SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 652598/2018**
COUNTY OF NEW YORK: Part 32

LORAINE KINYK,

Plaintiffs,

-v-

DARLENE HART and
519 EAST 6TH STREET LLC,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SEEKING TO AWARD PLAINTIFF ALL PROCEEDS FROM THE BUILDING SALE AND IN SUPPORT OF DEFENDANT HART'S REQUEST THAT THE COURT SEARCH THE RECORD AND GRANT SUMMARY JUDGMENT TO DEFENDANT HART

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted by Defendant Darlene Hart in opposition to Plaintiff's SJ' Motion which seeks summary judgment on "Plaintiff's Claims". Plaintiff's SJ Motion does not specify the claims upon which relief is being requested or the ground for the relief. Notwithstanding the foregoing, Plaintiff's Amended Complaint alleges two (2) causes of action, one for dissolution of 519 East 6, the other for money damages for the alleged value of management services Plaintiff provided to 519 East 6, and alleged personal investments made by Plaintiff into 519 East 6. Defendant requests that this court search the record and, upon doing so, enter summary judgment in favor of Hart on both the membership interest and money damage issues.

FACTUAL BACKGROUND

For a complete recitation of the facts in the instant matter the Court is respectfully referred to the Statement of Material Facts dated June 21, 2021, the Affidavit of Darlene Hart sworn to on June 19, 2021 (the "**Hart Aff.**") and the exhibits annexed thereto; the Affirmation of Stacie Bryce Feldman dated June 21, 2021, (the "**Feldman Affm**.") and the exhibits annexed thereto, and the Exhibits annexed to Plaintiff's SJ Motion, which are not reproduced by Defendant. For ease of reference all abbreviations and capitalized terms set forth in the Hart Aff. and Feldman Affm., as well as those defined in Plaintiff's SJ Motion and all supporting documents submitted therewith, are incorporated herein.

ARGUMENT

POINT I: Plaintiff has failed to establish that she is entitled to summary judgment on either her cause of action for dissolution of for money damages for services rendered BY PLAINTIFF as a manager or for REIMBURSEMENT OF LOANS MADE.

While Defendant Hart agrees with the general statement regarding the standards to be applied on a motion for summary judgment enunciated in Plaintiff's MOL, Defendant Hart disagrees that, in applying the applicable standards, Plaintiff has met her burden of proof and, therefore, summary judgment in favor of Plaintiff is not warranted.

A motion for summary judgment is governed by CPLR §3212. CPLR §3212(b), entitled "Supporting proof; grounds; relief to either party", sets forth the ground rules pursuant to which the summary judgment motion can be granted. Summary judgment can be granted where it is established "that there is no defense to the cause of action or that the cause of action or defense has no merit". The court, in determining a motion for summary judgment, can search the record and grant summary judgment to the non-moving party, without the necessity of a cross-motion, if it shall appear that the nonmoving party is entitled to summary judgment relief. CPLR §3212(b).

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (see CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; Korn v Korn, 135 AD3d 1023, 1024 [3d Dept 2016]). "The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers" *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NyS2d 316 [1985] *Escoffier v. Amalgamated Bank*, 2017 N.Y. Slip

Op. 32365, 3 (N.Y. Sup. Ct. 2017) Failure to make this prima facie showing requires denial of the motion (see *Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (see *Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Once this showing has been made by the moving party, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (see CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562).

Defendant Hart submits that in viewing the totality of the evidence presented in this case in a light most favorable to non-moving party Defendant Hart, and according her the benefit of every favorable inference, Plaintiff has failed to make a prima facie showing of an entitlement to summary judgment on Plaintiff's cause of action for dissolution of the 519 East 6. Plaintiff has failed to prove that the Side Agreement is void, illegal and unenforceable as a matter of law because it violates Penal Law §187.00(4); Plaintiff has failed to establish that the Side Agreement is void and unenforceable as a matter of because it violates the Statute of Frauds; and Plaintiff has failed to establish that the Side Agreement constitutes parol evidence and should not be considered.

Defendant Hart further submits that in the event this court determines that Plaintiff has met her prima facie burden, Defendant Hart has raised triable issues of fact that preclude a summary judgment finding in Plaintiff's favor.

Finally, Defendant Hart submits that, in searching the record, summary judgment

should be awarded in favor of Defendant Hart determining that Plaintiff and Defendant each had a 50% percent membership in 519 East 6 from 2007 and through and including the date of the 2019 Sale of the Building. If the court believes that issues of fact exist as to each parties membership interest from the 2013 Refinance and through and including the 2019 Sale, the Court should nonetheless award summary judgment in favor of Defendant for the period 2007 and through and including December 2013, it being undisputed that Plaintiff and Defendant were each 50% members of 519 East 6 from 2007 through and including the 2013 Refinance, sharing equally in all assets, profits and distributions made and/or to have been made including, but not limited to, the loan proceeds received from the 2013 Refinance, pursuant to the terms of the Operating Agreement. The total amount of these damages are not less than $724,570.70. The court may grant Defendant this relief without the need for a cross-motion being made. CPLR §3212(b).

Point I(a). The Side Agreement Is Not Illegal, Void Or Unenforceable As It Does Not Violate A Prohibitory Statute, And Can Be Performed Without Violation Of That Statute:

Plaintiff induced her sister to sign documents in conjunction with the 2013 Refinance, pursuant to which Defendant purportedly relinquished her entire 50% membership interest in 519 East 6 in order to secure refinancing from Customer's Bank in the amount of $1,575,000.00, by promising that Defendant's 50% membership interest would remain if effect despite the documents signed in conjunction with the refinancing. Plaintiff's promise, and Plaintiff and Defendant's agreement as stated above, is evidenced by the Side Agreement. Plaintiff now claims that the Side Agreement is unenforceable

because it would result in a fraud against Consumer's Bank because it violates a New York Statute, specifically Penal Law §187.00(4), which prohibits Residential mortgage fraud. Defendant submits that this claim is not only one that is inapplicable as a matter of law, but also is not a claim that Plaintiff has standing to make. Moreover, it is submitted by Defendant that, in making this argument, Plaintiff acknowledges that the Side Agreement was a written agreement signed by the parties, and otherwise duly valid and binding, for if it were not, it could not be an agreement that needs to be voided as being violative of the Penal Law.

Although arguing that "[n]o fraud was committed, not by Plaintiff, not by Defendant Hart, and not by Attorney Morrow" (Plaintiff's MOL at P.12), in the very next breath Plaintiff argues that this court must declare the Side Agreement null, void and inapplicable to the Amended Operating Agreement as being residential mortgage fraud and unenforceable as an agreement among thieves. Plaintiff argues that if this Court does not nullify the Side Agreement it will be endorse residential mortgage fraud (Plaintiff's MOL at P. 13). Plaintiff argument is without merit.

The statute relied upon by Plaintiff is inapplicable to the case at bar, and Plaintiff's claim that it is applicable is wholly without merit. As used in Penal Law §187.00, et seq.,

> " 'Residential real property' means real property improved by a **one-to-four family dwelling**, or a residential unit in a building including units owned as condominiums or on a cooperative basis, used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to unimproved real property upon which such dwellings are to be constructed." (emphasis added) Penal Law §187.00

It is admitted to by Plaintiff and, therefore, beyond dispute, that during 519 East

6's ownership of the Building, and at the time of the 2013 Refinance, the Building was a residential property consisting of ten (10) class A apartments, some subject to rent regulation, some purportedly free market. As such, Penal Law §187.00 et seq. is inapplicable. Pursuant to its definitional framework, it applies only to one to four family dwellings. Penal Law §187.00. Based upon the clear definitional framework, Plaintiff knew, and/or should have known, that the statute relied upon by her does not apply. As the Side Agreement does not implicate residential mortgage fraud as Plaintiff claims, it is not illegal, void or unenforceable, and this Court would not be endorsing residential mortgage fraud in upholding the Side Agreement.

The balance of Plaintiff's arguments and caselaw hinge on the applicability of Penal Law §187.00, et seq. Given that the penal law section relied upon by Plaintiff is inapplicable, the balance of Plaintiff's argument, that a contract that violates a prohibitory statute, or cannot be performed without violation of that statute, is illegal, void and unenforceable, fail as a matter of law. See *Hart v. City Theatres Co.*, 215 N.Y. 322, 325 (Ct. of App. 1915), citing *Miller v. Ammon*,145 U.S. 421, 426 (1892), (lease terms regarding construction to be performed violated the New York City Building and, as such, rendered the lease illegal and unenforceable, and Plaintiff could not prevail on his cause of action for sums due under the stipulations of the lease); *Sirota v. Champion Motor Group Inc.*,18 Misc.3d 862, 866 (Sup. Ct. Kings Co., 2008), (contract to sell a new car to a used car dealer violated New York State Vehicle and Traffic Law, and scheme to circumvent the law by purchasing the vehicle in another State did render the contract enforceable.); *Parpal Rest. v. Maitin Co.*, 258 AD2d 572 (2nd Dep't. 1999)(sublease was created for avoidance of improper tax avoidance); *Sabia v. Mattituck Inlet Marina and*

Shipyard, Inc., 24 A.D.3d 178 (1st Dept, 2005) (agreement for purchase of boat drafted in fictional manner to avoid paying sales tax was illegal and purchaser could not recover on claim for alleged breach of contract and fraud.) *Cochran v.Dellfava*, 517 N.Y.S.2d 854, 136 Misc.2d 38 (N.Y. City Ct. 1987)(Plaintiff may not recover $2200.00 paid in the so-called "airplane game" as the game constitutes a "chain distributor scheme" prohibited by General Business Law §359-fff, and by entering the game plaintiff was "promoting" the game in violation of the General Business Law.) *Bonilla v. Rotter*, 829 N.Y.S.2d 52, 36 AD3d 534, 2007 NY Slip Op 449 (1st Dep't 2007)(fee splitting agreement between nonlawyer and lawyer is prohibited by Judiciary Law §491 and, therefore, is void and unenforceable). *Malik v. Nihar*, 2008 NY Slip Op 50097 (App. Term. 2nd Dept. January 14, 2008)(plaintiff who could not obtain insurance on his own had unclean hands and could not recover insurance premiums paid to defendants, to whom he had transferred title of his livery car because he could not secure insurance due to bad driving record, after he was in an accident in which the car was totaled.)

Similary, *Albright v. Shapiro*, 214 A.D.2d 496 (1st Dept., 1995) does not apply to the facts of this case and does not warrant the result advanced by Plaintiff. In *Albright*, the parties engaged in a scheme to evade the rent stabilization laws by using residential space to conduct professional practice, in violation of the rent laws and applicable zoning regulations. The court found that, as a result of this evasion the law, the community was deprived of scarce, affordable housing units while Plaintiff tenants profited at public expense by renting space at below-market rates. The court in *Albright* found that the landlord and tenant acted in *pari delicto* and will not be permitted to enlist the aid of the courts in enforcement of their unlawful bargain. No such circumstances are present in

the case at bar. The parties were free to contract as to their respective membership interests. Customer's Bank has suffered no harm in that the loan was repaid in full. The fact that Customer's Bank may have had a possible claim for breach of the loan terms due to the reinstatement of Hart's 50% interest does not give rise to a claim in Plaintiff to void and/or breach the Side Agreement, but not void the Amended Operating Agreement or Assignment of Ownership Interest, and thereby retain a 100% in 519 East LLC. Finally, there was no public harm.

Simply put, the Penal Law statute relied upon by Plaintiff is inapplicable and, therefore, has not been violated by the Side Agreement. As such, Plaintiff's argument is not sustainable and Plaintiff's SJ Motion seeking a judgment that the Side agreement is illegal and, therefore void and unenforceable, must be denied.

Point I(b). The Side Agreement is Not Barred by the Statute of Frauds:

Plaintiff's SJ Motion is supported, in part, by her deposition testimony, in which Plaintiff has admitted that not only were the Amended Operating Agreement and Assignment of Ownership Shares not intended to result in divesting Defendant Hart of her 50% membership interest in 519 East 6 Street but, also, that the Side Agreement acknowledging that Defendant Hart would retain her 50% ownership/member interest in 519 East 6 was, in fact, signed by Plaintiff.

Plaintiff admits, on pgs. 5 through 6 of Plaintiff's MOL, that she had an agreement with her sister, Defendant in this action, that Defendant would remain a 50% member of the LLC despite the Amended Operating Agreement and Assignment of Ownership Interest that were executed in order to obtain the 2013 Refinance, and that she signed

the Side Agreement which corroborated this fact.

> Q. Did you and Ms. Hart have an agreement that after the Customers Bank mortgage was received by the LLC that she would remain a 50 percent member of the LLC?
> A. We had a verbal agreement, but if you could show me documentation, rd like to see that.
> (Kinyk Nov. 19, 2020 Dep., p. 54, lines 6-12, **Exhibit W).**
> A. My verbal agreement with Ms. Hart was to go 50/50.
> Q. Once the mortgage was obtained from the bank, right, to go back to 50/50?
> A. Yes.
> Q. And you point out that there's no signatures on this document, correct?
> A. The document you're showing me there's no signatures.
> Q. Do you have this document with the signatures of yourself and Ms. Hart?
> A. I provided everything that I've given you during discovery.
> **Q. Do you recall ever having a signed copy of this document?**
> **A. Yes.** (emphasis added)
>
> (Kinyk Nov. 19, 2020 Dep, p. 56, lines 8-23 , Exhibit W)

Plaintiff also submits portions of Defendant Hart's deposition testimony to establish that Defendant Hart also signed the Side Agreement. Plaintiff's MOL at P.4

> Q. [Referring to "Side Agreement"] Do you recognize this document?
> A Yes, I do.
> Q. What is this document?
> A This is the document stating that I gave up my rights just to get the mortgage because my credit was very poor.
> **Q. And did you sign this document?**
> **A Yes, I did.**
> Q. And do you have a signed copy of this document?
> A. No, I do not.
> Q. Do you know if a signed copy of this document exists?
> A. There was a signed copy in with all the other documents that were kept at 519 East 6th Street.
> Q. Who prepared this document?
> A. Rizpah Morrow.
> Q. Did Ms. Morrow review this document with you prior to your

signature?
A. Yes, we spoke about this on the phone and she ensured me that everything would go right back, and the only reason that I had to sign it was to -- as proof why Loraine was given that hundred percent for the short period of time because my credit was poor. (Emphasis added)

(Hart Dep., p. 43, line 22 - p. 45, line 5., Exhibit T)

The admission of both parties to this action, as advanced by Plaintiff, that they each signed the Side Agreement, eliminates any material issue of fact in this regard. The Side Agreement was duly executed by both parties. As such, the side Agreement does not violate the Statute of Frauds, and the case law relied upon by Plaintiff is inapplicable.

Plaintiff's reliance on *Friedman v. Ocean Dreams, LLC*, 15 Misc.3d 1146(A) (Sup. Ct, N.Y.Co.), 2007 N.Y. Slip Op. 51188(U) is misplaced, and its precedent does more to support Defendant's claim that the Side Agreement was fully enforceable and that Defendant retained a 50% membership interest, than Plaintiff's argument that it does not.

In *Friedman*, the claimed membership interest allegedly arose after the property in question was purchased. In the case at bar Defendant's membership interest arose at the inception and creation of the LLC, the property having been obtained by Plaintiff and Defendant as an inheritance upon their father's death. In *Friedman* the agreement was an oral one, there was never a written or signed agreement. In the case at bar the Side Agreement is, admittedly, one that is in writing, signed by both Plaintiff and Defendant. In *Friedman*, and as the court stated, in contrast to *Spodek v. Riskin*, 150 A.D.2d at 359 (2nd Dept., 1989), there was no evidence, documentary or otherwise, of any performance on plaintiff's behalf that would be unequivocally referable to the alleged oral contract so as to avoid the Statute of Frauds.

In *Spodek*, *supra*, the Appellate Division, Second Department stated:

> We agree with the court's determination that an oral agreement for a joint venture, which has, as its object, the conveyance of an interest in real property from one venturer to another is a contract subject to the Statute of Frauds *(Najjar v National Kinney Corp.*, 96 A.D.2d 836; *Pounds v Egbert*, 117 App. Div. 756, 759). However, a party's partial performance of an oral agreement conveying an interest in real property will be deemed sufficient to take that contract out of the Statute of Frauds if it is demonstrated that the acts constituting partial performance are "unequivocally referable" to the contract *(Anostario v Vicinanzo*, 59 N.Y.2d 662, 664; *see also, Boylan v Morrow Co.*, 63 N.Y.2d 616; *Mihalko v Blood*, 86 A.D.2d 723).

In the case at bar there is an abundance unequivocally referable evidence. Plaintiff repeatedly testified that it was never the intention that Defendant Hart would be permanently divested of her 50% membership interest. Plaintiff testified at her deposition that she and Defendant Hart continued to have meetings each and every year after the 2013 Refinance, throughout each year, although less formally than they were perhaps required to do due to their familial relationship. Plaintiff testified at her deposition that in or about 2018, after the 2013 Refinance occurred, Plaintiff asked Defendant Hart to buy out her 50% interest in 519 East 6, giving Defendant Hart a 100% interest. Plaintiff alleged in the Complaint, and then again in the Amended Complaint that she and Defendant Hart were, in 2018 and 2019 (the dates each pleading was verified), each 50% members in 519 East 6. Plaintiff alleged this joint ownership as the basis for the need to commence the action to dissolve 519 East 6. Plaintiff testified at her deposition that her sworn allegations regarding Defendant Hart's 50% membership interest were true when they were made, and continued to be true as of the date of the deposition. Perhaps most telling is the fact that in each and every year after the 2013 Refinance (2014 through 2018) Defendant was issued a K-1 by Plaintiff stating that Defendant had a 50% interest

in 519 East 6. The tax documents also establish that losses were shared between Plaintiff and Defendant. As stated in *Friedman*, *supra*, "[w]hile the mere sharing of losses and profits alone may not always be sufficient to establish the existence of a partnership, it is an indispensable element to showing that a partnership exists (see *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 317 [1958]; *People v. Andujar*, 110 A.D.2d at 606, 488 N.Y.S.2d 397)." Moreover, and as stated in *Friedman*, "a party is estopped from taking a position which is contrary to a position taken on his or her tax returns (see *Naghavi v. N.Y. Life Ins. Co.*, 260 A.D.2d 252, 252 [1999]; *Zemel v. Horovitz*, 11 Misc.3d 1058[A], *6 [2006]). The K-1's were issued to Defendant by 519 East 6 with Plaintiff's knowledge, consent and authority. As such, Plaintiff is estopped from taking a position contrary to the one taken in the K-1's issued by 519 East 6.

Based upon the foregoing, even if the Side Agreement fell within the Statute of Frauds, which it does not, it is taken out of the Statute of Frauds as it has been demonstrated that the acts constituting partial performance are unequivocally referable to the Side Agreement.

The totality of the evidence submitted to this court both in support of and opposition to Plaintiff's SJ Motion supports the fact that the Side Agreement, and its terms regarding Defendant Hart's continued 50% membership interest, are valid and enforceable and demonstrate that summary judgment on this issue should be granted in favor of Defendant. At worst, an issue of fact exists on the issue.

Point I(c). The Side Agreement is not prohibited by the Parol Evidence Rule.

The Side Agreement is a separate and distinct written and fully executed agreement that was drafted in conjunction with the Amended Operating Agreement and

Assignment of Ownership Interest and is part and parcel of the documents prepared at the time of the 2013 Refinance. The Side Agreement is not an oral agreement. Nor is it extrinsic evidence of notes or other memoranda or evidence of contemporaneous negotiations between the parties of terms or conditions that did not make their way from the negotiating table into the contract or agreement in question. The Side Agreement is a written agreement admitted to have been duly executed by both Plaintiff and Defendant. To the extent that it alters or modifies the Amended Operating Agreement, written amendments and modifications of the Amended Operating Agreement are, by the Amended Operating Agreement's express terms, permissible. The Side Agreement is not barred by the Parol Evidence Rule.

As stated by the court in *Mitchill v. Lath*, 247 N.Y. 377 (N.Y. 1928), "the parol evidence rule applies to attempts to modify a contract by parol. It does not affect a parol collateral contract distinct from and independent of the written agreement. It is, at times, troublesome to draw the line. Williston, in his work on Contracts (sec. 637) points out the difficulty. "Two entirely distinct contracts," he says, "each for a separate consideration may be made at the same time and will be distinct legally. Where, however, one agreement is entered into wholly or partly in consideration of the simultaneous agreement to enter into another, the transactions are necessarily bound together. * * * Then if one of the agreements is oral and the other is written, the problem arises whether the bond is sufficiently close to prevent proof of the oral agreement." "

As stated by the court in *Fogelson v. Rackfay Constr. Co.*, 300 N.Y. 334 (N.Y. 1950):

> The rule, defining the limits of the contract to be construed, forbids proof of an oral agreement to add to or vary the writing. It does not,

> however, apply where the written contract was not intended to embody the entire agreement between the parties. In general, an oral agreement may be proved only if it is "not * * * so clearly connected with the principal transaction as to be part and parcel of it." (*Mitchill* v. *Lath, supra,* 247 N.Y. 377, 381; see, also, *Ball* v. *Grady, supra,* 267 N.Y. 470; *Halloran* v. *N. C. Contr. Co.,* 249 N.Y. 381; *Thomas* v. *Scutt, supra,* 127 N.Y. 133; *Eighmie* v. *Taylor,* 98 N.Y. 288; *Wilson* v. *Deen,* 74 N.Y. 531; *Stoner* v. *Stehm,* 200 Iowa 809; *O'Malley* v. *Grady,* 222 Mass. 202; *Farr* v. *Wasatch Chemical Co.,* 105 Utah 272.) Decision in each case must, of course, turn upon the type of transaction involved, the scope of the written contract and the content of the oral agreement asserted. As this court expressed it, "in the end, the court must find the limits of the integration as best it may by reading the writing in the light of surrounding circumstances, and by determining whether or not the agreement was one which the parties would ordinarily be expected to embody in the writing." (*Ball* v. *Grady, supra,* 267 N.Y. 470, 472.)

In the case at bar, there were two (2) distinct written contracts. The Side Agreement is not merely notes or memorandum of negotiating points that were not included in the Amended Operating Agreement. As such, the parol evidence rule does not apply.

POINT II: THE AMENDED OPERATING AGREEMENT AND ASSIGNMENT OF OWNERSHIP INTEREST ARE VOID AND UNENFORCEABLE DUE TO A LACK OF MONETARY CONSIDERATION TO DEFENDANT HART

In support of Plaintiff's argument that the Side Agreement is barred by the Statute of Frauds Plaintiff relies on *Caribbean Direct, Inc. v. Dubset, LLC*, 100 A.D.3d 510 (2012). Defendant Hart submits that this case actually supports her position that the Operating Agreement is the agreement that controls.

In *Carribbean*, the lower court stated that a membership interest in an LLC is personal property and "a contract to sell such personal property is not

enforceable…beyond five thousand dollars in an amount or value unless there is some writing which indicates that a contract of sale has been made between the parties at a defined or stated price." Relying on this precedent, the Assignment of Ownership Interest and Amended Operating Agreement entered in 2013 in conjunction with the 2013 Refinance are void and unenforceable there, being no written agreement introduced of the sale or transfer of Defendant Hart's 50% membership interest at a defined stated price. It is reasonable to conclude that the multi-family Building involved in this case, which supported a mortgage of $1,575,000.00 in 2013, had a value well in excess of that amount. Even if the loan amount was the Building's total value, the amount satisfies the limited liability law requirement. Darlene Hart's 50% membership interest is personal property valued beyond five thousand dollars. As such, and in searching the record, this Court should grant Defendant Hart summary judgment holding that the Amended Operating Agreement and Assignment of Ownership Interest are null and void, and that the Operating Agreement is the operative contract between the parties.

POINT III: A CONSTRUCTIVE TRUST HAS BEEN IMPOSED.

Courts will impose a constructive trust '(w)hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest' (*Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 380(1918); 1 Scott, Trusts (3d ed.), s 44.2, p. 337; 4 Pomeroy's Equity Jurisprudence (5th ed.), s 1053, p. 119). "In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4)

unjust enrichment." *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121, 351 N.E.2d 721, 723 (1976)(internal citations omitted). It bears note that the elements of imposing a constructive trust are mere guidelines, and not inflexible standards - '[t]he constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice' " *Ning Xiang Liu v. Al Ming Chen*, 133 A.D.3d at 645, 19 N.Y.S.3d 565 (2nd Dep't 2015), quoting *Iwanow v. Iwanow*, 39 A.D.3d 476, 477, 834 N.Y.S.2d 251(2007).

In *Friedman, supra,* a case relied upon by Plaintiff in arguing that the Side Agreement was barred by the Statute of Frauds, the court, in considering the Statute of Frauds issue, addressed the issue of whether or not a constructive trust should be impressed. The court set forth the required elements for the imposition of a constructive trust - a confidential or fiduciary relationship, a promise, a transfer in reliance upon the alleged promise, and unjust enrichment (see *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 [1976]; *Osborne v. Tooker*, 36 A.D.3d 778, 779[2007]; *Natasi v. Natasi*, 26 A.D.3d 32, 37 [2005]; *Eicker v. Pecora*, 12 A.D.3d 635, 636 [2004]; Neos v. Neos, 262 A.D.2d 467, 468 [1999]). Each and every one of these elements is present in the case at bar.

As to the first element, Plaintiff and Defendant are sisters and members of 519 East 6. Here the plaintiffs are siblings; close family relationships are consistently recognized by the courts as a confidential relation. See *Sinclair v. Purdy*, 235 N.Y. 245 (1923) (siblings); *Delidimitropoulos v. Karantinidis*, 186 A.D.3d 1489, (2020) (father-in-law and son-in-law).

As to the second element, it is undisputed that a promise was made by Plaintiff to Defendant hat Defendant's the transfer of her 50% interest was intended solely to procure

refinancing, and that despite the execution of the Amended Operating Agreement and Assignment of Ownership Interest, Defendant would retain her 50% membership interest. As such a promise was made to share the profits of the LLC after the 2013 Refinance. Plaintiff's argument's as to the enforceability of the Agreement notwithstanding, a writing that evidences a promise, even if not enforceable as a contract, is still documentary evidence of a promise in this context. In *Sinclair*, *supra*, the Court of Appeals reversed the trial court's refusal to admit a memorandum from a sibling indicating that another sibling had an equity interest in property, notwithstanding the fact that the document was not an enforceable contract. The Court in *Sinclair* made clear that even if unenforceable as a matter of law, the memorandum's "interpretation was for the jury in light of the surroundings." Id. In other words, while Defendant maintains that the Side Agreement is enforceable, should the court decide otherwise, the Side Agreement should still be reviewed by the trier of fact to determine the factual questions surrounding Plaintiff's promise to Defendant. Moreover, and equally as important for the trier of fact to determine, is whether the promise was breached. Defendant maintains that it was.

As to the third element, Defendant relied upon Plaintiff's promise, memorialized in the Side Agreement, in executing the Amended Operating Agreement and Assignment of Ownership Interest. Both parties acknowledge that it was the intention when executing the Amended Operating Agreement and Assignment of Ownership Interest that Defendant Hart would retain her 50% membership interest. There was no other benefit to be had by Defendant Hart, there was no other logically conceivable or conscionable reason for Defendant to have transferred the entirety of her 50% membership interest in 519 East 6 and all of her interest in the Building were it not for her reliance on the promise

made by her sister, as evidenced in the Side Agreement. See *Reingold v. Bowins*, 180 A.D.3d 722, 724, 119 N.Y.S.3d 487, 490, leave to appeal dismissed, 36 N.Y.3d 926, 160 N.E.3d 320 (2020) (finding a constructive trust was appropriate where parties relied on an agreement that title would eventually be transferred to them, and expended money and labor based on such reliance).

Finally, as to fourth element, Plaintiff will be unjustly enriched if she is allowed to have a 100% interest in the Building entitling her to all of the sale proceeds. If this is to occur Plaintiff will be allowed, in a Hail Mary maneuver and by disavowing all of Plaintiff's sworn allegations and testimony to date, to have wrested Defendant Hart's inheritance from her for no consideration and in breach of Plaintiff's promise that, despite the 2013 Refinance documents to the contrary, Defendant Hart would indeed retain her 50% membership interest. As discussed infra, Plaintiff would be unjustly enriched by a windfall of 100% of the proceeds of the sale of the property, while Defendant receives nothing for her transferred interest. Viewed from the lens of equity and "human implication," as case-law requires, the conduct of Plaintiff shocks the conscience and indicates a scheme to obtain full interest in an inheritance passed equally to two siblings.

In *Spodek*, *supra*, also discussed in Point I(B) with regard to Plaintiff's Statute of Frauds argument, the court found "that the plaintiff also stated a cause of action to impress a constructive trust on the proceeds from the sale of the subject apartment building. The Statute of Frauds does not bar an action for a constructive trust *(Vanasco v Angiolelli*, 97 A.D.2d 462). A constructive trust will be impressed when an unfulfilled promise to convey an interest in land induces another, in the context of a confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment *(Sharp v*

Kosmalski, 40 N.Y.2d 119, 121; *Foreman v Foreman*, 251 N.Y. 237, 240). Contrary to the [lower] court's finding, the plaintiff has alleged the requisite elements, including a transfer of property resulting in unjust enrichment *(see, McGrath v Hilding*, 41 N.Y.2d 625)."

In the case at bar Defendant Hart's shares in the LLC were held in a Constructive Trust by Plaintiff, and any benefit from such equity share is the property of Defendant.

POINT IV: PLAINTIFF WILL BE UNJUSTLY ENRICHED IF DEFENDANT HART'S 50% MEMBERSHIP INTEREST IS NOT UPHELD

Should the Side Agreement be judicially declared to be void, as Plaintiff claims, Plaintiff will be unjustly enriched.

The doctrine of unjust enrichment is an obligation created under the principles of equity to prevent the injustice of one party unjustly enriching itself at the expense of another. *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, N.Y.S.2d 355, 361(2009). Thus, "[t]he essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695 [1972]).

A party seeking to bring an unjust enrichment claim must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' " *Citibank, N.A. v. Walker*, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48 [2d Dept.2004]; *Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 629–630, 840 N.Y.S.2d 445 [3d Dept.2007]) Notably, "(t)he existence of a valid and enforceable written contract governing a particular subject matter

ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" *Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190 [1987].

The facts of this case fit squarely within the elements of unjust enrichment. Should Plaintiff prevail, she would be enriched by receiving the entire value of the property, including Defendants share. Defendants interest in the property, were it not for Plaintiff's inducement in 2013, would be 50% of the total sale price, therefore Plaintiff's windfall would be directly at Defendant Hart's expense. Moreover, it would shock the conscience to allow Plaintiff to retain Defendant Hart's 50% share in the proceeds pursuant to an Amended Operating Agreement and Assignment of Ownership Interest that was induced based upon the reliance that Defendant would retain her right to the profits from the Building.

Courts have held that where a party relies on an agreement to share in the equity of a property, and acts on such reliance, the party having title to the property is unjustly enriched if such agreement is not honored. See *Reingold v. Bowins*, 180 A.D.3d 722, 724, 119 N.Y.S.3d 487, 490 (holding that defendant was unjustly enriched where "plaintiff expended money…. in reliance upon the agreement between the parties that title to the Ronkonkoma property would eventually be transferred to the plaintiff. . . and defendant breached her promise to transfer the Ronkonkoma property to the plaintiff, and unjustly secured for herself all of the equity gained in the property since its purchase."). Moreover, Courts have held that where the Statute of Frauds bars enforcement of a contract, a party's claim for financial contributions made in reliance on an agreement will survive. *Lake Overlook Partners, LLC v. Sosa*, 163 A.D.3d 945, 947, 83 N.Y.S.3d 83, 86

(2018)(finding that unjust enrichment cause of action was "not barred by the statute of frauds, as they merely seek to recover the value of [plaintiffs] financial contributions made in reliance on statements allegedly made by the defendant, and are not an improper attempt to enforce an oral agreement to acquire an interest in the subject properties (see *Kennedy v. Leibowitz*, 303 A.D.2d 375, 376, 757 N.Y.S.2d 50).")

Here Defendant expended her 50% ownership in the LLC in reliance on the fact that 50% of the profit of the LLC (including 50% of the profit of any sale) would remain hers. Defendant only seeks to retain her initial investment in the property.

CONCLUSION

Based upon the foregoing, Defendant requests that Plaintiffs' SJ Motion be DENIED in its entirety; that after searching the record the Court enter summary judgment in Defendant Hart's favor on the ownership and money damage issues; that Defendant be awarded cost and fees in opposing Plaintiffs' Motion including, but not limited to, legal fees; and for such other and further relief as this Court deems just, proper and equitable.

Dated: New York, New York
June 21, 2021

Yours, etc.

Stacie B. Feldman

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Certification Pursuant to 22 NYCRR 202.8-b

I, Stacie Bryce Feldman, and attorney duly licensed to practice before the Courts of the State of New York certify that the word count for Defendant's Memorandum of Law complies with the word count limit of 22 NYCRR 202.8-b Rules of the Supreme Court of the State of New York because it contains less than 7,000 words.

Stacie B. Feldman

Stacie Bryce Feldman