SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

LORAINE KINYK, Plaintiff,

-against-

DARLENE HART and
519 EAST 6th STREET LLC, Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT AWARDING
PLAINTIFF ALL PROCEEDS FROM THE BUILDING SALE
AND OTHER SIMILAR RELIEF

Presiding: Hon. Francis A. Kahn III

Index No.: 652598/2018
PRELIMINARY STATEMENT

The issue before this Court concerns the legal effect of an executed transfer of ownership interest in a limited liability company from one of two partners to the other, resulting in the 100% consolidation of ownership interest in one person prior to obtaining a mortgage, which was successfully closed. The mortgage approval had been predicated on a new operating agreement reflecting the aforementioned consolidation of ownership interest.

No subsequent transfer back of any ownership interest was ever executed. When the only asset of the limited liability company was sold, there existed only a single member of that LLC to whom all proceeds of the sale should have been distributed. Since all rights to profits from the asset’s sale vested in that sole member, non-members of the LLC should not have been provided any distributions whatsoever.

RELEVANT FACTS

The Parties, Loraine Kinyk (“Plaintiff”) and Darlene Hart (“Defendant Hart”) formed the limited liability company known as 519 East 6th Street LLC (“519 EAST”) by filing Articles of Organization and an Operating Agreement, on or about March 28, 2007 (see Exhibit A).

The LLC was formed for the purposes of owning, managing, and operating for profit a ten-family Class A multiple dwelling known as and located at 519 East 6th Street, New York, NY (“Building”) and obtained a mortgage from Astoria Federal for the Building.

Plaintiff and Defendant Hart were sole members of 519 EAST, and each held a 50% stake in the business pursuant to the initial March 28, 2007 Operating Agreement.
In 2013, 519 EAST prepared to refinance their mortgage with Customers Bank. The Parties retained Attorney Rizpah Morrow ("Attorney Morrow") to guide them through the mortgage application process with Customers Bank. Hart Dep., p. 39, line 3 – p. 41, line 12; p. 45, lines 18-23 (Exhibit T). Kinvk Oct. 29, 2020 Dep., p. 152, lines 1-17 (Exhibit V).

Attorney Morrow advised that she should draft a set of documents that would support their application to Customers Bank and avoid including Defendant Hart’s poor credit history which, Attorney Morrow believed, would jeopardize their loan application. Hart Dep., p. 39, line 16 – p. 40, line 18; p. 43, line 22 – p. 45, line 5.; p. 45, lines 18 -23 (Exhibit T). Kinvk Nov. 19, 2020 Dep., p. 52, lines 6 – 20., p. 54, lines 6 - 12., p. 56, lines 8-23 (Exhibit W).

On November 20, 2013, the Parties executed an “Amended Operating Agreement” which identified Plaintiff as the sole member of the LLC with 100% ownership interest (please see Exhibit B).

Defendant Hart testified that she spoke to Attorney Morrow and signed the Amended Operating Agreement. Hart Dep., p. 41, lines 1-19 (Exhibit T). Plaintiff testified that the Amended Operating Agreement was signed by both Parties for the 2013 Refinancing. Kinvk Nov. 19, 2020 Dep., p. 29, line 11- p. 30, line 22 (Exhibit W).

Consistent with the Amended Operating Agreement, the Parties also executed an “Assignment of Ownership Interest” in which Defendant Hart transferred Defendant Hart’s entire ownership interest in the LLC to Plaintiff (see Exhibit C).

Defendant Hart explained that she signed the document because “my credit was extremely bad at the time.” Hart Dep., p. 39, lines 16-20; p. 40, lines 9-10 (Exhibit T).
Plaintiff confirmed that the Parties signed, before a notary, the Assignment of Ownership Interest to provide Plaintiff 100% in 519 EAST for securing the 2013 Refinancing from Customers Bank. Nov. 19, 2020 Dep., p. 43, lines 14-21, p. 44, line 18 - p. 45, line 11 (Exhibit W).

On or about that same time, Attorney Morrow prepared, unknown to Customers Bank, a side agreement, hereinafter “Side Agreement” (Exhibit D).

Defendant Hart explains that the purpose of the Side Agreement was to return to her 50% in 519 EAST once the closing for the 2013 Refinance was completed:

Q. [Referring to Assignment of Ownership Interest] So Ms. Hart, did you sign this document?
A. I believe I signed this document in order to refinance.
Q. So do you know who prepared this document?
A. Rizpah Morrow.
Q. And so it was your understanding that you were surrendering a hundred percent – surrendering your ownership in 519 East 6th Street? However, it was also your understanding that you were only doing this in order to obtain a mortgage?
Q. What was your understanding, Ms. Hart, when you signed this document with regard to the terms of this document?
A. My sister and I were going to remortgage the building, were going to take out a loan and my credit was extremely bad at the time. So I believe that we both applied and were turned down because my credit was bad. So my sister called Rizpah and we had a conversation and I was told that if this document was filled out that my sister could get the loan and that it would just be for the course of the few days that the loan would take to come through and then everything would go back 50/50.

(Hart Dep., p. 39, line 16 – p. 40, line 18, Exhibit T)

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.
Q. So this document was never presented to Customers Bank, was it, to the best of your knowledge?
A. I don't think it was. Um not sure. I couldn't answer that.

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

Q. Did you authorize Rizpah Morrow to submit the amended operating agreement and assignment of ownership interest to Customers Bank on your behalf?
A. Yes, in order to get the mortgage. And it was my understanding that it would go right back to the way it was after the mortgage was obtained.

(Hart Dep., p. 45, lines 18 -23, Exhibit T)

Plaintiff confirmed:

Q. [Referring to the Amended Operating Agreement] Was it your intention in signing the amended operating agreement, which made you a 100 percent shareholder, and the assignment of ownership interest transferring Ms. Hart's 50 percent interest to you that she was permanently giving up her 50 percent interest in the LLC?
A. No.
Q. What was the intention?
A. To obtain another mortgage.
Q. [Referring to the Side Agreement”] And, in fact, there was another agreement entered between you and Ms. Hart giving her back her 50 percent interest, correct?
A. Do you have the document?
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, I'd like to see that.

(Kinyk Nov. 19, 2020 Dep., p. 54, lines 6-12, Exhibit W).

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.

(Kinyk Nov. 19, 2020 Dep., p. 56, lines 8-23, Exhibit W)

According to both Parties, the ultimate purpose Side Agreement was to return the Parties to their original 50% ownership interest each once the closing occurred. Hart Dep., p. 43, line 15 – p. 45, line 23, Exhibit T. Kinyk Nov. 19, 2020, Dep., p. 52, line 6 - p 56, line 23, Exhibit W.

On or about December 10, 2013, the LLC successfully closed on the mortgage refinancing with Customers Bank in the sum of $1,575,000.00, secured by the Building and a note signed by Plaintiff as sole member of 519 EAST and guarantor (“2013 Refinancing”). All closing documents were signed by Plaintiff as “sole member” of the LLC. Hart Dep., p. 53, lines 1-17, Exhibit T; Kinyk Nov. 19, 2020 Dep., p. 15, line 2 – p.
Plaintiff was the sole signatory on the Loan Disbursement Approval (Exhibit E), on the signature page of the Loan Agreement (Exhibit F), the General Conditions (Exhibit G), the Special Conditions (Exhibit H), the Consolidation and Extension Agreement (Exhibit I), the Consolidated and Restated Note (Exhibit J), the Statement of Undertaking (Exhibit K), Borrower Affidavit (Exhibit L), the Gap Mortgage Note (Exhibit M), the Carveout Guaranty (Exhibit N), the Assignment of Mortgage (Exhibit O), and the Assignment of Rents (Exhibit P).

Upon information and belief, Attorney Morrow submitted an Opinion Letter (Exhibit Q) and a Certificate of Authority (Exhibit R) besides the Amended Operating Agreement and the Assignment of Ownership Interest.

Five years later, on May 24, 2018, unsure of Defendant Hart’s remaining interest in the LLC, Plaintiff initiated a cause of action for the judicial dissolution of the LLC along with a claim against Defendant for unjust enrichment.

On April 12, 2019, the LLC entered into a contract for the sale of the LLC’s sole asset, the Building (“Sale”). On or about June 7, 2019, the LLC closed on the Sale.

Pursuant to their stipulation, all of the Sale’s proceeds were distributed equally between the parties except for $1,250,000.00 placed in escrow pending the settlement and/or determination of the claims each had against the escrowed amount (Exhibit S).

Plaintiff asserts that the documents drafted by Attorney Morrow provide Plaintiff the exclusive right to all proceeds from the 2019 Sale of the Building. The Amended Operating Agreement, dated November 20, 2013, submitted at the 2013 Refinance, lists Plaintiff as the sole member and owner of the LLC. The Assignment of Ownership
Interest resulted in Defendant Hart's relinquishment of her rights and ownership in the LLC and, along with the Amended Operating Agreement, was the basis on which Customers Bank predicated their mortgage approval. No other changes since then were made to the documents.

The Side Agreement, titled only as "Agreement," is dated one day before the Amended Operating Agreement and Assignment of Ownership Interest. Plaintiff does not recall signing such Side Agreement, and an exhaustive search has not produced any executed copies. The Side Agreement states that any transfer of Defendant Hart's ownership interest in the LLC was strictly for the purpose of inducing Customers Bank to approve their loan application but that otherwise the Parties retained their 50-50 ownership interest in the LLC.

Plaintiff contends that the Side Agreement is a nullity, and therefore Plaintiff retains, since November 20, 2013, 100% ownership interest in the LLC.

Plaintiff seeks summary judgment that would award Plaintiff the entire proceeds from the 2019 Building Sale, along with the moneys that remain in escrow, and including amounts wrongly distributed to Defendant.

ARGUMENT

THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO THE PLAINTIFF ON PLAINTIFF'S CLAIMS

A. No material issues of fact pertinent to this motion remain outstanding

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical
Center, 487 N.Y.S.2d 316, 64 N.Y.2d 851 (N.Y. 1985). See also Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (N.Y. 1980); Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 (N.Y. 1986). “The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist.” Kolivas v. Kirchoff, 14 AD3d 493 (2nd Dep’t. 2005). “On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party.’ Summary judgment is a drastic remedy, to be granted only where the moving party has ‘tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact’ and then only if, upon the moving party's meeting of this burden, the non-moving party fails ‘to establish the existence of material issues of fact which require a trial of the action.’” Vega v. Restani Constr. Corp., 965 NE2d 240 (Ct. of Appeals 2012) (citations omitted).

In the instant matter before this Court, the essential facts are not in dispute. Both Parties agree that they originally had equal ownership interest in the LLC when it was formed in 2007. Defendant Hart’s credit rating was considered unacceptable for the purposes of refinancing 519 EAST’s mortgage. The Parties then executed two documents, the aforementioned Amended Operating Agreement and the Assignment of Ownership Interest, positioning Plaintiff as the sole member of the LLC with 100% ownership interest. Said documents were submitted to Customers Bank in order to close on the 2013 refinancing of the LLC’s mortgage.

Defendant has invoked an unsigned agreement dated November 19, 2013 (“Side Agreement”) purporting to restore the Parties to their original 50-50 share of ownership
interest. However, giving effect to this unsigned Side Agreement is prohibited as a matter of law.

B. The purported Side Agreement cannot be enforced as it would result in a fraud perpetrated against Customers Bank

Over a century ago, the Court of Appeals declared “It is well settled that a plaintiff cannot recover if he is compelled to predicate his cause of action upon an illegal contract.” Hart v. City Theatres Co., 215 N.Y. 322, 325 (Ct. of App. 1915), citing Miller v. Ammon, 145 U.S. 421, 426 (1892). This proposition endures in more current decisions as well.

“It is well settled that a contract which violates a prohibitory statute or which cannot be performed without violation of that statute is an unlawful undertaking and is illegal, void, and unenforceable. Such an illegal contract cannot give rise to a viable cause of action. This is because a party ‘cannot ask a court of law to help [it] carry out [an] illegal object, nor can [it] plead or prove in any court a case in which [it], as a basis for [its] claim, must show forth [its] illegal purpose.’” Sirota v. Champion Motor Group Inc., 18 Misc.3d 862, 866 (Sup. Ct. Kings Co., 2008), quoting McConnell v. Commonwealth Pic. Corp., 7 NY 2d 465 (Ct. of Appeals 1960). For example, in Parpal Rest. v. Martin Co., 258 AD2d 572 (2nd Dep’t. 1999), the court dismissed the complaint because the affidavit of plaintiff’s president established that the agreement plaintiff sought to enforce "was created for the purpose of improper tax avoidance." Similarly, Sabia v. Mattituck Inlet Marina and Shipyard, Inc. involved a contract for the purchase of a boat that the plaintiff later found to be defective and upon which plaintiff sued; however, the court held that “by plaintiff’s sworn admission, the deal was documented in a fictional manner for the purpose of improper tax avoidance. Since no right of action can arise from an illegal
contract, plaintiffs are barred, as a matter of law, from suing on the alleged agreement for the purchase of the boat.” Sabia v. Mattituck Inlet Marina and Shipyard, Inc., 24 A.D.3d 178, 805 N.Y.S.2d 346, 2005 NY Slip Op 9403 (1st Dep’t 2005). Likewise, in Cochran v. Dellfava, 517 N.Y.S.2d 854, 136 Misc.2d 38 (N.Y. City Ct. 1987), the court denied plaintiff’s attempt to recover her $2,200 “admission price” into what she knew had been an illegal pyramid “airplane game,” holding that

[B]y entering the so-called "airplane game" as a passenger, one is in fact "promoting" the game in violation of the General Business Law (e.g., encouraging the pilot to make an illegal profit; encouraging others to enter the game by example; and eventually hoping to make an illegal profit). Therefore, plaintiff's cause of action must fail as a matter of law.

The plaintiff by entering the game had larceny in her heart. If the plane did not crash she would have made a substantial illegal profit. **If this court permitted her to recover, in effect this court would become a referee amongst thieves.** (citing Stone v. Freeman, 298 N.Y. 268 (Ct. of Appeals 1948).

In another case, a purported agreement between a nonlawyer and attorneys to split legal fees was proscribed by Judiciary Law § 491. “Accordingly, the agreement is illegal and plaintiff is foreclosed from seeking the assistance of the courts in enforcing it.”
Bonilla v. Rotter, 829 N.Y.S.2d 52, 36 AD3d 534, 2007 NY Slip Op 449 (1st Dep’t 2007). In Malik v. Nihar, 2008 NY Slip Op 50097 (App. Term. 2nd Dept. January 14, 2008), the plaintiff was unable to obtain his own insurance to drive a livery cab because of a bad driving record. Therefore, the plaintiff and the defendant livery company entered into an agreement wherein the plaintiff transferred title of his automobile to the defendant corporation so that he could work as a livery cab driver insured under that corporation's
insurance. As a precondition to working for the livery cab company, the plaintiff pre-paid five and one-half months of insurance premiums. Within two weeks of being hired, the plaintiff got into an accident which totaled the cab. The plaintiff sued the defendant livery corporation for his pre-paid insurance premiums. The court held that "plaintiff had unclean hands with respect to his claim to recover the insurance premiums paid to defendants, since he could not individually obtain insurance on his own" and, therefore, the plaintiff could not "invoke the power of this court to recover the money he lost."

The instant matter before this Court concerns circumstances that also violate a New York Statute. "Residential mortgage fraud," a prohibition with criminal penalties is committed by a person who, knowingly and with intent to defraud, presents, causes to be presented, or prepares with knowledge or belief that it will be used in soliciting an applicant for, applying for, underwriting or closing a residential mortgage loan, or filing with a county clerk of any county in the state arising out of and related to the closing of a residential mortgage loan, any written statement which: (a) contains materially false information concerning any fact material thereto; or (b) conceals, for the purpose of misleading, information concerning any fact material thereto.

Penal Law § 187.00[4]

Plaintiff and Defendant Hart signed the Amended Operating Agreement and the Assignment of Ownership. These documents were required to refinance the LLC's mortgage because they believed that the refinancing would not close if Defendant Hart's credit information were required for the transaction. These legally binding documents were critical predicates to Customers Bank's decision to provide the 2013 Refinancing. No fraud was committed, not by Plaintiff, not by Defendant Hart, and not by Attorney Morrow. In the Opinion Letter, Attorney Morrow wrote to Customers Bank that all the
"Loan Documents" submitted by 519 EAST were duly executed and were legally binding, that the Guarantor required no consent or preconditions to perform under the Guaranty, and that "The execution, delivery and performance by the Borrower of the Loan Documents and the Guarantor of the Guaranty do not violate and will not violate any provisions of any statute, rule or regulations, domestic or foreign." (see Exhibit Q).

The closing documents comprising the 2013 Refinancing are complete, legally valid, and binding. The closing documents neither refer to nor rely upon any document or agreement extrinsic to the 2013 Refinancing. This Court cannot validate the Side Agreement without implicating the occurrence of residential mortgage fraud. If this Court fails to declare the Side Agreement null, void, and inapplicable to the Amended Operating Agreement and Assignment of Ownership Interest, both of which were material predicates to the 2013 Refinancing, this Court will be endorsing mortgage fraud rather than quashing it pursuant to Article 187 of Penal Code.

This Court cannot give effect to the Side Agreement because "There is a long-standing policy of refusing to assist in the enforcement of agreements that are injurious to the public." Abright v. Shapiro, 214 A.D.2d 496, 496 (1st Dep’t 1995). "As has been frequently said, the courts, in refusing to enforce these agreements, does [sic] so, not because it desires to relieve one of the parties to such an agreement from the obligation that he assumes, but because of the fact that the making of such an agreement is an injury to the public, and that the only method by which the law can prevent such agreements from being made is to refuse to enforce them." Abright, at 496 (quoting Coverly v. Terminal Warehouse Co., 85 A.D. 488, 491, 83 N.Y.S. 369).

That courts should not aid the furtherance of a fraudulent scheme is a principle that
applies directly to this instant matter. See Miltenberg & Samton, Inc. v. Mallor, 1 A.D.2d 458 (1st Dep't 1956). This Court, in granting summary judgement, would provide the legislated protection of the Residential Mortgage Fraud statute “by discouraging contracts that contemplate cheating or defrauding members of the public through refusing to enforce them.” See Miltenberg at 461. “[I]llegal contracts, or those contrary to public policy, are unenforceable and . . . courts will not recognize rights arising from them.” Szerdahelyi v. Harris, 499 N.Y.S.2d 650, 654 (Ct. of Appeals 1986).

Defendant Hart is claiming rights under a Side Agreement that is extrinsic to and incompatible with the Amended Operating Agreement and Assignment of Ownership Interest that were both incorporated in the 2013 Refinancing. This Court should not give any weight to the Side Agreement and “help her carry out her illegal object.” Itskov v. N.Y. Fertility Inst., 11 Misc.3d 68, 69 (2nd Dep’t 2006). “[N]o court should be required to serve as paymaster of the wages of crime, or referee between thieves.” Ford v. Henry, 155 Misc. 2d 192 (App. Term, 2nd Dept. 1993), citing Cochran v. Dellfava, 136 Misc.2d 38, 40 (City Ct. Rochester 1987). The Side Agreement conveys no ownership interest to Defendant Hart. “If a document purportedly conveying a property interest is void, it conveys nothing.” Faison v. Lewis, 2015 NY Slip Op 4026, 25 NY3d 220, 10 N.Y.S.3d 185, 32 N.E.3d 400 (N.Y. 2015). Therefore, Defendant Hart cannot rely on the Side Agreement to receive a 50% ownership interest in the LLC. Furthermore, Defendant Hart cannot solicit this Court’s assistance. “It is well-settled law that parties to a fraudulent or illegal transaction who are in pari delicto may not invoke judicial aid to undo the consequences of their illegal acts.” Miltenberg, supra., at 461 (citing Flegenheimer v. Brogan, 259 App. Div. 347, 349). Defendant Hart retains no ownership interest in 519
EAST; when the Amended Operating Agreement and Assignment of Ownership Interest were executed, the character of 519 EAST was changed forever. "The court's aid is denied . . . when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. . . . It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." Balbuena v. Idr Realty LLC, 845 N.E.2d 1246, 6 N.Y.3d 338, 812 N.Y.S.2d 416 (N.Y. 2006).

C. The “Side Agreement” introduced by Defendant is subject to the Statute of Frauds and therefore unenforceable


In the instant matter before this Court, Defendant’s Side Agreement purports to change Defendant’s membership status from non-participate with zero ownership interest to one with a fifty-percent ownership interest. Because the Parties formalized in writing
the Amended Operating Agreement and Assignment of Ownership, the purported Side Agreement introduced by Defendant violates the Statute of Frauds.

In *D'Esposito v. Gusrae, Kaplan & Bruno, PLLC*, the court affirmed that a promise to be made a full partner/member of the firm was "barred by the statute of frauds."

*D'Esposito*, 44 A.D.3d 512, 513 (1st Dep’t. 2007). The lower court had reasoned, "While D'Esposito's alleged change in status to become a member of GKB in October 2000 could be performed within one year from the time that GKB allegedly made the agreement with D'Esposito (in April 2000), enforcement of this alleged promise, *including membership status and related monetary benefits, extended well beyond one year, indefinitely for the life or the firm*. This agreement is therefore impresible under the statute of frauds."


In *Caribbean Direct, Inc. v. Dubset LLC*, 2007 NY Slip Op 34466 (Sup. Ct., 6/16/2011), an agreement purporting to create a new limited liability company with a transfer of a 35% interest was held subject to the Statute of Frauds. The court held that Defendants' alternative argument that CD's breach of contract claim is barred by the statute of frauds (New York Uniform Commercial Code § 1-206 [1]) also has merit. Under Limited Liability Company Law (LLC Law) § 601, a membership interest in a limited liability company is considered personal property. An agreement to sell an interest is governed by New York Uniform Commercial Code § 1-206(1), which states that "a contract for the sale of personal property is not enforceable . . . beyond five thousand dollars in amount or value unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price . . . ." As there is no writing regarding the alleged transfer of a 35% interest in Dubset to CD, even if an oral one could be shown, it would be worth no more than the statutory maximum. *Id.*
Two cases are particularly on point. Gora v. Drizin concerned property owned by the parties' partnership. The partnership filed for bankruptcy. As part of the reorganization, the mortgage bank sold the property to an LLC in which only the plaintiff, not defendant, had an interest. The defendant claimed that the plaintiff orally agreed to transfer to the defendant 50% beneficial interest in the LLC after the sale. The court ruled that the oral agreement was barred by the Statute of Limitations because the property had been sold to an entity in which the defendant had no interest. Gora v. Drizin, 300 AD2d 139 (1st Dep't. 2002).

In Friedman v. Ocean Dreams, LLC, 2007 NY Slip Op 51188(U) (N.Y. Sup. Ct. 6/11/2007) for purposes of the defendant’s presentation to HSBC for an extension of a $1 million line of credit to that member’s business, the papers prepared by the plaintiff stated that that defendant owned a 100% interest in the LLC. The plaintiff claimed an oral agreement between the plaintiff and the defendant for the transfer of a 50% interest in an LLC after the LLC had obtained title to the real property. The plaintiff’s claim was barred by the Statute of Frauds. On appeal, the result was affirmed. The appellate court summarized as follows:

In essence, the plaintiff ... claims that he owns 50% of Ocean Dreams, LLC, based upon an oral agreement with the defendant ... and prior partnership agreements precluding Weisz from purchasing real property without his partners, including the plaintiff. ... [A] Partnership Redemption Agreement ... contained a merger clause precluding him from relying on any prior partnership agreements, and a no-modification clause precluding him from entering into any oral agreements regarding Ocean Dreams, LLC. ...Under the traditional rules of contract law, the courts will enforce a clear and unambiguous merger clause.

Other statutory provisions that are more lenient would still deem the purported Side Agreement introduced by Defendant as unenforceable:

GOL § 5-1107. Written assignment. An assignment shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, *if such assignment is in writing and signed by the assignor, or by his agent.* (Emphasis added.)

GOL § 5-1103. Written agreement for modification or discharge. An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest, *shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge, or by his agent.* (Emphasis added.)

The above provisions require at minimum a signature to validate applicable agreements. In the instant matter before this Court, the purported Side Agreement was never signed and therefore is barred by the Statute of Frauds. Therefore, the purported Side Agreement has no legal effect. Plaintiff retains, since November 20, 2013, her 100% ownership interest in 519 EAST.

**D. The Parol Evidence Rule prohibits the introduction of the purported Side Agreement because the Amended Operation Agreement is an unambiguous, fully-integrated contract.**

New York case law clearly supports that a contract should be interpreted within the four corners of the document. As the Court of Appeals has stated "As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement . . . .

Furthermore, where a contract contains a *merger clause*, a court is obliged 'to require full
application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.” Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 436 (2013)(emphasis added). Additionally, “there is a ‘heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties,’” Chimart Associates v. Paul, 66 N.Y.2d 570, 574 (1986)(citation omitted), and “[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing” W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157 (1990).

The court in Ashwood Capital, Inc. v. OTG Mgmt., Inc., 99 A.D.3d 1 (1st Dep’t. 2012), emphasized the importance of “objective intent,” quoting Learned Hand that “[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law.” Ashwood Capital, 99 A.D.3d at 6. The existence of ambiguity in a contractual term “must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources.” Id. At 7.

The “Assignment of Ownership Interest” involved in this instant matter before this Court is unequivocal. The Assignment of Ownership Interest, written as a legally binding contract, states that Defendant Hart desires to transfer her membership, ownership, and management interest in the company to Plaintiff, making Plaintiff “sole managing member of the company with a one hundred percentage (100%) ownership interest in the company” (see Exhibit D).

The Amended Operating Agreement contained key provisions that Plaintiff is the
“only member” of 519 EAST, that the Plaintiff owns a 100% ownership interest, that the LLC’s profits and losses are to be allocated “in proportion to the respective Percentage Ownership of the Member,” and that the agreement “contains the full understanding of the parties with respect to the subject matter hereof and may not be amended, altered or discharged except by another agreement in writing signed by the parties sought to be charged therewith” (see Exhibit B).

Taken together, the above two agreements are consistent and complementary, and objectively express the same intention, namely that the operating agreement was amended on account of Defendant’s transfer of ownership interest. The Amended Operating Agreement contains a very explicit merger clause that the document “contains the full understanding of the parties . . . and may not be amended, altered, or discharged except by another agreement in writing signed by the parties.” (Emphasis added.) The formality and deliberateness of both documents are clearly evident; their objective intent and purpose are also unmistakable. Thus, the Amended Operating Agreement exemplifies an integrated contract to which the Parol Evidence Rule strictly applies.

CONCLUSION

The facts pertinent to this motion for summary judgment are not in dispute. Summary Judgment should be granted. Defendant Hart concurs with the pertinent facts. Therefore, no triable issues of fact exist concerning 519 East’s application for the 2013 Refinancing. Since November 20, 2013, Plaintiff has retained 100% ownership in the LLC. When the Building was sold in 2019, the profits from that Sale should have been distributed only to Plaintiff. Plaintiff is entitled to 100% of the proceeds from the Sale,
the total amount of money escrowed during this cause of action, and 100% of the LLC's net revenues from the time of the 2013 Refinancing until the Building's Sale in 2019, and any other relief this Court deems just and proper.

Dated: White Plains, New York
March 1, 2021

[Signature]

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