SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: COMMERCIAL DIVISION

KRISTEN L. EIKENBERRY, Plaintiff, - against - RICHARD JOSEPH LAMSON, Defendant.	Index No. 516653/2020 (Hon. Leon Ruchelsman) Mot. Seq. 002

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Plaintiff Kristen L. Eikenberry ("Eikenberry") submits this memorandum in opposition to Defendant's Motion to Dismiss the Complaint (the "Motion").[1]

PRELIMINARY STATEMENT

Richard Joseph Lamson ("Lamson"), Eikenberry's partner for 25 years, moves to dismiss the Verified Complaint ("Complaint"), which alleges claims for an accounting, dissolution of their business partnership and for damages resulting from Lamson's breaches. Lamson seeks dismissal using his affidavit in opposition to Eikenberry's motion for preliminary injunction, which the Court granted (the "PI Order"). Ignoring the fundamental rule that allegations of a complaint are to be given all favorable inferences on a dismissal motion, Lamson asks the Court to accept his own set of facts. Lamson's procedurally improper request is reason alone to deny the Motion.

As with his opposition to preliminary relief, Lamson's Motion is based on false premises: first, there is no partnership; and second, he is the sole owner of the specified assets and Eikenberry has no rights in them. But the allegations of the Complaint, confirmed by Lamson's own admissions and documentary proof (mostly public filings), showing Eikenberry's ownership rights and involvement in the partnership's projects, refute Lamson's premises.

The Complaint well pleads the parties' initial intent to form a partnership; the sharing of profits and losses; the coordinated steps they took to achieve its goals; and their joint contributions over time. Eikenberry further alleges the wrongful conduct Lamson has employed to attempt to deny Eikenberry her rights: transferring assets without her knowledge or permission; filing fake documents purporting to reduce her partnership rights; cutting her off from partnership assets to

[1] The Verified Complaint (NYSCEF Doc. No. 2) is cited herein as "VC." Facts supporting the Complaint are also set forth in Eikenberry's accompanying Opposition Affidavit ("Eikenberry Aff."). Lamson's Affidavit filed in support (NYSCEF Doc. No. 38) is cited as "Lamson Aff." Lamson's Memorandum of Law in Support (NYSCEF Doc. No. 72) is cited herein as "Mem."

"starve" her in retaliation for dissolving the partnership. Against this backdrop, in issuing the PI Order, the Court correctly held that Eikenberry was likely to succeed on her claims.

Lamson's Motion is little more than a rehash of his arguments on the earlier motion. It proceeds on the erroneous contention—already rejected—that the use of limited liability companies ("LLCs") to transact business precludes the existence of a partnership. In fact, New York law recognizes that partnerships may and do transact business through affiliated entities.

Lamson makes other meritless arguments that (1) the partnership agreement alleged fails under the statute of frauds and/or the "doctrine of definiteness"; (2) the claims for breach of fiduciary duty and unjust enrichment duplicate Eikenberry's breach of contract claim; (3) Eikenberry's request for a constructive trust violates domestic relations law; and (4) the fraudulent conveyance claim is insufficiently detailed.

First, New York law is settled that the statute of frauds does not apply to partnership formation. The pleading is explicit as to partnership scope, including assets and projects involved, and therefore, sufficiently "definite" under applicable precedent. Second, breach of contract and breach of fiduciary duty claims can coexist where a joint venture is pleaded, and in any event, the Complaint alleges breach of separate fiduciary duties, and alternative claims for equitable relief are permissible at the pleadings stage. Third, Lamson's repeated efforts to compare this to domestic relations cases fail because his authorities do not involve jointly owned businesses, accounts, or joint contributions to the venture. Fourth, the Complaint not only alleges "badges of fraud" to sustain a fraudulent conveyance claim, Lamson freely admits he intentionally made the subject transfers to remove assets from Eikenberry.

Finally, Lamson's request for a discovery stay is properly denied. It is contrary to Court rule and facilitates Lamson's concealment of partnership assets.

ALLEGATIONS OF THE COMPLAINT AND PROCEDURAL HISTORY

Lamson asks the Court to accept his story as true, using it as the basis for his Motion, and largely ignores the Complaint. This approach turns the motion to dismiss standard on its head and is properly rejected.

As alleged in the Complaint, in or around 1996, Lamson and Eikenberry formed a partnership[2] to acquire, develop, and sell real property in New York and New Jersey. (VC ¶¶ 2, 21.) Lamson contributed investment and construction services, while Eikenberry contributed (a) market intelligence, including identifying locations and properties, (b) concept and overall design, (c) administrative support, and (d) effecting sales. (*Id.* ¶¶ 2, 21, 26, 47.) Each contributed capital through their respective services and by re-investing sales proceeds in subsequent projects. (*Id.* ¶¶ 21, 25, 83, 141.) They agreed to share profits and losses equally and formed companies through which they transacted the venture's business. (*Id.* ¶¶ 2, 22, 46.) The two also had a personal relationship including four children, agreeing that Eikenberry's contribution to the Partnership would include leaving her other employment and raising the children. (*Id.* ¶¶ 24, 145.)

The Partnership Companies and Accounts

The venture completed at least eight development projects and earned millions of dollars. (*Id.* ¶¶ 46-93.) Its special purpose companies formed between 2007 and 2019 include: Fairmont Industries Inc. ("Fairmont Industries") (*id.* ¶ 38); HTHP Leasing LLC ("HTHP"), (*id.* ¶ 39); Two Route 17 South LLC ("Route 17 LLC") (*id,* ¶ 42); Fairmont Industries Supply, LLC ("Fairmont

[2] The Complaint defines the venture alleged as the EL Partnership ("Partnership"), including the various specified LLCs, properties, accounts, and cash.

Supply") (*id.* ¶ 37); Easy Wind L.L.C. ("Easy Wind") (*id.* ¶ 35); and 330 Atlantic Ave Development LLC ("330 Atlantic") (*id.* ¶ 33; *see also* Eikenberry Aff. ¶¶ 9-12).[3]

Eikenberry is a member, manager, owner, partner, and/or authorized signatory of each venture entity. She is sole member of 330 Atlantic (Eikenberry Aff. ¶ 9), sole member of Fairmont Industries (*id.* ¶ 10), and principal and manager of Easy Wind (*id.* ¶ 11). Eikenberry is sole managing member of HTHP and holds HTHP's hauling license allowing it to operate. (*See id*. ¶ 12). Through these companies, the venture also leases at least four vehicles, including two Chevrolet Suburbans, a Range Rover, Jeep Cherokee, and three large trucks, each worth approximately $500,000. (*See* VC ¶ 39).

Each of these entities holds bank or investment accounts of which Eikenberry is owner (as Member), principal and/or authorized signatory. Eikenberry is: (a) member/signatory, key controller and beneficial owner of the 330 Atlantic account at Morgan Stanley (the "330 Atlantic Account"); (b) "key controller" and manager of the Easy Wind account at Morgan Stanley ("Easy Wind Account"); (c) authorized signatory of the Fairmont Industry Supply account at Santander Bank ("Fairmont Supply Account"); (d) joint owner and/or signatory of two Fairmont accounts at JPMorgan Chase ("Fairmont Accounts"); and (e) authorized signatory, president, and officer of the HTHP account at Santander. (*See id*. ¶¶ 33-42; Eikenberry Aff. ¶¶ 9-12.)

Through these accounts, which are controlled jointly or through one of the partners, the venture maintains significant cash and securities. (VC ¶ 29.) Once Eikenberry determined to dissolve the venture, however, Lamson began a campaign to strip Eikenberry of her rights, including transferring assets without her knowledge or consent. (*Id.* ¶¶ 7, 97-119.)

[3] Lamson asserts that his businesses pre-existed Eikenberry's involvement (Lamson Aff. ¶ 16), but the dates of formation of these Partnership entities belies this assertion.

The Partnership Properties and Projects

The venture accumulated its assets through successful real estate development projects over the last twenty-five years, including Birdsong Farm, 28 Sidney Avenue in Rutherford, New Jersey, 444 Dock Road and 445 Center Street in Beach Haven, New Jersey, 13 Harrison Street, 122 Boerum Place, 297 Pacific Street, the Pacific Street Townhomes, and 330 Atlantic Avenue. (*See id.* ¶¶ 46-93.)

The venture partnered with Philip Mendlow and the Ace Hotel owners to acquire and develop three lots in downtown Brooklyn: one on Pacific Street, another on Atlantic Avenue, and the third on Schermerhorn Street. (*Id.* ¶¶ 74-93.) Lamson contends that the three lots had "nothing to do with each other" (Lamson Aff. ¶ 36) and Eikenberry had nothing to do with them, but this was disproved on the PI motion by documentary proof. (*See* Eikenberry Aff. ¶¶ 18-20.)

The Partnership worked with Mendlow to develop the Pacific Street lot into four townhomes located at 319, 321, 323, and 325 Pacific Street in Boerum Hill, Brooklyn. (VC ¶ 78.) The Partnership was to receive 70% of the profits. (Eikenberry Aff. ¶ 20.) Eikenberry worked on administration, development of theme and design elements, and the sale process. (*See* Eikenberry Aff. ¶¶ 20-22.) 325 Pacific sold for $7,875,000 – the highest selling townhouse in Brooklyn in 2017. (VC ¶ 80.) The other three sold for approximately $5.9 million, $5.75 million, and $6.4 million, respectively, between 2017 and April 2019. (*Id.* ¶ 81.) Lamson received the sale proceeds, including $4,328,530.60 from 325 Pacific Street. (*Id.* ¶ 82.) Lamson has never accounted to Eikenberry for the sale proceeds. (*Id.*)

Another of the three lots, 330 Atlantic Avenue, is currently under development. Eikenberry holds the work permits and is listed as general contractor with NYC DOB. (*Id.* ¶ 89-90; Eikenberry Aff. ¶ 19.) Eikenberry was to direct interior design for this project. (VC ¶ 87; Eikenberry Aff. ¶ 22.) Lamson asserts that the project requires between $2 to $2.5 million in

additional funding; however, that assertion is belied by the parties' agreement ("A&P Agreement") showing Mendlow provided $1.4 million in capital, the balance of financing is through loans, and the Partnership's contribution is lot assemblage, construction management and other support. (*Id.* ¶ 86; Eikenberry Aff. ¶ 19.)

The Partnership owns two properties where the partners raised their family: Birdsong Farm and 297 Pacific Street. (VC ¶¶ 46, 64-67.) Birdsong Farm is a farm in Delhi, New York that they located and redeveloped and has been used for commercial purposes. (*Id.* ¶¶ 46-51.) 297 Pacific Street is a carriage house property Eikenberry located in an up-and-coming Brooklyn neighborhood near where she grew up. Lamson and Eikenberry purchased it using proceeds from an earlier project. (*Id.* ¶ 65; Eikenberry Aff. ¶ 15.)

Lamson's Efforts to Deny Eikenberry Her Partnership Rights

The partners agreed to use distributions for personal expenses, including their children, and did so for 25 years. (*Id.* ¶¶ 4, 45.) In or about May 2020, Eikenberry advised Lamson that the Partnership needed to be dissolved. (*Id.* ¶ 96.) Ever since then, Lamson has engaged in a campaign to transfer and hide Partnership assets, and fraudulently remove or impede Eikenberry's rights, including from access to Partnership property. (*Id.* ¶¶ 97-119.) Lamson has stated he intends to "starve" Eikenberry in retaliation for her decision to terminate their Partnership. (*Id.* ¶ 121.)

In June 2020, Lamson cancelled the Partnership credit card Eikenberry used for her expenses. (*Id.* ¶ 97.) As further alleged, Lamson removed $1.275 million from the Santander Account they jointly controlled, cashed large checks made out to Partnership companies, and used the cash or otherwise transferred the funds for his own purposes. (*Id.* ¶¶ 7, 102.) Lamson has not accounted for the $500,000 in cash he held in March 2020. (*Id.* ¶ 92.) Lamson has removed and destroyed Partnership books and records. (*Id.* ¶ 115.)

In July 2020, Lamson demanded that Morgan Stanley release to him the million plus in assets held in the Easy Wind Account, for which Eikenberry is authorized signatory. (*Id.* ¶ 35.) Lamson then unsuccessfully attempted to withdraw them, without Eikenberry's knowledge or consent, by writing large checks to their children. (*Id.* ¶ 105.)[4] Eikenberry soon began receiving notices from banks, including Morgan Stanley, informing her as owner/manager/signatory of Lamson's efforts to remove her control over Partnership assets. (*Id.* ¶ 101.) For example, Morgan Stanley "flagged" the approximately $3.5 million 330 Atlantic Account after Lamson attempted to impersonate Eikenberry by submitting fictitious documents and demanding the assets transfer to his personal account. (*Id.* ¶ 34.)

Lamson also remotely deleted Eikenberry's business and personal data from her iPhone. (*See* Lamson Aff. ¶ 111.) This information contains privileged attorney-client communications. (*Id*. ¶ 112.) Lamson still has refused to restore all of it.

Eikenberry Files the Complaint and Obtains Preliminary Relief

On September 4, 2020, Eikenberry filed the Complaint, alleging counts for dissolution of the Partnership, an accounting, breach of fiduciary duty, breach of contract, fraudulent conveyance, and equitable claims for unjust enrichment and constructive trust. (VC ¶¶ 154-79.)

On October 20, 2020, Eikenberry moved for preliminary relief to preserve her rights. The Court issued a temporary restraining order, *inter alia* preventing Lamson from transferring Partnership property, requiring that he use best efforts to restore Eikenberry's electronic data, requiring that he document expenses from Partnership accounts, and ordering a $100,000 distribution to Eikenberry for her ongoing expenses. (NYSCEF Doc. No. 7.)

[4] In response, Eikenberry moved these assets to her personal account at Morgan Stanley to preserve them. (VC ¶ 109.)

On November 30, 2020, the Court issued its PI Order. (NYSCEF Doc. No. 73.) It concluded Eikenberry had established a likelihood of success on her claims (*id.* at 11-12) based on evidence that included (1) formation documents listing Eikenberry as "registered agent and member and signatory"; (2) bank account applications "which specifically states is designed for 'partnerships, limited liability entities, sole proprietorships, corporation and incorporated associates accounts for U.S. Taxpayers'" and listed Eikenberry as "beneficial owner" and "key controller" with "'significant responsibility to control or manage or direct the" named entity; and (3) DOB work permits issued to 330 Atlantic in Eikenberry's name. (*Id.* at 3-5.)

The Court rejected Lamson's assertion that Eikenberry's ownership role was merely "an expedient" in case Lamson "would pass away", noting he had "fail[ed] to explain why the different interpretations of the plaintiff's role do not create questions of fact." (*Id*. at 5.) It enjoined Lamson from transferring "partnership assets without plaintiff's consent", ordered him to "make distributions to the plaintiff from Partnership accounts wherein the plaintiff appears on", and ordered him to "return plaintiff's cell phone with all information intact and accessible." (*Id.* at 12)

ARGUMENT

POINT I

LAMSON MISAPPLIES THE STANDARD ON A MOTION TO DISMISS

A motion to dismiss pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). A court must "liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (citation omitted). A plaintiff is accorded "the benefit of every possible favorable inference." *Levenherz v. Povinelli*, 14 A.D.3d 658, 658 (2d Dep't 2005).

Dismissal is not warranted under CPLR 3211(a)(1), unless "the documentary evidence 'establishes a defense to the asserted claims as a matter of law.'" *Kolchins v. Evolution Mkts., Inc.*, 31 N.Y.3d 100, 105-06 (2018); *J. A. Lee Elec., Inc. v. City of New York*, 119 A.D.3d 652, 653 (2d Dep't 2014). Such a motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (2002). A moving affidavit that denies the facts alleged and presents movant's own version of events, without more, does not meet the 3211(a)(1) standard. *See id.* Lamson has not met any threshold for dismissal.

POINT II

THE COMPLAINT ALLEGES A PARTNERSHIP UNDER NEW YORK LAW

Lamson contends that the Complaint does not allege a partnership. (Mem. 8.) His main argument is that because the Partnership used LLCs to transact business, it could not exist as a matter of law. (*Id.*) This flies in the face of common business practice and is a misstatement of law. Partnerships often operate through special purpose companies to protect the partners from liability, manage a discrete project, or allow for investors, among other reasons.[5] *See Kaye v. Levine Prospect, LLC*, No. 653003/2018, 2019 N.Y. Misc. LEXIS 2261, at *1 (Sup. Ct. N.Y. Cnty. May 6, 2019) (noting parties "engaged in real estate business endeavors through various jointly-formed special purpose entities").

Numerous courts have rejected Lamson's argument. *See Rinaldi v. Casale*, 13 A.D.3d 603, 605 (2d Dep't 2004) (rejecting contention that parties could not have carried on joint venture through corporate vehicle, as latter could be "conduit to hold title to underlying property");

[5] *See, e.g.*, Single Purpose Entity (SPE), explained, Momentum Legal Group (Jan. 5, 2020), http://monumentllp.com/index.php/2020/03/31/single-purpose-entity-spe-explained/ (recognizing joint ventures operate through special purpose entities).

Sherpaco, LLC v. Kossi, No. 103875/2007, 2010 N.Y. Misc. LEXIS 1322, at *11 (Sup. Ct. N.Y. Cnty. Jan. 15, 2010) (same); *see also Patycki v. Slaski*, 42 Misc. 3d 1213(A), 1213A (Sup. Ct. Kings Cnty. 2014) (partners "may agree to act as partners as between each other and act as corporation to the rest of the world" so long as "partnership's rights do not conflict with the functioning of the corporation"); *Meseonznik v. Govorenkov*, 36 Misc. 3d 1240(A) (Sup. Ct. Kings Cnty. 2012) (same); *Matter of Hochberg v. Manhattan Pediatric Dental Grp., P.C.*, 41 A.D.3d 202, 204 (1st Dep't 2007) (same).

Weiner v. Hoffinger, Friedland, Dobrish & Stern, P.C., 298 A.D.2d 453, 455 (2d Dep't 2002) (Mem. 10), is inapposite. There, plaintiff sued his former law firm to recover for work performed before he left. Plaintiff claimed entitlement to profits from his practice group, alleging it functioned like a partnership, even though the firm had converted to a professional corporation five years before plaintiff departed. *Id.* at 454. The Second Department affirmed dismissal of the complaint after trial, holding "the partnership ceased to exist once the professional corporation was formed." *Id.* Here, there is no allegation that the Partnership ceased to exist or reorganized as another entity. Rather, Eikenberry alleges that separate entities operated under the venture's umbrella.[6] Her allegations are akin to those sustained in *Rinaldi*, *Patycki* and *Meseonznik* discussed above.

[6] Lamson also misplaces reliance on *Weisman v. Awnair Corp. of Am.*, 3 N.Y.2d 444, 449 (1957). (Mem. 10.) *Weisman* has been qualified; *Blank v. Blank* represents current law. *See* 222 A.D.2d 851, 852-53 (4th Dep't 1995) (rejecting *Weisman* and finding no "compelling reason to preclude individuals from acting as partners between themselves and as a corporation to the rest of the world . . . as long as the rights of third parties, like creditors, are not involved and the parties' rights under the partnership agreement are not in conflict with the corporation's functioning") (citations omitted). *See Bianchi v. Midtown Reporting Serv., Inc.*, 103 A.D.3d 1261, 1261 (4th Dep't 2013) (confirming *Blank*); *Matter of Hochberg*, 41 A.D.3d at 204 (same). Lamson's federal cases are inapposite: plaintiff in *Jacobs v. Baum* failed to allege 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"; *Nasso v. Seagal* has been rejected by *Cosy Goose Hellas v. Cosy Goose USA, Ltd.*, 581 F. Supp. 2d 606, 620 (S.D.N.Y. 2008) (criticizing *Nasso* and citing *Blank* standard).

Far from "black letter law" (Mem. 8), whether a separate entity was used to *transact* business is not part of the test to determine whether a partnership exists. Allegations of partnership are based on intent to form one, sharing of profits and losses, and joint investment of capital, with no one factor dispositive. *See Kelly v. Bensen*, 151 A.D.3d 1312, 1313 (2d Dep't 2015); *Kamel v. Aghelian*, 2019 N.Y. Misc. LEXIS 2545, *4 (Sup. Ct. Kings Cnty. May 15, 2019) (elements are "an agreement manifesting the intent of the parties, to be associated as joint venturers, a contribution by the co-venturers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge)"), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses"); *Richbell Info. Servs. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 297-98 (1st Dep't 2003) (same). Eikenberry's allegations readily meet this standard.

A. Intent to Form a Partnership

Lamson argues that Eikenberry has not alleged intent because "the Complaint does not allege, much less describe, any preliminary negotiations between the parties about the terms or scope" of their agreement or "the existence of documents or communications reflecting or memorializing such negotiations." (Mem. 12.) Yet Eikenberry alleges an *oral* partnership. As alleged, she and Lamson agreed: (a) to enter into the partnership in or around 1996 and began work on development projects at that time (VC ¶ 21); (b) Lamson would have responsibility over investment and construction services and Eikenberry would contribute market intelligence, including identifying properties that would appreciate in value, and overall concept and design (*id.* ¶ 2); (c) they would both contribute capital, including reinvestment, intellectual and industrial, and share profits and losses (*id.* ¶¶ 141-42); and (d) all assets would be shared equally, regardless of

title (*id.* ¶¶ 28, 143). These facts, which must be accepted as true, *prima facie* show the parties' intent to enter the partnership. *See Richbell*, 309 A.D.2d at 297-98.

This intent to engage in a business venture as partners is also manifested by their conduct over the past twenty-plus years. *See Pace v. Perk*, 81 A.D.2d 444, 459 (2d Dep't 1981) (earlier agreement to form partnership to buy property can be "evidenced either by words or the course of dealing between the parties that it was their intention to form a partnership"); *Schultz v. Sayada*, 133 A.D.3d 1015, 1016 (3d Dep't 2015) (finding intent to form joint venture "from the totality of their conduct" including active involvement with property, although interests later diverged). Even Lamson acknowledges indicia of intent to engage in a joint venture by referencing (a) working together on development projects, (b) Eikenberry's design input; (c) investing proceeds of sales in new projects, and (d) Eikenberry as Member or Manager of development companies. (*See* Lamson Aff. ¶¶ 27, 31, 67, 69, 73, 83, 92, 108.)

Moreover, Eikenberry is signatory and/or Manager or Member on numerous company documents, including bank accounts and government filings to obtain permitting, licensing, and tax lot authorization. (Eikenberry Aff. ¶¶ 8-13, 18-20.) *See City of N.Y. v. Venkataram*, No. 06-CV-6578, 2011 U.S. Dist. LEXIS 77480, at *16 n.6 (S.D.N.Y. July 13, 2011) (named holder of bank account has "presumption of ownership"). Documentary proof and business associates corroborate Eikenberry's role in the partnership, including as general contractor, licensee, partner, and design, furnishing, and marketing contributions to projects such as the Pacific Street Townhomes. (Perkins Aff. Exhs. A, B.) Lamson seeks to disprove the Partnership by his holding title to 297 Pacific and Birdsong Farm (Mem. 15, 23); however, title ownership is not dispositive of ownership as "[i]t is well established that it may always be shown that property, title to which

is taken in the name of individuals, is in truth and in fact partnership property." *Tita v. Lampeas Family Ltd. P'ship No. 4*, 26 Misc. 3d 1241(A), 1241A (Sup. Ct. Queens Cnty. 2010).

Lamson's only other response is that he "put [Eikenberry's] name on certain entities or bank accounts . . . to ensure continuity in the event that something happened to [him]" (Lamson Aff. ¶¶ 84, 102). Not only is this incredible, it is belied by Eikenberry's documented participation in the venture as they represented to government agencies, which in any event, estops him from denying Eikenberry's role. *See, e.g.*, *Whiteman Osterman & Hanna, LLP v. Preserve Assoc., LLC*, 63 Misc. 3d 585, 598-99 (Sup. Ct. Albany Cnty. 2019) (applying estoppel to prevent party from contradicting statements to government agency).

B. Sharing of Profits and Losses

Lamson contends that the Complaint contains "a single allegation" that as partners, they agreed to share in profits and losses. (Mem. 13.) Not so; it contains at least ten such allegations, concerning different Partnership projects. (*See* VC ¶¶ 6, 22, 29, 31, 46, 76, 93, 139, 142, 171.)[7] Lamson's contention that the pleading lacks a specific timeframe and assets involved (Mem. 13) is more white noise; Eikenberry has identified with particularity the Partnership property and the agreements to share 50/50 in profits and losses. (*See id.*).

Lamson concedes Eikenberry's expenses were paid by venture assets for twenty-plus years, including use of a credit card, health insurance, and car. (Lamson Aff. ¶¶ 6, 92, 110.) Thus, his insistence that Eikenberry "never received a single distribution from me" (*id.* ¶100) is true because

[7] Lamson's cases where this element was not met (Mem. 13) are factually or procedurally inapposite. The joint ventures in *Matter of Steinbeck v. Gerosa*, 4 N.Y.2d 302 (1958) and *Dinaco, Inc. v. Time Warner, Inc.*, 346 F.3d 64, 68 (2d Cir. 2003) were based on royalty agreements, which are "not agreement[s] to share profits." *Dinaco*, 346 F.3d at 68 (citing *Steinbeck*). Plaintiffs in *Cmty. Capital Bank v. Fischer & Yanowitz*, 47 A.D.3d 667, 668 (2d Dep't 2008), *In re Alpert*, 37 A.D.3d 187, 188 (1st Dep't 2007), and *Prince v. O'Brien*, 256 A.D.2d 208, 212 (1st Dep't 1998) failed to prove, ***on summary judgment***, agreements to share profits and losses.

those distributions came from the venture. And, Lamson's repeated contention that the Partnership did not file tax returns or issue K-1s (Mem. 14), is not dispositive of its existence. *See Dundes v. Fuersich*, 13 Misc. 3d 1223(A), 1223A (Sup. Ct. N.Y. Cnty. Oct. 16, 2006) (rejecting argument that "the fact that the joint venture did not file a Form 1065 … or issue Schedule K-1's . . . is definitive proof that no joint venture existed").[8] Lamson fails to detail what tax returns he filed (if any).

C. Eikenberry's Contributions

Lamson falsely asserts that Eikenberry "does not allege she contributed any capital" to the Partnership. (Mem. 15.) Eikenberry alleges that the partners contributed "time, skills, and capital" (VC ¶¶25, 141), and she and Lamson used sales proceeds from partnership properties "to reinvest in additional development projects."[9] (VC ¶ 25); *see Babani v. Royal Chain, Inc.*, No. N.Y. Misc. LEXIS 3596, N.Y. Misc. LEXIS 3596, at *8-9 (Sup. Ct. N.Y. Cnty. July 27, 2020) (allegations of "agree[ment] to reinvest his share of the gross profit" from business alleged partnership's existence); *Sherpaco*, 2010 N.Y. Misc. LEXIS 1322, at *14-15 (partnership/joint venture evidenced by party's reinvestment of proceeds from sale of apartment into new development). Lamson recognizes that capital from Partnership projects was reinvested (Lamson Aff. ¶¶ 26, 69,

[8] *Rakosi v. Sidney Rubell Co*., LLC (Mem. 14), confirms this factor is not dispositive. *See* 155 A.D.3d 564, 565 (1st Dep't 2017) (K-1s "are not determinative" of partnership's existence). *Nanbar Realty Corp. v. Pater Realty Co.* (Mem. 14) addresses discovery, a different issue entirely. *See* 242 A.D.2d 208, 209 (1st Dep't 1997).

[9] Lamson's reliance on *Brodsky v. Stadlen*, 138 A.D.2d 662, 663 (2d Dep't 1988) (Mem. 15) is misplaced. Brodsky loaned to the alleged partnership and was repaid, which "negates the notion of partnership." *Id.* Eikenberry does not contend she loaned funds. Similarly, unlike Eikenberry, the plaintiff in *Hammond v. Smith,* 151 A.D.3d 1896, 1899 (4th Dep't 2017) "made no capital contributions and did not share in the business venture's losses." *Id.*

108), he just claims the money was his, an assertion that has no bearing here (and, in any event, is refuted by documentary evidence).

The Complaint also alleges Eikenberry's contributions of time, labor, and skill. *See Lee v. Slovak*, 81 A.D.2d 98, 100-01 (3d Dep't 1981) (partnership is "contract of two or more persons to place their money, effects, *labor or skill*, or some or all of them, in lawful business, and to divide the profits and bear the losses in certain proportions") (emphasis added); *Bubba Gump Fish & Chips Corp. v. Morris*, 90 A.D.3d 592, 593 (2d Dep't 2011) (affirming finding that parties were equal partners where one partner contributed capital and other supervised business without salary); *Yaary v. Silverman*, No. 100264/2012, 2013 N.Y. Misc. LEXIS 6329, at *14 (Sup. Ct. N.Y. Cnty. Dec. 2, 2013) ("plaintiff's contribution was her artistic expertise in locating the painting and providing an onsite valuation").[10] And, at Lamson's request, she gave up her separate job to focus on the partnership full time and to raise the couple's four children (VC ¶¶ 24, 145; Lamson Aff. ¶ 6), which is consideration. *See Dee v. Rakower*, 112 A.D.3d 204, 210 (2d Dep't 2013) (complaint pleaded contract pursuant to which plaintiff quit working full-time to care for parties' children, in exchange for share in defendant's retirement accounts); *Zahradnikova v. Buhl*, No. 152586/2016, 2017 N.Y. Misc. LEXIS 2867, at *1-2 (Sup. Ct. N.Y. Cnty. July 27, 2017) (sustaining breach of contract claim where "plaintiff left her employment" in reliance upon defendant's "representations . . . to support, provide and maintain her in a certain lifestyle").

[10] Unlike the plaintiff in *Fasolo v. Scarafile*, 120 A.D.3d 929, 931 (4th Dep't 2014) (Mem. 15), Eikenberry contributed capital (by reinvestment), skill and labor (by administration, designing and furnishing), and expertise (by providing market intelligence). Unlike the plaintiff in *Cleland v. Thirion*, 268 A.D.2d 842, 844 (3d Dep't 2000), Eikenberry never loaned money or received wages as compensation for her contributions.

POINT III

EIKENBERRY'S CLAIMS STATE CAUSES OF ACTION

The Complaint alleges the elements of claims for breach of contract, breach of fiduciary duty, unjust enrichment, constructive trust, and fraudulent conveyance under New York law.

A. Breach of Contract

A breach of contract claim requires the "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 803 (2d Dep't 2010). As discussed above, Eikenberry adequately alleges an agreement. (VC ¶¶ 2, 22, 29, 46, 76, 139, 143, 171.) Lamson breached the parties' agreement by concealing and diverting funds from the Partnership, including transferring approximately $1.275 million, and attempting to remove her name from Partnership accounts. (*See id.* ¶¶ 97-119.) Eikenberry alleges damages in the millions of dollars. (*See id.* ¶¶ 127, 135, 144, 152, 159, 165, 172.)

Lamson argues that the contract claim violates the Statute of Frauds, which requires written agreements in certain circumstances. NY GOL § 5-701. (Mem. 16.) The Motion fails to mention one key factor. The Statute of Frauds does not apply to agreements to form a partnership. *See Pace*, 81 A.D.2d at 457-458 ("Where parties agree to form a partnership and make no provision for the duration of that relationship between them, a partnership at will is created, and because it is possible to dissolve a partnership at will within one year, an agreement which is silent as to the duration of the partnership does not violate the Statute of Frauds"); *Foster v Kovner*, 44 A.D.3d 23, 27 (1st Dep't 2007) (*citing Shandell v Katz,* 95 A.D.2d 742, 743 (1st Dep't 1983)) (same).[11]

[11] Lamson argues the Partnership alleged also violates the UCC's statute of frauds (Mem. 17-18), but relies on the fallacy that Eikenberry alleges an agreement for stock, not a partnership (*see id.*, "Plaintiff's alleged contract would operate to give Plaintiff shares in certain corporations in exchange for her services"). The Complaint alleges no such thing.

Lamson's additional argument that the breach of contract claim fails for lack of "definiteness" (Mem. 18-19) is unsupported. Eikenberry sufficiently alleges the contours of the agreement, *i.e*. that they would acquire, develop and sell properties, share in profits and losses, including by reinvesting their profits in later projects, and details each of the companies and projects that comprise the venture. (VC ¶¶ 2, 3, 21, 22, 25-27, 46.) This is more than sufficient. *See Art & Fashion Grp. Corp. v. Cyclops Prod., Inc.*, 120 A.D.3d 436, 437 (1st Dep't 2014) (oral joint venture sufficiently alleged based on plaintiffs and defendants' formation of special purpose "LLC to operate [the] joint venture", agreement to "operate on a 50/50 basis", "to share profits and losses equally", and "to pay their respective share of all the expenses of the joint venture").

Lamson refrains that Eikenberry does not "explain how the alleged 50/50 profits arrangement would apply in the face of an operating agreement that conflicted" with this distribution. (Mem 19.) The concept is not difficult: distributions under an LLC agreement are subject to a 50% sharing pursuant to the overarching Partnership agreement, which is fully enforceable. *See Richbell*, 309 A.D.2d at 297-98.

In any event, contrary to Lamson's assertions, the standard of definiteness is flexible and the doctrine may only be used to ignore a parties' agreement "as a last resort." *Marshall Granger & Co., CPAs, P.C. v Sanossian & Sardis, LLP*, 15 A.D.3d 631, 632-633 (2d Dep't 2005); *Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 N.Y.2d 475, 482-483 (1989) (standard of definiteness "is necessarily flexible, varying … with the subject of the agreement, its complexity, the purpose for which the contract was made, and the relation of the parties …[I]f the doctrine is applied with a heavy hand it may defeat the reasonable expectations of the parties in entering into the contract.")

B. Breach of Fiduciary Duty

To state this claim, a plaintiff must allege "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Cupcake & Boomboom, LLC v. Aslani*, No. 515757/2015, 2016 N.Y. Misc. LEXIS 4330, at *35 (Sup. Ct. Kings Cnty. Nov. 22, 2016). The partnership alleged (Point II) automatically gives rise to a fiduciary relationship under New York law. *Le Bel v. Donovan*, 96 A.D.3d 415, 417 (1st Dep't 2012) ("[u]nder New York law, partners owe each other a fiduciary duty").

Eikenberry alleges Lamson's various breaches of that duty, including secreting Partnership assets, transferring them to personal bank accounts, and attempting to remove Eikenberry as member of their operating entities and signatory on accounts, without Eikenberry's knowledge or consent. (VC ¶¶ 102-103; Eikenberry Aff. ¶ 27.) Lamson does not dispute that these actions constitute breaches of fiduciary duty. *See Miltland Raleigh-Durham v. Myers*, 807 F. Supp. 1025, 1058 (S.D.N.Y. 1992) (fiduciary duties breached where partner "uses or obtains the benefit of partnership credit or assets for himself . . .") (applying New York law).

Lamson's only argument is that this claim must be rejected as duplicative of the contract claim. Not so. Where, as here, a breach of contract claim premised on an alleged joint venture is properly plead, a breach of fiduciary duty claim can be sustained. *See Shapsis v. Kogan*, 30 Misc. 3d 1208(A), 1208A (Sup. Ct. Kings Cnty. Jan. 7, 2011) (sustaining both claims, holding, "inasmuch as plaintiffs have alleged the existence of an oral partnership or joint venture with [defendant] and an alleged breach by [defendant] of a fiduciary duty owed to the plaintiffs, they have pleaded a cognizable claim of breach of fiduciary duty"); *Island Rehab. Servs. Corp. v. Maimonides Med. Ctr.*, 19 Misc. 3d 1108(A), 1108A (Sup. Ct. Kings Cnty. 2008) (when breach of joint venture agreement is pleaded, breach of fiduciary duty "cause of action may be separately

maintained by plaintiffs and its dismissal must be denied"); *Foster,* 44 A.D.3d at 30 (when "breach of joint venture agreement claim" pleaded, "breach of fiduciary duty claim may stand").

Lamson's authorities (Mem. 20) hold that when a contract claim is defective under the Statute of Frauds, a fiduciary duty may not be based on that agreement. *See Foster*, 44 A.D.3d at 30 ("inasmuch as the statute of frauds did not bar the breach of joint venture agreement claim, this rationale is inapplicable and the breach of fiduciary duty claim may stand"). For reasons in Point III.A, the contract claim is not barred by the Statute of Frauds. Lamson cites no authority for his contention that the use of special purpose vehicles supersedes partners' fiduciary duties to each other (Mem. 21.) Lamson may have additional fiduciary duties to Eikenberry from those relationships. *See Jones v. Voskresenskaya*, 125 A.D.3d 532, 533 (2d Dep't 2015) ("members of an LLC may stand in a fiduciary relationship to each other and the LLC"), but they do not supplant those owed between partners. [12]

A separate fiduciary duty also exists from Lamson's control of much of the Partnership information, including dealings with development partners and contractors. *See EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 20 (2005) (fiduciary relationship separate from contract imposed where defendant "induced to and did repose confidence in . . . knowledge and expertise to advise it and . . . engage in honest dealings with [plaintiff's] best interest in mind"); *see Mandelblatt v. Devon Stores*, 132 A.D.2d 162, 167-68 (1st Dep't 1987) ("the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself.").

[12] Lamson's cases (Mem. 21) involve parties that did not otherwise have a relationship of trust. *See Hoeg Corp. v. Peebles Corp.*, 153 A.D.3d 607, 609 (2d Dep't 2017) ("The written retainer agreement reflects a consultant-principal relationship between the parties"); *First Keystone Consultants, Inc. v. DDR Const. Servs.*, 74 A.D.3d 1135, 1137 (2d Dep't 2010) (no fiduciary relationship where documentary evidence showed that plaintiff was not member of LLC or party to joint venture with LLC).

C. Unjust Enrichment and Constructive Trust

A claim for unjust enrichment must allege (1) defendant was enriched, (2) at plaintiff's expense, and (3) "it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered." *Cruz v. McAneney*, 31 A.D.3d 54, 59 (2d Dep't 2006) (citations omitted). A constructive trust is warranted where unjust enrichment is shown. *See Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976). Eikenberry alleges Lamson's transfer, retention, and misuse of Partnership funds at her expense. His retention of Partnership property is against equity and good conscience, depriving Eikenberry of her twenty-five years of investment. (VC ¶¶ 152, 153.)

Lamson argues that the unjust enrichment claim fails as duplicative of breach of contract and fiduciary duty claims. (Mem. 23.) This argument fails. "[W]here, as here, the existence of the contract is in dispute, the plaintiff may allege causes of action to recover for unjust enrichment and in quantum meruit as alternatives to a cause of action alleging breach of contract." *Thompson Bros. Pile Corp. v. Rosenblum*, 121 A.D.3d 672, 674 (2d Dep't 2014) (citations omitted); *Elbroji v. 22 E. 54th St. Rest. Corp.*, 67 A.D.3d 957, 958 (2d Dep't 2009) (same).

Lamson contends that a constructive trust would violate domestic relations law (Mem. 23), but this is not such a case. None of his authorities involves ownership of businesses, or contributions of capital, skill, and labor to the enterprise. *See Jennings v. Hurt*, 160 A.D.2d 576, 578 (1st Dep't 1990) (plaintiff did not contribute to business partnership that resulted in purchase of apartment at issue); *Tompkins v. Jackson,* 22 Misc. 3d 1128(A), 1128A (Sup. Ct. N.Y. Cnty. 2009) ("there is no evidence that plaintiff contributed any efforts or money toward the purchase, maintenance, or improvement of the . . . home").

D. Fraudulent Conveyance

The elements of an actual fraudulent conveyance action are "(1) a conveyance was made with (2) actual intent to hinder, delay or defraud present or future creditors." *Seidler v. Workable Atl. LLC*, No. 518713/2019, 2020 N.Y. Misc. LEXIS 1844, at *13 (Sup. Ct. Kings Cnty. May 6, 2020) (citing Debtor and Creditor Law § 276). A plaintiff may plead "badges of fraud" creating an inference of intent including "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; … and retention of control of the property by the transferor after the conveyance." *Wall St. Assocs. v. Brodsky*, 257 A.D.2d 526, 529 (1st Dep't 1998) (citations omitted).

Lamson contends that the Complaint lacks requisite particularity. (Mem. 22.) But Eikenberry has alleged the bank accounts, amounts, dates of transfer, and provided documentation showing Lamson's efforts (successful and attempted) to remove and secrete Partnership assets. (*See* Eikenberry Aff. ¶¶ 26-27.) This is more than sufficient to comply with CPLR 3016(b). *JDI Display Am., Inc. v. Jaco Elecs., Inc.*, 2020 N.Y. App. Div. LEXIS 6677, at *5 (2d Dep't Nov. 12, 2020) (transfer of "corporate funds it had received from the sale of its assets" to a shareholder "and that said transfer left [defendant] insolvent" met "the particularity required by CPLR 3016(b)" and gave "rise to an inference that [defendant] intended to hinder, delay, or defraud the plaintiff").

POINT IV

THERE IS NO BASIS FOR A STAY OF DISCOVERY

Lamson requests a stay of discovery under CPLR 3214(b) and Commercial Division Rule 11(d). (Mot. 24.)[13] The Court should reject this request. First, CPLR 3214(b) (providing for stay

[13] Lamson purports to have "moved" for this relief, yet his Notice of Motion makes no such request, moving solely pursuant to CPLR 3211(1) & (7)). *See* NYSCEF Doc. No. 68. His request should also be denied on this basis. *See Hudson City Sav. Bank v. Atanasio*, 60 Misc 3d 1223(A) (Sup. Ct. Suffolk Cnty. 2018)

of discovery upon filing of motion to dismiss) does not apply to Commercial Division cases. The Commercial Division adopted its own default rule—the ***opposite*** one—to prevent discovery delays that plagued the system. Its general practice is to allow discovery to proceed pending a Rule 3211 motion. *See* Commercial Division Rule 11(d); *Harrop & Co., Ltd. v. Apollo Inv. Fund VII, L.P.*, No. 651949/2014, N.Y. Misc. LEXIS 2332, at *15-16 (Sup. Ct. N.Y. Cnty. June 25, 2015) ("The strong general practice of the Commercial Division is to allow discovery to proceed, notwithstanding the filing of a motion to dismiss, in order to ensure that cases proceed as expeditiously as possible").

Second, Lamson's Motion lacks merit. Eikenberry has demonstrated a likelihood of success on her claims. There is no basis on which to suspend discovery.

Third, a stay would be inequitable. Lamson has engaged in harassment and intimidation to obstruct discovery, including by deleting data and threatening Eikenberry. (Eikenberry Aff. ¶¶ 26-30.) The Court should not reward this behavior.

As there is no basis for deviating from Court Rule, with pressing reasons to allow discovery to continue, Lamson's request should be denied.

CONCLUSION

For the foregoing reasons, Kristen Eikenberry respectfully requests that the Court deny the Motion in its entirety.

Dated: New York, New York
January 6, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the 7,000 word limit set forth in Commercial Division Rule 17(i). This document contains 6,991 words, excluding the caption, table of contents, table of authorities and signature block. I have relied on the word count of the word processing system used to prepare this document.

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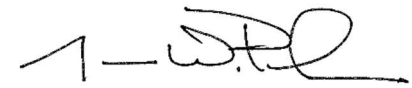
January 6, 2020



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