STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

PATRICIA LATOUR,

Plaintiff, DECISION AND ORDER

v.

Index #2007/05166

MICHAEL VALLE,
KITCHEN'S - PLUS DESIGN &
REMODELING CENTER, LLC,

Defendant.

This is a motion by plaintiff for summary judgment. Plaintiff's filings consist of an affidavit by plaintiff and a series of attached exhibits lettered A through V. The pleadings are not attached to the motion papers, but the court is in possession of them, having obtained them when the RJI was filed for Commercial Division screening. Haveron v. Kirkpatrick, 34 A.D.3d 1297 (4th Dept.); Barr v. Country Motor Car Group, Inc., 985 (4th Dept. 2005). The complaint lodges three causes of action, breach of contract, fraudulent inducement and unjust enrichment and the answer contains only a general denial, with two defenses not invoked by defendants on this motion.

Plaintiff seeks a return of the $25,000.00 which she gave to defendant to invest in a limited partnership to be formed. She avers that, in a conversation with Valle, she gathered that there were to be a total of 10 investors putting in the same amount each, and that she would be a 10% owner of the limited partnership. Defendant's very specific proposal to her was

contained in a February 8, 2006, letter from defendants addressed to plaintiff and her husband. The letter states: "At this time, in order to meet the demands of the development, Kitchens Plus is offering 100 shares in a limited partnership in the amount of $25,000.00 each - providing for a total investment of $250,000.00 for business development, . . ." The letter offered the alternative of a loan ("it could be a loan, in which I agree to the terms you have requested") or "it could represent an investment equaling ten shares of interest in Kitchens Plus."

On February 10, 2006, plaintiff wrote a check for $25,000.00 as an investment in the limited partnership to be formed, made payable to "Kitchens Plus" containing a notation "LLC 10%." However, defendant acknowledged receipt by letter dated February 11, 2006, signed by Valle, which acknowledged plaintiff's "investment of $25,000.00 in Kitchen Plus Design & Remodeling Center Limited Partnership." The letter "encourag[ed] plaintiff "to offer input to . . . promote investment in the Limited Partnership," and promised as a "first goal now is to complete the Limited Partnership and LLC publication." Plaintiff avers that Valle specifically told her that she would receive organization documents within a week of giving him her money. (Deposition testimony; Ex. F).

No limited partnership was formed or documents drawn up (Ex. G). Moreover, Valle admitted in deposition that he never got

any other investors, and that he never told her of that fact. (Ex. H). Valle also admitted using the money immediately existing in his LLC business; that he never considered holding the money until he procured the other nine investors (Ex. I). The check was deposited immediately into defendant's existing LLC account and defendant began to spend it on his existing business. (Ex. J). The entire amount was used by defendants within about six months (Ex. L and Ex. M). Plaintiff contends that Valle and his existing LLC benefitted from the use of the money and that plaintiff received no benefit herself, and that defendant admitted as much in his deposition.

Valle testified at one point in his deposition (at p. 19)(Exh. H) that he was aware that the money was to be an investment in a limited partnership to be formed, although other portions of his deposition can be seen to be inconsistent with this acknowledgment. Each of his letters to plaintiff, however, acknowledged as much. Indeed, his letter of September 29, 2006 (Exh. R) was quite explicit about it ("I did acknowledge receipt of your investment back in February, in writing . . . [and] "was very optimistic at that time that we would have the limited partnership completed within days of receiving your investment, (but) we have faced one problem after another").

Defendant's affidavit in opposition to the motion contends that plaintiff's notation on the check of "LLC 10%" leaves "no

other interpretation of what the check was for," i.e., "a 10% investment in Kichen's-Plus Design & Remodeling Center, LLC." Defendant refers in his affidavit to his letters of February 8th containing "the offer to accept the money as a loan or investment," and of February 11th "acknowledg[ing] the receipt of the investment," but his affidavit ignores the specific terms he laid out in each making the proposed, and later acknowledged, investment as referable only to a limited partnership to be formed. Defendant seeks to explain away his "reference to limited partnership in the letter" as "merely meant as an assurance to the Latours that they would not be responsible for any of the debts and obligations of the LLC, beyond their initial investment, should the business not succeed." But this is wholly contrary to the unambiguous terms of his offer letter, and his acknowledgment letter. And it is wholly contrary to the representations made in his subsequent letter of September 29th to plaintiff's husband. As plaintiff contends, the defense that the money was intended to be an investment in Valle's existing LLC business appears to have been raised for the first time in his deposition testimony. The defense does not appear in the Answer.

Accordingly, plaintiff establishes in support of her motion a written offer to form a Limited Partnership, accepted by her with the writing of the check, and that her acceptance was

acknowledged by defendant in a separate writing making clear that, notwithstanding plaintiff's notation on the check, the investment accompanied an agreement between them to form a Limited Partnership. Plaintiff establishes further that defendants breached the agreement by failing to cause the formation of the Limited Partnership and that they instead directed the money for their own use. I find that plaintiff's notation on the check, and her *husband's* signing of a loan application presented to him by Valle, which referred to the LLC, without more, does not create an issue of fact on this unpleaded defense. Eurlich v. Am. Moniger Greenhouse Mfg. Corp., 26 N.Y.2d 255, 259 (1920). Defendants failed to lay bare any proof on the structure of the LLC, whether it has an operating agreement, whether if it does have an operating agreement it was permissible under the applicable governing provisions to take on a new member, and under what circumstances, or what capital contribution, if any, was required to make plaintiff a 10% member or shareholder.[1] Nor did defendants lay bare proof of any effort on their part to accommodate plaintiff's supposed investment in it, and any sharing in the LLC's distributions or profits in the

[1] In the absence of an operating agreement, the LLCL requires as a precondition to admitting a new member "the vote or written consent of a majority in interest of the members." LLCL §602(b)(1). Defendants offer no proof of such a vote or consent despite Valle's deposition testimony that plaintiff's husband was a member. Valle Deposition (Exh. A) at 8.

part of plaintiff. It is also important that dissolution of a limited liability company, or withdrawal therefrom, is considerably more difficult than can be achieved under the Partnership Law. LLCL §§ 606, 701, 702. Cf., Hochberg v. Manhattan Pediatric Dental Group, P.C., 41 A.D.3d 202 (1st Dept. 2007). Valle's explanation of his acceptance letter of February 11, 2006, in his affidavit opposition the motion (at ¶ 20) is plainly contrary to the letter's terms, fails to explain how the reference to a limited partnership aids in making clear that plaintiff would not be liable for past debts of the LLC unless actual formation of the limited partnership were to occur, and in any event would be wholly unnecessary given the scheme of LLCL §609.

Summary judgment cannot be defeated on so meager a record as the check notation and Valle's conclusory testimony in his affidavit and deposition when confronted with the true nature of the transaction as he himself had described it to plaintiff both orally (Valle does not dispute plaintiff's account of the oral conversations in February), in writing during the Winter of 2006, and later on September 29th when Valle, again in writing, acknowledged his failed obligation to create the limited partnership. Mallad Const. Corp. v. County Fed. Sav. & Loan Ass'n., 32 N.Y.2d 285, 291-92 (1973); Preferred Capital, Inc. v. PBK, Inc., 309 A.D.2d 1168 (4th Dept. 2003)(recognizing that an

unpleaded defense may defeat summary judgment, but holding that defense insufficiently established to create an issue of fact).[2]

Accordingly, plaintiff is entitled to summary judgment. Because an "agreement to form a partnership or joint venture for an indefinite period creates a partnership or joint venture at will," which "may be dissolved, without liability for breach of contract on a 'moment's notice,'" Foster v. Kovner, 44 A.D.3d 23 (1st Dept. 2007)(quoting Shandell v. Katz, 95 A.D.2d 742, 743 (1st Dept. 1983)), the court must "loo[k] to partnership law principles to resolve the dispute" between the parties. Gramercy Equities Corp. v. Dumont, 72 N.Y.2d 560, 565 (1988)("[i]t is in a sense a partnership for a limited purpose"). See also, Eskenazi v. Schapiro, 27 A.D.3d 312, 314-15 (1st Dept. 2006).[3] There was no definite duration or term either for agreement to form a

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[2] Valle's letter was written evidently in response to plaintiff's husband's letter decision to leave Kitchens Plus, dated September 19, 2006, because it encouraged him to stay on.

[3] There is authority that plaintiff may sue for breach of a pre-incorporation agreement to form a corporation by reason of the corporation's having "failed because individual defendants had refused to make the monetary contributions which they had promised to make to the corporation." Signer v. Unum Realty Corp., 23 A.D.2d 883 (2d Dept. 1965)(describing the holding of Higgins v. Applebaum, 186 App. Div. 682). Signer involved a breach of a pre-incorporation agreement on the part of defendants "by reason of their failure to contribute pro rata to the corporation's capital in accordance with the terms of their private pre-incorporation agreement." Id. 23 A.D.2d at 883. But for the reasons stated in Gramercy and Eskenazi cited in the text above, and the fact that it was a limited partnership that was contemplated, partnership principles have been consulted.

limited partnership or for the limited partnership defendants proposed in their letters to plaintiff, and thus plaintiff's withdrawal breached no agreement and otherwise dissolved their partnership or joint venture to create a limited partnership. Forbes v. Six-S Country Club, 12 A.D.3d 1049, 1051 (4th Dept. 2004); Partnership Law §62. The partnership or joint venture may also be seen as having been dissolved by defendants' diversion of the money to their own account in the LLC's business. Staines Associates v. Adler, 266 A.D.2d 52 (1st Dept. 1999).

Ordinarily, "the plaintiff's sole remedy against the defendants [i]s for an accounting, not damages." McQuillan v. Kenyon & Kenyon, 220 A.D.2d 395, 396 (2d Dept. 1995). See Lord v. Hall, 178 N.Y. 9 (1904). Stated another way, it is the general rule that "a partner may not maintain an action at law for any claim arising out of the partnership until there has been a full accounting and a balance struck, or an express agreement to pay." Wiesenthal v. Wiesenthal, 40 A.D.3d 1078, 1080 (2d Dept. 2007)(collecting cases). In the case of an ongoing business or where otherwise an examination of the partnership's accounts are indicated, application of the rule requires that, in a case of a plaintiff alleging breach of fiduciary duty owed to other parties, the offending partner may be held to account in an action in equity." Parnes v. Edelman, 128 A.D.2d 596, 597 (2d Dept. 1987). See Bassett v. American Meter Co., 20 A.D.2d 956,

957 (4th Dept. 1964). Here, plaintiff has brought three causes of action, at law, not in equity.

But exceptions to this rule abound, chief among them the rule that an action at law may be maintained "where the wrong alleged involves a partnership transaction which can be determined without an examination of the partnership accounts [citations omitted], or where 'no complex accounting is required or only one transaction is involved which is fully closed but unadjusted.'" Wiesenthal, 40 A.D.3d at 1080 (quoting Giblin v. Anesth Escology Assocs., 171 A.D.2d 839). This exception recognizes that the general rule against actions at law between partners prior to an accounting and a balance struck as between them "reflects 'the judicial desire to avoid entering into the day-to-day management of the partnership and to avoid piecemeal adjustments of the amount due each partner.'" Morris v. Crawford, 281 A.D.2d 805, 806 (3d Dept. 2001)(quoting St. James Plaza v. Notey, 95 A.D.2d 804, 805).

By like reasoning, the exception described above often is applied when the partnership business has terminated, Snyder v. Puente De Brooklyn Realty Corp., 297 A.D.2d 432, 439 (3d Dept. 2002); Morris v. Crawford, 281 A.D.2d at 806-07; Seiden v. Gogick, Seiden, Bryne & O'Neill, LLP, 278 A.D.2d 302, 304 (2d Dept. 2000); Cole v. Forman, 274 App. Div. 818 (2d Dept. 1948), or where the partnership business never got off the ground in the

first place or was otherwise aborted at the inception. Schuler v. Birnbaum, 62 A.D.2d 461, 463-64 (4th Dept. 1978)(also observing that defendants did not counterclaim for an accounting); Crownshield Trading Corp. v. Earle, 200 App. Div. 10, 15-16 (1st Dept. 1922)("there was, at most, an agreement to form a copartnership or to engage in a joint venture, which the defendant refused to perform, and plaintiff now seeks its damages by reason of such breach.") See Yonofsky v. Wernick, 362 F.Supp. 1005, 1020 (S.D.N.Y. 1973)("action at law will also lie when there is a beach of a joint venture agreement and no business has been transacted under the agreement"). This case is of the latter variety, albeit plaintiff does not seek her share of any profits of the business defendant refused to organize as a limited partnership, precisely because it was not formed and transacted no business. Instead, she seeks recovery of her interest in the aborted enterprise in the form of her capital contribution or advance as damages. There is no reason to examine partnership accounts; there aren't any. Roberts v. Astoria Medical Group, 43 A.D.2d 138, 139 (1st Dept. 1973)("an individual partner may vindicate specific wrong perpetuated against him when the wrong alleged involves a partnership transaction but can be determined without an examination of the partnership accounts").

In short, as in Schuler v. Birnbaum, supra, the undisputed

proof was that her $25,000 contribution was "incurred in the reasonable operation of the partnership (to be formed) and became a partnership charge for which . . . [defendants] became pro-rata responsible when the partnership assets were insufficient to satisfy plaintiff's claim." Id. 62 A.D.2d at 464. Because "[p]laintiff is entitled to indemnity for the sums expanded" on behalf of the partnership to be formed, she is entitled to summary judgment awarding her defendants' pro-rata share. Partnership Law §40; §71. From the proofs presented on this motion, "there is no explanation for the S[25],000 payment other than that it was a capital contribution." Liddle, Robinson & Shoemaker v. Shoemaker, 309 A.D.2d 688, 692 (1st Dept. 2003), on subsequent appeal, 12 A.D.3d 282, 283 (1st Dept. 2004). When a partner resigns from a partnership she is entitled to the return of her capital contribution, Partnership Law § 71(b)(III), and where the assets of the partnership are insufficient to pay it, defendants may be "charged personally with the receipt of the funds" in these circumstances. Crane v. Scott, 50 A.D.2d 884, 885 (2d Dept. 1975)("evidence is thus clear that plaintiff unilaterally undertook to divert and invest partnership funds in an enterprise not owned by the partnership and, therefore, he should be charged personally with the receipt of the funds"); Partnership Law §43(1). Even if they had not done anything wrongful, but failed to form the limited partnership together

with "the consequent failure of the entire scheme of the contract," the defendants would be "under a duty to reconvey" or return the funds advanced. Rudiger v. Coleman, 228 N.Y. 225, 230 (1920)(underscoring the court's holding on the prior appeal, id. 199 N.Y. 342 (1910)(directing a reconveyance of land on an aborted pre-incorporation agreement to form a corporation).

Inasmuch as defendants do not contend that they contributed anything to the partnership or joint venture found to exist here by way of capital contributions or advances, they are accountable to plaintiff for plaintiff's ownership share represented by the percentage of her capital contribution, 100%, for the funds which were converted to defendants' own use. Sohon v. Rubin, 282 App. Div. 691, 692 (1st Dept. 1953).[4] It must be remembered that it

[4] Liebman v. Gerstein, Savage, Kaplowitz, Zuckerman & Liebman, 196 A.D.2d 772 (1st Dept. 1993); Christal v. Petry, 275 App. Div. 550, 557 (1st Dept. 1949)("two people may be partners in the profits of a business but that does not necessarily mean that they are equal in ownership"), affd. 301 N.Y. 562 (1950); Hillock v. Grape, 111 App. Div. 720 (4th Dept. 1906); Smiley v. Smiley's Adm'x, 112 Va. 490, 71 S.E. 532, 533 (1911)("'When it is said that the shares of partners are prima facie equal, although their capitals are unequal, what is meant [is] that the losses of capital, like other losses, must be shared equally; but it is not meant that on a final settlement of accounts capitals contributed unequally are to be treated as one aggregate fund, which ought to be divided among the partners in equal shares.'")(quoting Lindley on Partnership, 676-78), quoted in Gillespie v. Gillespie, 124 Misc. 881, 885 (Sup. Ct. 1924)(quoting the same passage as appearing in 2 Lindley, Partnership 595 [Rapalje, Am. Ed.); Legum Furniture Corp. v. Levine, 217 Va. 782, 787, 232 S.E.2d 782, 786 (1977)(equality of distribution despite contribution to capital "is the general rule as to profits and losses, [but] it is not the rule as to the division of the partnership capital which, in the absence of an agreement to the contrary, express or implied,

is not the never formed limited partnership contemplated by the parties in their February conversations and writings that is here being dissolved, but rather the agreement to form that business enterprise which itself is considered a partnership or joint venture under the cases cited above.

The motion for summary judgment is granted.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: November 20, 2007
Rochester, New York

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will be returned to the partners in the proportion contributed by them").

> The rights of a partner to share in the profits of the partnership are drawn substantially from UPA section 18. Under UPA, in the absence of an agreement to the contrary, partners share equally in profits and losses, regardless of their contribution to partnership capital. However, absent an agreement to the contrary, partnership capital will be returned to the partners in proportion to the partner's contribution upon dissolution.

Wade Faulkner, Attorneys' Rights in a Law Partnership Outside of a Partnership Agreement, 23 J. Legal Prof. 311, 319 (1999)(citing UPA §18(a), which is identical to N.Y. Partnership Law §40(1)).