seven days a week to construct the buildings, including during the summer months

when Plaintiff was vacationing at Mr. Lamson's New Jersey shore house. (Lamson Aff. ¶ 42). Plaintiff did not contribute any work whatsoever towards the construction of the Pacific Street Townhouses. (*Id*. ¶ 42). As a favor to Plaintiff and her brother, Mr. Lamson retained their friend's wife as a realtor for one of the townhouses, which realtor received a significant commission for the sale. (Lamson Aff. ¶ 44).

The 330 Atlantic Avenue Project is ongoing. (*Id*. ¶ 45). It consists of a development deal that Mr. Lamson entered into with Mr. Mendlow to construct a six-story mixed use building at 330 Atlantic Avenue in Brooklyn. (*Id*.). Mr. Lamson's role is to construct the building. (*Id*.). The company managing the construction work is 330 Atlantic Avenue Development LLC, a Wyoming LLC formed in June 2019. (*Id*. ¶ 85).

D) <u>The Parties' Break Up and the Present Situation</u>

In or about May 2020, Mr. Lamson and the children were concerned for Plaintiff's wellbeing and held a family intervention about her persistent alcohol and prescription drug abuse, which had been escalating over the last three years. (Lamson Aff. ¶ 52). After the intervention, Plaintiff enrolled in a $150,000 ten-week treatment program at the Dunes, a luxury addiction treatment center in East Hampton, New York. (*Id*. ¶ 52). Mr. Lamson paid for the program. (*Id*.). While she was supposed to have been undergoing rehabilitation, Plaintiff spent over $46,000 on clothes, luxury items, membership to a private racquet club, and several Venmo transfers (of over $1,000 each) to unidentified parties. (*Id*. ¶ 54). Plaintiff's fiscal irresponsibility and unpredictable behavior led Mr. Lamson to cancel Plaintiff's access to the credit card she was using, and which Mr. Lamson was paying. (*Id*. ¶ 55).

Upon completion of the rehabilitation program, Plaintiff asked Mr. Lamson to support her in renting what she called a "sober house," and whether he'd agree to pay her share of a $50,000 a month 7-bedroom luxury rental home in the Hamptons. (*Id*. ¶¶ 56-57). Mr. Lamson's fear that

the Hamptons home would not be conducive to her sobriety but, because of his desire to support Plaintiff in getting better, he agreed. (Lamson Aff. ¶ 58). Not to Mr. Lamson's surprise, he discovered that Plaintiff was still using prescription drugs and confronted her about it. (*Id*. ¶ 59). After that confrontation, relations broke down and Plaintiff stayed in the Hamptons house – she still has not returned to her family. (*Id*. ¶ 60).

Because Plaintiff and Mr. Lamson were never married, Plaintiff is not entitled to equitable distribution or spousal support as a matter of law. Recognizing as much, on September 4, 2020, Plaintiff commenced this action alleging claims based on a "business partnership" and seeking an accounting and distributions from that partnership, along with tag along claims for breach of fiduciary duty, breach of contract, fraudulent conveyance and constructive trust. Mr. Lamson moves to dismiss all of the claims because they are all based on a partnership that does not exist.

ARGUMENT

Where a complaint fails to state a cause of action as a matter of law, dismissal is warranted. CPLR 3211(a)(7). *See Sanders v. Winship*, 57 N.Y.2d 391, 394 (1982); *Bailey v. Gray, Siefert & Co.*, 300 A.D.2d 258, 258 (1st Dep't 2002). To survive dismissal, the complaint "must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 839 (1st Dep't 2011) (citations omitted). While the well plead allegations of fact are presumed to be true, the Court is not required to assume the truth of conclusory allegations or legal allegations. *See Ruggiero v. DePalo*, 153 A.D.3d 870, 871 (2d Dep't 2017) (stating "[b]are legal conclusions . . . are not presumed true") *citing 3 E. 54th St. New York, LLC v. Patriarch Partners, LLC*, 90 A.D.3d 418, 419 (1st Dep't 2011). "[C]onclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." *Barnes v. Hodge*, 118 A.D.3d 633 (1st Dep't 2014), *quoting Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

CPLR 3211(a)(1) provides an independent basis for dismissal at the pleading stage where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007) (internal quotations and citations omitted); *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004).

POINT I THE COMPLAINT DOES NOT PLAUSIBLY ALLEGE THE EXISTENCE OF A PARTNERSHIP AND THE CLAIM FOR AN ACCOUNTING MUST BE DISMISSED

"A partnership is an association of two or more persons to carry on as co-owners a business for profit." N.Y. Partnership Law § 10 (McKinney). The Complaint does not allege the existence of a written partnership agreement. (Compl. ¶¶ 20-31). A party like Plaintiff, claiming the existence of an oral partnership, "bears the burden of proving the indicia of such a relationship." *F & K Supply, Inc. v. Willowbrook Dev. Co.*, 304 A.D.2d 918, 920 (3d Dep't 2003). Where there is no written agreement, "the relevant inquiry is whether [the plaintiff] has averred specific facts, pled with particularity, demonstrating the existence of a partnership in fact." *Ardis Health, LLC v. Nankivell*, No. 11 CIV. 5013 NRB, 2012 WL 5290326, at *5 (S.D.N.Y. Oct. 23, 2012) (emphasis added) (*citing Czernicki v. Lawniczak*, 74 A.D.3d 1121, 1125 (2d Dep't 2010).

Among relevant factors are the parties' intent to enter a partnership; agreement to share profits and losses; joint control and management of the business; contribution of capital; and whether the parties combined their property, skill, or knowledge. *Hammond v. Smith*, 151 A.D.3d 1896, 1897 (4th Dep't 2017); *Fasolo v. Scarafile*, 120 A.D.3d 929, 930 (4th Dep't 2014); *Brodsky v. Stadlen*, 138 A.D.2d 662, 663 (2d Dep't 1988).

Here, the documentary evidence (and the admissions in the Complaint) show that, to the extent the parties had a business relationship, they did not intend to conduct business as a partnership, but instead chose to operate under various corporate forms. For this reason alone, the Complaint must be dismissed. It is black letter law that a partnership cannot exist in the face of

demonstrable intent to operate as corporate entities. In any event, Plaintiff fails to plead any specific facts to allege the existence of a partnership.

A) Plaintiff Alleges the Existence of Corporate Structures, Not a Partnership

Plaintiff's most critical allegation—her claim that the parties entered into an at will 50/50 partnership in 1996—is not credible. The law is clear that "calling an organization a partnership does not make it one." *Kidz Cloz, Inc. v. Officially for Kids, Inc.*, 320 F. Supp. 2d 164, 174 (S.D.N.Y. 2004) (*quoting Kosower v. Gutowitz*, 2001 WL 1488440, at *6 (S.D.N.Y. Nov. 21, 2001)); *Brodsky*, 138 A.D.2d at 663 (rejecting general manager's allegations of the existence of a partnership agreement where business was conducted through a production company called Diana Enterprises). The allegation of a partnership is flatly belied by the documentary evidence showing that varying corporate structures (other than a partnership) were used to govern the parties' legal rights and liabilities. *Ullmann v. Norma Kamali, Inc.*, 207 A.D.2d 691, 692 (1st Dep't 1994) (the Court need not accept as true factual and legal conclusions that are "either inherently incredible or flatly contradicted by documentary evidence.").

There is no dispute that each of the entities to which Plaintiff claims a right (*330 Atlantic Ave Development LLC, Easy Wind L.L.C., Fairmont Industries Supply, LLC, Fairmont Industries Inc., HTHP Leasing LLC, and Two Route 17 South LLC*) is an independent legal entity taking the form of either a limited liability company or corporation. (Compl. ¶¶ 37-42). There is also no dispute that Mr. Lamson's and Plaintiff's business activities (to the extent there were any) were carried out through those entities. Plaintiff cannot plausibly allege that the "EL Partnership" formed any of, 330 Atlantic Ave Development LLC, Easy Wind L.L.C., Fairmont Industries Supply, LLC, Fairmont Industries Inc., HTHP Leasing LLC, or Two Route 17 South LLC.[1] Nor

[1] For instance, Plaintiff claims that 330 Atlantic Ave Development LLC was formed by the "EL Partnership." (Compl. ¶ 33). But the original Articles of Organization list "Kristen Eikenberry" (not something called the "EL Partnership")

can Plaintiff allege that the alleged EL Partnership contracted with other parties, or otherwise conducted business with other parties, as the EL Partnership.

Because a partnership cannot exist where the business is conducted in corporate form, and parties may not be partners between themselves while using the corporate shield, Mr. Lamson's and Plaintiff's business relationship (to the extent one existed) cannot be a partnership as a matter of law. *Weisman v. Awnair Corp. of Am.*, 3 N.Y.2d 444, 449, 144 N.E.2d 415, 165 N.Y.S.2d 745 (1957) ("When parties adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders."); *Jacobs v. Baum*, No. 1:07-CV-167, 2008 WL 819037, at *6 (N.D.N.Y. Mar. 24, 2008) (dismissing complaint because ". . . the fact that Jacobs shielded himself from risk of individual loss by contracting solely in the corporate form would appear to preclude any inference that he undertook individually to share the burden of the losses of the venture."). *Nasso v. Seagal*, 263 F. Supp. 2d 596, 618 (E.D.N.Y. 2003) ("when parties form a corporation to carry out the business of the partnership, they cease to be partners"); *Weiner v. Hoffinger, Friedland, Dobrish & Stern, P.C.*, 298 A.D.2d 453, 455, 749 N.Y.S.2d 255 (2d Dep't 2002) ("It is well established that a partnership may not exist where the business is conducted in corporate form, and the parties may not be partners between themselves while using the corporate shield.") (emphasis added).

Plaintiff's rights and obligations, if any, with respect to 330 Atlantic Ave Development LLC, Easy Wind L.L.C., Fairmont Industries Supply, LLC, Fairmont Industries Inc., HTHP

as the organizer. (Eikenberry Aff., Ex. A, Dkt. No. 16). Similarly, HTHP Leasing LLC's certificate of formation lists Kristen Eikenberry, not the EL Partnership, as the member and manager. (Reply Eikenberry Aff., Ex. Z, Dkt. No. 52). All of the entities that Plaintiff claims a right to are summarized on Exhibit P to Plaintiff's Reply Affidavit. (Reply Eikenberry Aff., Ex. P, Dkt. No. 42). Not a single entry includes a reference to something called the EL Partnership. (*Id.*).

Leasing LLC, or Two Route 17 South LLC (e.g., profit, distributions, ownership of assets, etc.) would necessarily flow from the nature of her *association with each specific corporate entity*—not from a blanket partnership agreement with vague and unspecified terms allegedly covering "all projects" for eternity (Compl. ¶ 93). In particular, limited liability companies are governed by the companies' operating agreements and the LLC Acts enacted by the States where the entities were formed. It would be anathema to the well-developed LLC laws (and counter to the intent of the parties as memorialized in written LLC agreements) to replace the parties' rights and obligations under the agreements and LLC Acts with rights and obligations flowing from a purported oral partnership agreement.[2] *See Union St. Tower, LLC v. First Am. Title Co.*, 161 A.D.3d 919, 921 (2d Dep't 2018) (title insurance policy containing entirety of terms between parties barred the plaintiff's claim of an oral agreement); *Cobalt Partners, L.P. v. GSC Capital Corp.*, 97 A.D.3d 35, 41–42 (1st Dep't 2012) (". . . it was also proper to dismiss the claim alleging breach of oral contract because the alleged oral agreement contradicts terms in the written [subscription agreement]").

B) Plaintiff Fails to Meet the Requisite Elements of a Partnership

The claim for a partnership accounting should be dismissed for the additional reason that Plaintiff fails to satisfy the requisite elements of a partnership, including intent to enter a

[2] For example, 330 Atlantic Ave Development LLC is a Wyoming LLC, which, under Wyoming law is "separate and distinct from [its] owners" and/or members. *GreenHunter Energy, Inc. v. W. Ecosystems Tech., Inc.*, 2014 WY 144, ¶ 12, 337 P.3d 454, 459 (Wyo. 2014); Wyo. Stat. Ann. § 17-29-104 (West). Relations among the members of a Wyoming LLC are governed by the LLC's operating agreement (Wyo. Stat. Ann. § 17-29-110 (a)(i) (West)), which covers, inter alia, distributions to members (*Id*. at (a)(vii)). Similarly, Plaintiff's rights to distributions or other monies due from HTHP Leasing LLC and Two Route 17 South LLC (each a New Jersey LLC) must be analyzed under New Jersey's Revised Uniform Limited Liability Company Act ("RULLCA"), New Jersey's second-generation LLC statute. In enacting RULLCA, the New Jersey legislature codified over two decades of legal developments in the field of LLC law and provided a series of default rules that govern the relations among LLC members in situations they have not addressed in their operating agreement. N.J. Stat. Ann. § 42:2C-1 (West). Plaintiff also alleges that she is a shareholder of Fairmont Industries, Inc. (Compl. ¶ 38). As the alleged shareholder of a New York corporation, Plaintiff has rights under New York law, including statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid purpose. *Ret. Plan for Gen. Employees of City of N. Miami Beach v. McGraw-Hill Companies, Inc.*, 120 A.D.3d 1052, 1055 (1st Dep't 2014). None of these inquiries are properly before this Court in this faux-partnership action filed against Mr. Lamson in his individual capacity.

partnership, sharing of profits and losses, and contribution of capital. The absence of any one element "is fatal." *Kidz Cloz*, 320 F. Supp. 2d at 171. Here, none of the typical indicia of a partnership are present.

There is no writing anywhere that refers to the "EL Partnership" or any "partnership" between Plaintiff and Mr. Lamson. In fact, in over twenty-plus years of the alleged existence of the partnership, there is no reference anywhere (not in emails or communications, not in corporate documents, not in contracts with third-parties) that references a "partnership" between Mr. Lamson and Plaintiff. What's more, the purported partnership never reported income as a partnership and there are no partnership tax returns; the purported partnership did not have a business name or bank account (on the contrary, each entity that is alleged to be part of the partnership is a separate legal entity governed by an operating agreement and/or state laws); there were no partnership assets; there is no partnership real property; Plaintiff made no capital contributions; there is no indication that Plaintiff ever shared in any profits or losses of a purported partnership.

1) No Intent

Intent can be found in the parties' preliminary negotiations. *Hammond*, 151 A.D.3d at 1897; *Boyarsky v Froccaro*, 131 AD2d 710, 713 (2d Dep't 1987). Here, in conclusory fashion, the Complaint alleges that the parties formed a 50/50 partnership in 1996, almost immediately upon meeting. (Compl. ¶¶ 21-22). But the Complaint does not allege, much less describe, any preliminary negotiations between the parties about the terms or scope of their alleged partnership agreement. (Compl. ¶¶ 20-23). Nor does Plaintiff allege the existence of documents or communications reflecting or memorializing such negotiations. (*Id*.).

2) No Sharing of Profits and Losses

As the New York Court of Appeals has explained, "[a]n indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses." *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 317, 175 N.Y.S.2d 1 (1958); *see also*, *e.g.*, *Dinaco, Inc. v. Time Warner, Inc.*, 346 F.3d 64, 68 (2d Cir. 2003) (following *Steinbeck* and dismissing where there was no agreement to share losses); *Community Cap. Bank v. Fischer & Yanowitz*, 47 A.D.3d 667, 668 (2d Dep't 2008) (same); *In re Alpert*, 37 A.D.3d 187, 188 (1st Dep't 2007) (affirming dismissal where there was no agreement to share profits and losses); *Prince v. O'Brien*, 256 A.D.2d 208, 212, 683 N.Y.S.2d 504 (1st Dep't 1998) (affirming dismissal where "there was no evidence that they agreed to share losses, which is an 'essential element' of a partnership").

Plaintiff's Complaint includes a single conclusory allegation that the parties agreed in 1996 "*that they would share equally in the profits and losses of their business endeavors*." (Compl. ¶ 22). But Plaintiff does not define "business endeavors," or even attempt to articulate which business endeavors were to be subject to profit and loss sharing. The Complaint does not provide whether the purported agreement encompassed sharing profits or losses from Mr. Lamson's investments *preceding* the parties' purported partnership. Nor does it provide whether profits or losses from Mr. Lamson's projects or investments (if any) occurring *after* the parties' relationship (which ended in May 2020) were to be shared equally. Even assuming that the purported agreement to share profits or losses only pertained to the time frame between 1996 and the couple's breakup May 2020, the Complaint does not explain whether the purported agreement applied to *every single* "business endeavor" by either party, only mutual endeavors, or only to business endeavors bearing certain characteristics or meeting some minimum criteria.

Moreover, Plaintiff does not allege that she ever actually received a share of profits from the alleged partnership, or that she actually shared in any of its losses. (*See* Compl., generally). Plaintiff does not allege that the alleged partnership filed partnership tax returns, nor does she allege the existence of K-1 tax statements listing income received from the alleged partnership. *See Rakosi v. Sidney Rubell Co., LLC*, 155 A.D.3d 564, 565 (1st Dep't 2017) (K–1 forms are relevant to the inquiry of whether a partnership exists); *Nanbar Realty Corp. v. Pater Realty Co.*, 242 A.D.2d 208, 210 (1st Dep't 1997) (partnerships' K–1 forms sufficient to demonstrate income from the partnership).

Plaintiff's bare conclusory allegation that the parties agreed to share equally in profits and losses—without articulating the nature or scope of the mutual promise or undertaking to share the burden of the losses—is not enough. As the Second Department has confirmed, failing to plead this indispensable element of a partnership dooms a Complaint to be dismissed

> Contrary to the Supreme Court's determination, the amended complaint and the documents submitted in opposition to the motion to dismiss failed to set forth a legally cognizable cause of action based on an oral partnership/joint venture agreement . . . [v]iewing the facts as alleged in the record as true, and affording the plaintiff every favorable inference, the plaintiff failed to plead a mutual promise or undertaking to share the burden of the losses of the alleged enterprise, an indispensable element of a partnership or joint venture . . . [t]hus, the motion to dismiss the amended complaint should have been granted pursuant to CPLR 3211(a)(7)

Latture v. Smith, 1 A.D.3d 408, 408–09 (2d Dep't 2003); *see also Ardis Health, LLC*, 2012 WL 5290326, at *6 ("Here, the pleadings are bereft of any allegation that the parties agreed to share losses. Without this 'indispensable' ingredient, Nankivell cannot plead the existence of a partnership in fact"); *Jacobs*, 2008 WL 819037, at *6 ("Under New York law, where a plaintiff fails to plead "a mutual promise or undertaking to share the burden of the losses of the alleged enterprise," a cause of action alleging a joint venture should be dismissed.").

3) Plaintiff Contributed No Capital

The failure of a party to contribute capital is "strongly indicative that no partnership exists." *Brodsky*, 138 A.D.2d at 663; *Hammond*, 151 A.D.3d at 1899 ("documentary evidence and plaintiff's own deposition testimony establish that plaintiff made no capital contributions and did not share in the business venture's losses"); *Fasolo v. Scarafile*, 120 A.D.3d 929 (4th Dep't 2014) (facts "strongly suggest[ed] that no partnership existed" where parties did not file partnership tax returns, alleged partnership did not have a business name or bank account, and there were no partnership assets or capital contributions). Here, Plaintiff does not allege that she contributed any capital to the alleged partnership, offering only one vague and conclusory allegation that "[t]hroughout the years, the partners contributed time, skills, and capital to the EL Partnership, often using Partnership profits to reinvest in additional development projects." (Compl. ¶ 25). Plaintiff does not allege any specific amount of capital that she provided, when it was provided, or towards what project.

In sum, Plaintiff's allegations of the existence of a partnership are baseless and cannot support any of her causes of action.[3]

POINT II
PLAINTIFF FAILS TO ALLEGE BREACH OF CONTRACT

A) The Breach of Contract Claim is Barred by the Statute of Frauds

[3] *See also F & K Supply, Inc.*, 304 A.D.2d at 920–21 (no partnership where defendant made all critical decisions and directed the construction of project, purported partnership never reported income as a partnership, purported partnership took the corporate structure of a sole proprietorship, defendant was alone the title owner of the real property where the project was developed, plaintiff devoted time to working on the project but did not make any capital contributions and there was no indication that he ever shared profits or agreed to share losses); *Cleland v. Thirion*, 268 A.D.2d 842, 844 (3d Dep't 2000) (defendant former girlfriend failed to establish existence of partnership in defendant's glassblowing business, even though she performed services and made financial contributions to business, where studio property was owned solely by defendant and plaintiff made no contribution to its purchase nor assumed responsibility for mortgage payments thereon, former girlfriend was never placed on certificate of doing business as partners, and there was never any sharing of profits or losses between the parties).

New York's Statute of Frauds requires all agreements to be in writing if "[b]y its terms is not to be performed within one year from the making thereof." N.Y. Gen. Oblig. Law § 5–701. The critical question for statute of frauds purposes is whether there is any possibility that the contract could have been performed within one year or completed before the end of a lifetime. *Diaz v. Local 338 of Retail, Wholesale, Dep't Store Union, United Food & Commercial Workers*, No. CV 13-7187 SJF SIL, 2014 WL 4364819, at *7 (E.D.N.Y. Aug. 20, 2014), *report and recommendation adopted sub nom. Diaz v. Local 338 of the Retail, Wholesale Dep't Store Union, United Food & Commercial Workers*, No. 13-CV-7187 SJF SIL, 2014 WL 5502316 (E.D.N.Y. Oct. 28, 2014). The Court of Appeals has explained that an oral agreement, which by its own terms must continue for more than a year unless terminated by its breach, is void under the Statute of Frauds. *D & N Boening, Inc. v. Kirsch Beverages, Inc.,* 63 N.Y.2d 449, 456-57, 483 N.Y.S.2d 164, 472 N.E.2d 992 (1984) (agreements "terminable within one year only upon a breach by one of the parties" fall within Statute of Frauds); *see also Milton Abeles, Inc. v. Farmers Pride, Inc.*, No. 03-CV-6111 DLI WDW, 2007 WL 2028069, at *11 (E.D.N.Y. July 11, 2007) (an agreement calling for performance of an indefinite duration and could only be terminated within one year by its breach during that period fell within the Statute of Frauds and was void).

Here, by its alleged terms, Plaintiff's purported agreement was not to be performed within one year from the making thereof. Plaintiff alleges that the agreement was entered into in 1996 and applied to the parties' acquiring and renovating properties or developing them into residences over a twenty-plus year span. (Compl. ¶¶ 2, 21).[4] As alleged, the agreement was of infinite duration and could only have been terminated by breach. (*Id*. ¶¶ 21-31). Indeed, Plaintiff does

[4] While Plaintiff alleges the parties entered into an "at-will business partnership" (Compl. ¶ 1), as demonstrated above, there was no indicia of partnership. Thus, to the extent Plaintiff alleges an agreement to be compensated for services she allegedly provided during the parties' relationship, Plaintiff's claims arise out of something other than a partnership agreement and the alleged agreement would be subject to the Statute of Frauds.

not allege that either party could have terminated the purported oral partnership agreement within one year. (*Id*.). The oral agreement is thus barred by the Statute of Frauds.

> Courts have found oral agreements with seemingly indefinite durations capable of being 'performed' within a year, but only where one party made a specific representation that would allow that party to terminate the agreement by discontinuing the activities upon which the agreement was conditioned

Milton Abeles, Inc. v. Farmers Pride, Inc., No. 03-CV-6111 DLI WDW, 2007 WL 2028069, at *11 (E.D.N.Y. July 11, 2007); *George Burke Co. v. Intermetro Indus. Corp.*, 268 A.D.2d 310, 310 (1st Dep't 2000) (". . . oral agreement alleged by plaintiff, under which he was to become and indefinitely remain defendant's exclusive distributor for a certain product, could not be performed within a year, and is therefore void under the Statute of Frauds (General Obligations Law § 5–701[a][1]").

B) The Claim is Barred by the UCC 8–319 Statute of Frauds

As discussed above, Plaintiff's purported agreement is not really a "partnership," but instead pertains to interests that Plaintiff claims to hold in certain companies, including several corporations (Compl. ¶¶ 32, 38). Article 8 of the Uniform Commercial Code includes its own Statute of Frauds which renders unenforceable contracts for transfers of "securities,"[5] which expressly includes shares or similar equity interests issued by a corporation. § 8-319. Statute of Frauds., Unif.Commercial Code § 8-319; *Fallon v. McKeon*, 230 A.D.2d 629, 629 (1st Dep't 1996) ("The complaint was properly dismissed as the oral partnership agreement alleged by plaintiff, purportedly entitling him to 50% of the stock of defendant KFS Service Inc., is void and unenforceable under the Statute of Frauds contained in UCC 8–319"); *Hart v. Windjammer Barefoot Cruises Ltd.*, 220 A.D.2d 252, 252 (1st Dep't 1995) (alleged oral contract involving an

[5] "A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security." Unif. Commercial Code § 8-103(a).

exchange of plaintiff's services for a share of defendant's corporate stock is barred by the Statute of Frauds contained in UCC 8–319); *Scarpinato v. Nat'l Patent Dev. Corp.*, 75 Misc. 2d 94, 97, 347 N.Y.S.2d 623, 625 (N.Y. Sup. Ct. Nassau Co. 1973) (plaintiffs' claim of oral agreement failed because oral agreement containing an option to purchase stock was unenforceable under UCC 8–319).

Plaintiff's alleged contract would operate to give Plaintiff shares in certain corporations in return for her services. The contract is thus unenforceable under the UCC 8–319 Statute of Frauds.

C) The Alleged Oral Agreement Fails Under the Doctrine of Definiteness

Even if Plaintiff's breach of contract claim was not barred by the Statute of Frauds, it must nonetheless be dismissed because the terms of the alleged agreement are not reasonably certain. "The doctrine of definiteness or certainty is well established in contract law. In short, it means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to." *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91, 575 N.E.2d 104, 105 (1991); *Total Telcom Grp. Corp. v. Kendal on Hudson*, 157 A.D.3d 746, 747 (2d Dep't 2018) ("[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract"); *Carione v. Hickey*, 133 A.D.3d 811, 811 (2d Dep't 2015) (same). As with any contract, an oral agreement is not enforceable unless there is "a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Kelly v. Bensen*, 151 A.D.3d 1312, 1313 (3d Dep't 2017). Here, the Complaint fails to adequately articulate the terms of the contract, rendering the oral agreement "too vague to be capable of enforcement." *See Hart*, 220 A.D.2d at 253

Plaintiff does not describe in any detail the material terms of the alleged contract. In particular, Plaintiff does not explain exactly what consideration she was to provide in return for a 50% share of profits. Plaintiff's only allegation is that she would provide "*conceptual, exterior*

and interior design services" in return for an equal share in the profits and losses of "our business." (Compl. ¶ 21). But Plaintiff does not explain: *what sort* of conceptual, exterior and interior design services she was to provide; *how often* she would provide those services; *to what degree*; or how the parties were to determine if her end of the bargain was kept or broken (i.e., whether services satisfying Plaintiff's vague description of her consideration were actually provided). Nor does Plaintiff define the contract's duration or scope, boldly claiming that it applies to an equal "*share in the profits and losses of*" all projects. (Compl. ¶ 93). Nor does she explain how the alleged 50/50 profits arrangement would apply in the face of an operating agreement that conflicted with the notion of Plaintiff receiving any profits or distributions, much less 50%.

Such an indefinite, vague, and ambiguous oral contract, which fails to articulate the parties' agreement on the most basic terms—including defining the parties' obligations, or providing a methodology, objective extrinsic event, condition, or standard for determining whether such obligation was provided—cannot be enforceable. *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 587 (2d Cir. 1987) (applying New York law) ("if there is no basis or standard for deciding whether the agreement had been kept or broken, or to fashion a remedy, and no means by which such terms may be made certain, then there is no enforceable contract."); *Huntington Dental & Med. Co. v. Minnesota Min. & Mfg. Co.*, No. 95 CIV. 10959 (JFK), 1998 WL 60954, at *3 (S.D.N.Y. Feb. 13, 1998) (plaintiff failed to state a claim upon which relief may be granted where it failed to articulate adequately the existence and terms of the oral agreement); *Total Telcom Grp. Corp.*, 157 A.D.3d at 747 (agreement unenforceable where there was no standard by which defendant's consideration could be determined); *Carione*, 133 A.D.3d at 811 (oral agreement was too vague and indefinite to constitute an enforceable contract that was "reasonably certain in its material terms"); *Mercado v. Schwartz*, 63 Misc. 3d 362, 377, 92 N.Y.S.3d 582, 594 (N.Y. Sup.

Ct. Suffolk Co. 2019) (vague and ambiguous agreement was unenforceable); *see also U.K. Cable Ventures, Inc. v. Bell Atl. Investments*, 232 A.D.2d 294, 295 (1st Dep't 1996); *Brands v. Urban*, 182 A.D.2d 287, 290 (2d Dep't 1992) (contract unenforceable where there was no meeting of the minds between the parties on a material element of the contract).

POINT III
THE COMPLAINT FAILS TO ALLEGE BREACH OF FIDUCIARY DUTY

The entirety of Plaintiff's claim for breach of fiduciary duty rests upon the supposed existence of an oral agreement to make Plaintiff "a partner in the EL Partnership." (Compl. ¶ 134). Notably, Plaintiff does not allege that Mr. Lamson was ever charged with a duty to act on her behalf, does not allege any specific prior business dealings entitling her to claim Mr. Lamson as her fiduciary, and does not allege anything to impose such a duty upon Mr. Lamson prior to the supposed oral agreement at issue. The only duties alleged to be chargeable to Mr. Lamson are his "duties owed to the EL Partnership and to [Plaintiff]" which derive from the alleged existence of this supposed oral agreement to form the EL Partnership. (Compl. ¶¶ 134-37). Thus, Plaintiffs claim for breach of fiduciary duty is merely duplicative of her allegations of breach of contract and must be dismissed for the same failure to allege a writing. *Sheehy v. Clifford Chance Rogers & Wells LLP*, 3 N.Y.3d 554, 558-59 (2004) (denying claims by law partner of breach of contract and breach of fiduciary duties related to his agreement to accept early retirement because "the contract was required to be in writing in order to be enforceable."); *Pollack v. Moore*, 85 A.D.3d 578, 579 (1st Dep't 2011) (upholding dismissal of contract claim due to Statute of Frauds and holding that "Plaintiff's alternative claims sounding in breach of fiduciary duty, fraud, fraud in the inducement and negligent misrepresentation were duplicative of his breach of contract claims and, as such, properly dismissed."); *RNK Capital LLC v. Natsource LLC*, 76 A.D.3d 840, 842 (1st Dep't 2010) ("Rather, plaintiffs' allegations of breach of fiduciary duty merely duplicate the breach of

contract claim barred by the statute of frauds."); *Fallon*, 230 A.D.2d at 629 ("[T]he IAS court properly dismissed the fourth and fifth causes of action for breach of fiduciary trust and breach of partnership, since they both were clearly based on the unenforceable partnership agreement . . .").

Furthermore, as discussed above, it is undisputed that, to the extent the parties had a business relationship, they used LLC's and corporations to conduct business. (Compl. ¶¶ 37-42). To the extent Plaintiff is owed fiduciary duties it could only be by virtue of her being a member of a particular LLC, or a shareholder of a particular corporation—and each corporate relationship needs to be assessed on its individual merits by looking at the governing agreements and applicable laws.[6] The Complaint does not contain any claims for breaches of duties owed to Plaintiff by Mr. Lamson in his capacity as an LLC member or shareholder, and, as such, it must be dismissed. *Hoeg Corp. v. Peebles Corp.*, 153 A.D.3d 607, 610 (2d Dep't 2017) (written agreement belied the existence of a fiduciary relationship between the plaintiff and the defendant); *First Keystone Consultants, Inc. v. DDR Const. Servs.*, 74 A.D.3d 1135, 1137 (2d Dep't 2010) (complaint failed to plead facts evincing the existence of a relationship that involved "a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions . . . [a]lthough the [complaint] alleged that SSE owed DDR a fiduciary duty by virtue of their purported status as joint venturers, that pleading failed to allege facts sufficient to make out a claim that SSE agreed to share, with DDR, the profits and losses of certain contracts awarded to SSE by the New York City Department of Environmental Protection").

[6] *See*, *e.g.*, *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014) ("As the managing member of the LLCs, Gary owed plaintiff-a nonmanaging member—a fiduciary duty"); *Cortes v. 3A N. Park Ave Rest Corp.*, 46 Misc. 3d 670, 694, 998 N.Y.S.2d 797, 815 (N.Y. Sup. Ct. Kings Co. 2014) ("A minority shareholder in a close corporation is owed a fiduciary duty by the majority shareholders.").

POINT IV
THE COMPLAINT FAILS TO ALLEGE UNJUST ENRICHMENT

Plaintiff's unjust enrichment claims also fails as the damages are identical to breach of contract and breach of fiduciary duty—her failure to receive an "equal return" from her contributions to the supposed EL Partnership. (Compl. ¶ 150). *See Fallon*, 230 A.D.2d at 630 ("Finally, the amended complaint also fails to make out a claim for unjust enrichment, since instead of identifying the reasonable value of services rendered by plaintiff on behalf of the SignaSure program and KFS, plaintiff simply claims damages identical to the other four causes of action, which in form, request gross revenues from the program.")

POINT V
THE COMPLAINT FAILS TO ALLEGE A FRAUDULENT CONVEYANCE

Although the Complaint does not identify which section of Debtor Creditor Law ("DCL") forms the basis of Plaintiff's claim, it is clear that Plaintiff is alleging actual (not constructive) fraud based on a transfer made with *actual intent* to hinder, delay, or defraud either present or future creditors. (Compl. ¶¶ 163-68). To plead an actual fraudulent conveyance claim, a plaintiff must allege fraudulent intent with the particularity required by CPLR 3016(b). *Carlyle, LLC v. Quik Park 1633 Garage LLC*, 160 A.D.3d 476, 477 (1st Dep't 2018).

Plaintiff's claims of intentional fraud are based on "*information and belief*," and, as such, fail to state the claim with particularity as a matter of law. (Compl. ¶¶ 164-66); *Carlyle, LLC*, 160 A.D.3d at 477; *RTN Networks, LLC v. Telco Grp., Inc.*, 126 A.D.3d 477, 478 (1st Dep't 2015) (key allegations regarding the allegedly fraudulent conveyance based on information and belief were inadequate under CPLR 3016(b)).

Moreover, as with her breach of fiduciary duty claim, Plaintiff's fraudulent conveyance claim hinges on the existence of a partnership and alleges Mr. Lamson "fraudulently conveyed and transferred funds out of the EL Partnership." (Compl. ¶ 164). As demonstrated above, Plaintiff

fails to plead an oral partnership agreement. Since she offers no other basis for her being a "creditor," this claim must fail.

POINT VI
NO 'CLAIM' FOR CONSTRUCTIVE TRUST IN THIS CASE

Constructive is an equitable *remedy* imposed to prevent unjust enrichment, not an independent cause of action. *Stewart v. Maitland*, 39 A.D.3d 319 (1st Dep't 2007). Plaintiff's Fifth Claim should be dismissed on these grounds alone. Nor is the remedy even available here. The factors for imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment. *Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 473 (1st Dep't 2010); *Onorato v. Lupoli*, 135 A.D.2d 693, 695 (2d Dep't 1987). This equitable remedy may only be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest (i.e., unjust enrichment). *Dee v. Rakower*, 112 A.D.3d 204, 212 (2d Dep't 2013). Here, as demonstrated above, these was no unjust enrichment.

Additionally, Plaintiff's request for a constructive trust cannot stand because it seeks 50 percent of Mr. Lamson's personal assets, including his personal residences at 297 Pacific and Birdsong Farm (properties he paid for and acquired in his sole name[7]). Plaintiff's request for a constructive trust on half of Mr. Lamson's personal assets, including his personal residences, is nothing more than a request for an equitable distribution that would require this Court to treat the relationship as a marriage—which is not permitted by law. For this reason, constructive trust has been rejected in the context of unmarried relationship claims. *See, e.g., Jennings v. Hurt*, 160 A.D.2d 576, 578 (1st Dep't 1990) (cause of action to impose a constructive trust on an apartment owned by defendant dismissed where plaintiff failed to establish that she had a property interest in

[7] See Affirmation of Martin Krezalek, Ex. A (Deed to 297 Pacific), and Ex. B (deed to Birdsong Farm).

the apartment); *Tompkins v. Jackson*, 22 Misc. 3d 1128(A), at *17, 880 N.Y.S.2d 876 (N.Y. Sup. Ct. N.Y. Co. 2009) (claim for constructive trust failed where plaintiff made no transfer in reliance of a promise; never owned the subject home or contributed money to its upkeep).

POINT VII
A STAY OF DISCOVERY IS WARRANTED
PENDING A DECISION ON THE MOTION TO DISMISS

Mr. Lamson also moves, pursuant to Rule 11(d) of the Commercial Division Rules, to apply the automatic stay of discovery provided for in CPLR § 3214(b) during the pendency of his motion to dismiss. CPLR § 3214(b) provides for an automatic stay of discovery upon the filing of a dispositive motion. As set forth in the Advisory Committee Notes to the statute, the purpose of the stay is to prevent burdening a party with unnecessary discovery during the pendency of a dispositive motion. N.Y. C.P.L.R. § 3214 *note* (Consol. 2011) (Advisory Committee Notes). Commercial Division Rule 11(d) provides that "[t]he court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion." N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70, Rule 11(d).

Generally, courts have found that stay of discovery pending a decision on a dispositive motion is warranted unless the motion was filed for the express purpose of frustrating an outstanding discovery request, or where there is some other legitimate purpose for having discovery go forward. *See Cantos v. Castle Abatement Corp.*, 251 A.D.2d 40, 42 (1st Dep't 1998) (discovery should have been precluded where defendants' motion for summary judgment was neither frivolous nor "deliberately designed to hinder and prevent the orderly process of pretrial disclosure") (quotation and citation omitted).

The strength of a defendant's motion should be considered in weighing whether discovery should be stayed while the motion is pending. *See MBIA Ins. Corp. v. Royal Bank of Canada*, 28 Misc. 3d 1225(A), 958 N.Y.S.2d 62, at *2 (Sup. Ct. N.Y. Co. Aug. 19, 2010) (staying all

depositions pending decision but allowing paper discovery where it appeared that that at least some aspects of the complaint would likely survive the motion to dismiss).

The need for discovery will be obviated if the motion to dismiss is granted. Thus, unnecessary costs to the litigants and to the court system can be avoided if discovery is stayed until the Court rules on the motion to dismiss. Accordingly, given the strength of Mr. Lamson's arguments for dismissal, Mr. Lamson respectfully requests that the Court issue an order, pursuant to Rule 11(d) of the Commercial Division Rules, applying the automatic stay of discovery provided for in CPLR § 3214(b) during the pendency of this motion.

POINT VIIILEAVE TO REPLEAD SHOULD BE DENIED

Finally, because there is nothing that Plaintiff can do or say to change the simple fact that there was no partnership as a matter of law, a repleading would be futile. Accordingly, any request for leave to amend Plaintiff's pleading to address its deficiencies should be denied. *Island Surgical Supply Co. v. Allstate Ins. Co.*, 32 A.D.3d 824, 824 (2d Dep't 2006) (cross application for leave to replead was properly dismissed pursuant to CPLR 3211(a)(7) and 3013 because the allegations were vague, conclusory, and indefinite as to the alleged breach of contracts); *Norte & Co. v. New York & Harlem R. Co.*, 222 A.D.2d 357, 357 (1st Dep't 1995) ("The court also did not improvidently exercise its discretion in denying plaintiffs leave to replead as recasting the complaint would have been futile in light of the court's holdings.").

CONCLUSION

For the foregoing reasons, Mr. Lamson's motion to dismiss should be granted and the complaint should be dismissed in its entirety with prejudice.

Dated: November 25, 2020
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Respectfully submitted,

BLANK ROME LLP

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