[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 48

----------X

WARREN COLE,

Plaintiff,

-against-

Index No. 604784/99

HARRY MACKLOWE,

Defendant.

----------X

MARYLIN G. DIAMOND, J.:

The plaintiff Warren Cole was employed by defendant Harry Macklowe from April, 1988 to April, 1999. Macklowe is the chairman of Macklowe Properties, an unincorporated real estate investment and development business. In this action, Cole asserts that he and Macklowe entered into enforceable oral and written agreements in which Cole was given equity interests in numerous real estate properties which Macklowe owned. He seeks money damages arising from Macklowe's refusal to honor these agreements. In addition, plaintiff seeks to enforce, by either specific performance or money damages, a provision in one of the written agreements in which Macklowe agreed that Cole had the right to purchase at cost an apartment in a building located at 145 East 76th Street in Manhattan.

On April 17, 2001, this court issued a ruling which bifurcated this case so as to try the issue of liability first and then, if necessary, conduct a second trial on the issue of damages. The bench trial commenced on October 15, 2001 and concluded on November 14, 2001. Over the following five months, the parties submitted post-trial memoranda. On October 4, 2002, the court advised the parties that it was unable to determine whether Cole

and Macklowe had entered into any enforceable agreements without hearing evidence on the issue of damages. The court therefore ruled that it was unbifurcating the trial and would issue a decision only after hearing evidence on damages. Each of the parties thereafter moved, pursuant to CPLR 2221, to vacate the court's order unbifurcating the trial. By decision and order dated December 18, 2003, the court denied both of these motions. However, on appeal, the Appellate Division, First Department reversed and remanded the matter to this court for a decision on the issue of liability. *See Cole v. Macklowe*, 15 AD3d 260, 261 (1st Dept 2005). This court therefore shall now proceed to resolve the liability issues raised at trial.

Findings of Fact

1. Cole's Salary, Bonuses and Benefits From April, 1988 to August, 1994

Plaintiff Cole graduated from Brandeis University with a bachelor's degree in economics in 1981. He did not subsequently attend graduate school. In 1982, he joined the Chase Manhattan Bank where he was trained as a lending officer. In 1984, he became a lending officer in the bank's real estate department. In April, 1988, Cole left Chase, where his final salary had been approximately $74,000 per year, to join Macklowe Properties as a vice-president responsible for financing and acquisitions. Hired as an at-will employee, his initial annual salary with Macklowe was fixed at $100,000. In 1989, his annual salary was increased to $125,000. In addition, he received a discretionary bonus of $50,000. In 1990, Cole's annual salary through mid-June was $180,000. However, due to a major economic downturn in the real estate market, Cole and other senior employees of Macklowe took a

voluntary 20% salary reduction.[1] Cole's annual salary was thus reduced to $144,000. Despite this reduction, Cole received a bonus that year of $75,000, for a total earnings of in 1990 of approximately $235,000. In 1991, 1992 and 1993, Cole's annual salary remained at $144,000. In 1991, he again received a $75,000 bonus. However, no bonuses were given in 1992 and 1993.

It is clear that Macklowe was very satisfied with Cole's job performance. As a result of the economic downturn, Macklowe was required to restructure his debts in order to avoid foreclosure and exposure to personal liability. As Macklowe conceded at trial, Cole was instrumental in helping him to successfully do so and to convince lenders that they should not go against him personally. Indeed, at some point during this period, Cole became Macklowe's closest employee, generally characterized as his "right-hand man." As Cole testified, they also became friends and confidants. Indeed, Macklowe and his son Billy witnessed the ketubah at Cole's marriage and Cole was named a successor trustee for the Macklowe children's trusts.

Due to his appreciation of Cole's work, Macklowe sought to supplement Cole's salary with various non-cash and cash benefits at no cost to Cole. First, Cole was given interests in three financial entities which thereafter provided him with a substantial tax shelter for his earned income, effectively increasing his salary. Second, Cole was given a lease at below-market rent on a two-bedroom apartment in a Macklowe building located on East 72nd Street in Manhattan. Third, Cole was given the opportunity to invest on the "ground floor" of Planet Hollywood, which ultimately provided him with a capital gain of

[1]Macklowe also reduced the number of his employees.

approximately $600,000. Fourth, Macklowe gave Cole a profit interest in a series of investments known as "Coolidge." Each of the Coolidge investments involved the acquisition by Macklowe and a real estate company named Houlihan-Parnes of a pool of defaulted mortgages from the Resolution Trust Corporation which would be resold for a profit. As a passive limited partner in these investments, Macklowe put up approximately $11.6 million of his own equity capital and gave Cole an interest in each of these investments ranging from 15% to 25% of the profits which Macklowe would receive. Ultimately, the Coolidge investments performed poorly and did not generate any real profits. As a result, Cole, who in any event never made any monetary contribution to these investments, never received any payments from them.

Finally, in August, 1994, Macklowe gave Cole a $2.5 million cash bonus from the proceeds of the sale of an office building known as the Metropolitan Tower. The bonus represented approximately 10% of the profits which Macklowe realized through the sale. The bonus was given at Macklowe's sole initiative in an amount which Macklowe unilaterally decided was appropriate. Macklowe testified that it was given as a reward to Cole for the hard work he had put in towards the successful development of this real estate investment. After consulting with Macklowe's financial advisors, Cole requested that the actual payment of this bonus not be made until September, 1995. At that time, Cole placed the money in a "rabbi trust," a deferred compensation arrangement by which he deferred payment of income taxes and invested the entire $2.5 million on a pre-tax basis until Cole's departure from Macklowe Properties. When Cole left the company in 1999, he received approximately $4 million from the trust he had created.

2. The Parties' Oral Discussion About Giving Cole a 10% Equity Interest in Future Acquisitions

In the Fall of 1994, soon after having told Cole that he would receive a $2.5 million bonus from the proceeds of the sale of the Metropolitan Tower, Macklowe orally advised Cole that he had also decided to give him a 10% equity interest in all Macklowe investment projects going forward. Although Cole testified that this offer was made in lieu of a salary increase after they agreed that Macklowe could not afford to pay him an annual salary of $1 million which, according to Cole,[2] would accurately reflect the market value of his services, the court does not find that this testimony is credible given the fact that Cole had just been told that he would receive a $2.5 million bonus. Rather, the court credits Macklowe's testimony that his offer to Cole of a 10% equity participation in all future projects was made at his own initiative and discretion in order to reward Cole for his work on behalf of the company and that the terms of the offer had not been negotiated. Indeed, neither Macklowe nor Cole testified that detailed terms of the offer were even discussed. In his testimony, Cole stated that Macklowe told him that any distributions to Cole would be subordinate to the return of Macklowe's cash but that there would otherwise be "no strings attached." Since Cole did not claim that Macklowe specified what he meant by the term "no strings attached," the phrase is too vague on which to attach any legal significance.

---

[2] Although Cole claimed in his testimony at trial that the annual market value of his services was $1 million, this claim was unsupported by any other testimony or evidence. Neither side called any witness to testify on this issue.

3. The Drafting of a Limited Partnership Agreement Which Would Implement Macklowe's Offer and Be Consistent With Macklowe's Prior Business Practices

In late 1995, Macklowe began a series of meetings with lawyers and accountants for the purpose of drafting an omnibus legal document which would, *inter alia*, implement his offer to Cole of a 10% equity interest in Macklowe's properties and establish a chain of succession in the event of Macklowe's death or retirement. At a meeting held on February 6, 1996 and attended by Macklowe, his wife, his organization's accountant Ken Weissenberg and attorneys Laurence Cohen and Roger Goldman, Macklowe stated that he wished to create a partnership whose members would include himself, the members of his family and Cole, who would be given a 10% interest. He also stated that (1) he wanted to treat his portfolio of properties as a pool from which, in his discretion, he could use funds from one property to pay the expenses of other properties or establish reserves, (2) he would unilaterally control when cash from a particular property would be distributed to the other members, (3) he would provide all of the equity and would be entitled to recoup his invested capital, plus interest, before distributing any funds to the other members, including Cole, (4) his son Billy would control the company upon his death or retirement and (5) Cole would have no right to transfer or alienate his 10% interest. A memorandum prepared by Cohen after this meeting confirmed these intentions.

In fact, the control of cash, pooling and return of interest reflected Macklowe's past business practices. Over the years, Macklowe had invariably been the sole source of equity for his company's real estate investments, had wielded absolute control over the cash generated by the company's holdings, was the sole arbiter of when to take cash out of the

company, had treated his portfolio as a pool in which revenues from one property were used to support other properties or make new investments and, toward this end, had established a "concentration account" into which funds generated by the properties were deposited and from which expenses were paid. Although title to each property was held by a separate limited liability company[3] which maintained its own discrete bank account, the funds from all of the properties were nevertheless transferred to the concentration account where they could be used on a daily basis to make investments or pay necessary expenses. Consistent with this practice, the status reports on the Coolidge investments which were given to Cole showed that Macklowe treated the various investments as a pool and applied a 10% interest rate to his invested capital.

In the Spring of 1996, Macklowe attended additional meetings with Cohen and Goldman at which the limited partnership agreement was discussed and modified, such as by inserting his wife into the chain of succession after Macklowe and their son Billy. A revised memorandum which Cohen prepared in May, 1996 confirmed that reserves for Macklowe's real estate projects would be established on a pooled basis in lieu of each partnership standing on its own.

Subsequent to the 1994 meeting at which Macklowe offered Cole a 10% equity interest in future acquisitions, Cole inquired from time-to-time about what was being done to document his interests. Macklowe told him that he was working on it with his attorneys.

---

[3] Macklowe individually owned 99% of each such limited liability company and a corporation, wholly-owned by Macklowe, owned the remaining 1%.

4. The July, 1996 Agreement

At the same time that the final terms and draft of a limited partnership agreement were being considered, Cole prepared a short, five paragraph document entitled "Agreement" which he asked Macklowe to sign in July, 1996. Macklowe, who was about to leave for a vacation, immediately read the document in his office and signed it. He did so without discussing its substance with Cole or speaking with any of his attorneys or financial advisors.

The first three paragraphs of the document, which make up a little more than one-half of a page, addressed Cole's equity interests in Macklowe's properties. The first paragraph of the document stated that it was intended to "memorialize" an agreement between Macklowe and Cole under which Macklowe "holds equity interests in certain properties for the benefit of WC." The paragraph went on to state that

> It is the intention of the parties to fully document these interests as soon as reasonably possible upon the return of HM from his vacation, approximately August 1, 1996. WC's interests will be in the form of limited partnership interests or membership interests, as the case may be. WC's interests are non-contributory but are subordinate to the return of HM's cash investment. The effective date of WC's interest in each property is the date upon which that property was acquired by HM (or his nominee entity).

The second paragraph of the document provided that in the event of Macklowe's death prior to the completion of the necessary documentation, Macklowe mandated that such documentation be completed by the proper designee, trustee or successor. The third

paragraph listed the properties in which Cole had an equity interest, which included the Coolidge investments and eight buildings. It indicated that other than the Coolidge investments, Cole held a 10% interest in each property. The final two paragraphs acknowledged that Cole had advanced $598,000 to Macklowe and that this loan was evidenced by a promissory note which Macklowe executed, and authorized the immediate repayment of the loan upon Cole's demand. The second page of the document contained the notarized signatures of Cole and Macklowe.

Cole testified at trial that he drafted the document because he was

> getting married, and I started to think about that, buying a home, creating a will, my own personal finances, things I hadn't thought so much about before. And I wrote this agreement up to memorialize our agreement, to have it in writing.

Macklowe testified that he signed the agreement because he "completely agreed with" the first paragraph since

> We were in the process.....of preparing limited partnership agreements, and I was preparing to give Warren the appropriate percentages listed against all of those...And that's what Warren asked me to do, and I certainly said sure, by all means.

He went on to explain that when he signed the agreement, he did not believe that he was thereby transferring the ownership interest of any property to Cole. As he stated,

> The ownership of real estate is a very serious and complicated matter. It is not something that is conveyed without taking into consideration all the documentation which gives you a legal interest in property.....To own and convey property you have to acquire your interest, it has to be recorded. For Warren to have an interest in property it would be

> through a limited partnership which is what we were preparing with my lawyers....

5. Macklowe's Continuing Efforts to Formulate a Limited Partnership Agreement

In September, 1996, less than two months after the execution of the July, 1996 agreement, the efforts undertaken by Macklowe, his attorneys and accountants over the previous year to formulate a limited partner agreement and succession document resulted in a draft operating agreement for a new limited liability company named Macklowe Properties, LLC ("MPL"). This new entity, in which Cole was given a 10% membership interest, was intended to own 99% of each of the individual LLC's which hold title to a property acquired by Macklowe after 1994. A corporation, wholly owned by Macklowe, would own the other 1%.

Under the draft operating agreement, Macklowe was designated as MPL's sole manager and, as such, had exclusive management of the company with the authority to use the company's funds to buy new properties, to distribute available cash to the other members at his discretion and to use the available cash to fund reserves, make new acquisitions or satisfy any other business needs. As the holder of a 99% interest in each of the separate property-holding LLC's, MPL was thus entitled to pool the funds from any individual property and use those funds for business purposes not related to that property.

The draft also provided that if Macklowe dies, becomes incapacitated or resigns as manager, his wife would become manager and that she, in turn, would be succeeded by an entity named W&E Master, LLC, which is comprised of Macklowe's son Billy and his daughter Elizabeth. Under the W&E Master operating agreement, the responsibility for

operating the company would fall to Billy.

As to the transferability of a member's interest in MPL, the draft provided that no outsider could become a member without the consent of the manager. The draft of the operating agreement also gave Macklowe or any other member a right to the return of his or her cash investments. Although Macklowe had indicated to his advisors that he wished to recover interest on the capital he had invested in the property-holding LLC's, there is nothing in the draft which expressly authorizes any such recovery.

During this extended period, Cole was, at the very least, aware that an operating agreement was being drafted to create an LLC which would own all investment properties Macklowe thereafter acquired and that he would hold an interest as a member of this company. Thus, in September, 1996, at the closing on a building located at 540 Madison Avenue which was acquired by a Macklowe LLC in which MPL was to have a 99% interest, Cole informed Macklowe's attorney, Andrew Albstein, that the transaction should go forward despite the absence of a signed operating agreement for MPL. In doing so, Cole clearly indicated that he was aware that the terms of an operating agreement for a company he would be a member of which would have a controlling interest in the property were then being ironed out and negotiated. Similarly, in March, 1997, at the closing on a building located at 305 West 50th Street, Cole again expressed his familiarity with the fact that a final agreement concerning the creation of MPL had not yet been signed and that its completion was imminent.

Finally, in April or May of 1997, Cole attended a meeting with Macklowe, Billy Macklowe and Cohen at which a revised draft of the MPL operating agreement was

presented and summarized. Soon after the meeting, Cole met with Macklowe and expressed concern about the extent of Billy Macklowe's authority to control the company after he had succeeded his father and that the restrictions on the transferability of his 10% interest would limit his ability to establish his net worth in order to obtain loans from a bank. Macklowe was receptive to these objections and instructed his advisors to revise the operating agreement so as to at least partially accommodate Cole's concerns.

As a result, in December, 1997, an operating agreement for a new LLC called Macklowe Assets, LLC ("MAL") was drafted and sent to Cole and Macklowe. The members of MAL were Macklowe, his wife Linda, a trust for the benefit of Billy Macklowe, and Cole. The draft gave Cole a right to transfer his interests, but only after Billy Macklowe had succeeded his father. Moreover, it gave Billy a right of first refusal on Cole's interest. In addition, it gave Cole a veto power over Billy's ability to make new real estate acquisitions. Macklowe testified at trial that, after reviewing this document, he was uncertain whether he wanted to give Cole either the limited right of transferability or the right to veto Billy's use of cash.

6. Macklowe's Attempt to Create a Real Estate Investment Trust

A final decision on the precise terms of an operating agreement for MAL was never reached. Rather, in January, 1998, Macklowe and his advisors undertook to establish, in place of an LLC, a real estate investment trust ("REIT"). The REIT involved the creation of a public company consisting of all of the properties which Macklowe owned. These properties would be conveyed to the public company through what is known as a contribution agreement among the property owners. Macklowe decided that Cole

should be given 15% of the sponsor's shares which, he anticipated, would be worth between $15 and $20 million. In order to set up the REIT with Cole holding such an interest, it was determined that Cole should be deemed to own an interest in various Macklowe properties which would be "contributed" to the public company.

Accordingly, an Omnibus Contribution Agreement ("OCA") was signed in May, 1998 in which Macklowe, his wife, Billy Macklowe and Cole agreed to contribute their interests in Macklowe's properties. The OCA states that Cole was contributing his stock in Manhattan Pacific Management Co., Inc. and his "non-managing member interests" in 12 LLC's. Of these 12 LLC's, only one, Formerly Maxwell's, LLC, was listed in the July, 1996 agreement as property in which Cole had an equity interest. It also provided that in the event the REIT failed to go forward by December 31, 1998, the OCA became null and void *ab initio*.

On the same day the OCA was signed, Macklowe filed a draft registration statement with the Securities and Exchange Commission with respect to the creation of the REIT. This document included a number of statements which represented that Cole owned properties and assets which would be contributed to the REIT. It also stated that Cole owned an interest in two properties, 800 Madison Avenue and 3 East 66th Street, which were not being contributed to the REIT.

In July, 1998, Macklowe's attorneys received comments from the SEC about the draft registration statement and undertook to prepare a revised draft. However, an amended statement was never filed due to the deterioration of the stock market. By October, 1998, the decline of the anticipated value of the REIT caused Macklowe to

abandon the project.

7. The Execution of the November, 1998 Addendum

During the period that the REIT was being developed and pursued, no further discussions were held with regard to the terms of an operating agreement for an LLC in which Cole would hold an interest since the REIT was intended to replace the proposed LLC as an investment vehicle. In November, 1998, approximately one month after Macklowe's abandonment of the REIT, Cole prepared another page-and-a-half document, titled "Addendum to Agreement of July 22, 1996," which he gave to Macklowe and asked him to sign. The document was drafted only after Cole had consulted an attorney who, two years earlier, had successfully represented an employee of a real estate investor in a lawsuit in which the employee sought to enforce oral employment agreements regarding bonuses and equity participation.[4]

The addendum contained four paragraphs. The first paragraph added 10 properties to the list of properties from the July, 1996 agreement in which Cole had an equity interest. The second paragraph "further acknowledged" that distributions had been made from three of the partnerships in which Cole had an equity interest but that "the distributions were withheld and used to fund shortfalls and working capital needs of related real estate activities." The paragraph went on to state that it was "acknowledged" that the distributions which Cole did not receive "represent loans" from Cole to Macklowe and affiliated entities. The paragraph listed the amounts due for each of the three

---

[4] The case was *Canet v. Travelstead*, 917 F Supp 969 (EDNY 1996). As discussed later, Cole has substantially relied on the decision in that case in crafting his legal arguments herein.

properties: (1) 245 Seventh/Escory Realty - - $565,000, (2) 1412 Broadway - - $280,000, and (3) 3 East 54th Street - - $2,550,000.

The third paragraph provided that partial satisfaction of these loans would be made from three specified sources. Next to each source was a blank line which was to be filled in with the amount to be paid. None of these lines was ever completed. The paragraph went on to state that Cole's proportionate share of distributions which were not received by him as of the day the addendum was executed would be considered loans due and owing.

Finally, the fourth paragraph provided that Cole had the right to purchase an apartment at 145 East 76th Street at cost and that although a specific apartment had not yet been selected, "it is agreed that the apartment will be consistent with the current floor plans of the building and that the apartment must contain a maid's room."

As with the July, 1996 agreement, the second page of the document contained the notarized signatures of Cole and Macklowe. In addition, Cole does not dispute that on the right-hand margin of the first page, Macklowe had written "1) cash in, 2) losses, 3) repayment, 4) structure & plan, 5) not just deal."

At trial, Macklowe testified that he clearly made it known to Cole that he did not agree to the second and third paragraphs and that he ultimately signed the document only because Cole had pressed him to at least make a commitment with respect to the sale of an apartment in order to accommodate Cole's wife, who was pressing him on the issue. Macklowe further testified that the five points he had outlined on the front page of the document reflected his reluctance to commit to any obligation to distribute monies to Cole

from the sale of any of his properties. Macklowe explained that he had incurred extraordinary losses and expenses in various transactions in which he had supplied the capital, including the failed REIT venture, and that it was first necessary to establish a repayment plan and a plan for the company's business going forward before he agreed that Cole was entitled to a distribution of monies from the sale of Macklowe's properties.

Cole's testimony conflicted with Macklowe's version of events. He stated that Macklowe did not object to paragraphs two or three and did not suggest that he was reluctant to obligate himself to making cash payments to Cole because of his losses and capital expenditures. According to Cole, Macklowe merely inquired as to whether it had been their agreement that profits received in certain deals could be used to offset losses in other deals and was told that it was not. Cole also testified that he had ultimately agreed with Macklowe that a repayment schedule was not necessary and that the blank lines in the third paragraph need not be completed.

The court finds Macklowe's testimony to be the more credible of the two. As evidenced by the proposed terms of the operating agreement for an LLC in which Cole would have an interest, it is clear that Macklowe did not intend to be obligated to distribute monies to Cole whenever a particular property would be sold at a profit and had every intention of controlling his cash and being able to use the profits from one property to cover the losses of other properties or, indeed, to purchase other properties. There is nothing in the record which indicates that Macklowe believed that once a property was sold at a profit, Cole was immediately entitled to 10% of the net gain. Rather, when Macklowe wished, at his own discretion, to pay Cole a percentage of the profit gained on a

particular property, he would do so. Thus, of the three properties listed from which distributions to Cole had allegedly been made, Macklowe expressly authorized a distribution from only one, Seventh/Escory Realty. The sum authorized to be distributed, $565,000, was obviously discretionary and did not reflect the terms of any agreement between Macklowe and Cole since it represented more than 10% of the realized profit. The court finds that this amount was intended as a bonus, rather than as Macklowe's discharge of any contractual obligation to Cole.

Moreover, notwithstanding Cole's testimony, paragraph two is factually inaccurate. Although it states that distributions to Cole had been made from three properties, Macklowe never authorized the distribution of monies from the other two properties, 1412 Broadway and 3 East 54th Street. Clearly, Cole included these two properties on his own, based on his interpretation of the July, 1996 agreement. He testified at trial that he arrived at the alleged amount distributed from these two properties, $2,550,000 for 3 East 54th Street and $280,000 for 1412 Broadway, after asking Kevin Neuner, the Chief Financial Officer ("CFO") of Macklowe Properties, what a 30% and 10% share of the profits gained from their sale would, respectively, be.

Paragraph two was also inaccurate in stating that the distributions were withheld in order to be used to fund shortfalls and working capital needs of related real estate activities. At trial, Cole conceded that $565,000 from 245 Seventh/Escory Realty was available to him after payment was authorized but that he chose to defer payment solely because he wished to minimize his tax liability. Clearly, Macklowe was aware that the $565,000 payment which he had authorized to Cole was not withheld in order to fund any

shortfalls and that Cole had voluntarily chosen not to accept it at that time.

8. The Transaction For Cole's Purchase of an Apartment at 145 East 76th Street

Following the execution of the November, 1998 addendum, Macklowe offered Cole apartment 7B at 145 East 76th Street, a project which Macklowe had developed for the sale of condominium units. It was owned by an entity named Lennox 76 LLC, itself wholly owned and controlled by Macklowe.

In order to accommodate Cole's request for a maid's room, Macklowe undertook renovations to the apartment, which involved electrical and plumbing changes, as well as the creation of a duplex. In March, 1999, Cole and Lennox 76 signed a formal sales contract for the sale of apartment 7B and Cole made a $271,584 down payment.

By the beginning of April, 1999, Cole and Macklowe's relationship had deteriorated. Cole testified that Macklowe had blamed him for a number of difficulties which the company had experienced, including an unsatisfactory banking relationship with First Boston. At about that time, they agreed that Cole should leave the company. Cole submitted his resignation later that month. Cole testified at trial that he had rejected Macklowe's offer of a severance payment of $500,000 and forgiveness of the balance due on the apartment, which was about $1.5 million. Cole testified that in preparation for his move into the apartment, he thereafter spent between $175,000 and $200,000 on furniture and on improvements to the apartment's electrical wiring.

In September, 1999, Macklowe renewed his offer of a severance payment which Cole again rejected. Macklowe then advised Cole that he was rescinding his offer to sell the apartment and would refuse to close.

9. K-1 Forms as Indicating Whether Cole Has an Ownership Interest in Macklowe's Properties

Federal Income Tax Form K-1 is a form which discloses, *inter alia*, a shareholder's pro rata share of a limited liability company's income, credits and deductions. The shareholder is liable for income tax on his or her share of the company's income, irrespective of whether it has been distributed.

In 1997, CFO Kevin Neuner authorized the issuance of a K-1 for tax year 1996 indicating that Cole had a 10% interest in MPL. He testified at trial that he did so on his own, without authorization from Macklowe, in anticipation of the MPL operating agreement being signed. The issuance of this K-1 did not therefore signify that Cole held an actual interest in any LLC or property.

As to any of the LLC's which owned post-1994 properties, neither Neuner nor anyone else from Macklowe's company issued a K-1 to Cole for the tax year 1996. However, for tax year 1997, K-1 forms for eighteen LLC's were issued to Cole listing him as having an interest in the particular entity. For tax year 1998, K-1 Forms for three of these LLC's were again issued to Cole. As with the K-1 Form for MPL in 1996, the issuance of these forms did not reflect the fact that Cole held an actual interest in any of these companies. Indeed, the forms did not reflect the terms of the July, 1996 agreement since Cole's interests in these properties were formulated in order to minimize his tax burden in the acquisition of an interest in the anticipated REIT and, as a result, some of these interests exceeded the 10% amount set forth in the agreement. In fact, the K-1's were issued by Neuner based not on the July, 1996 but, rather, on a schedule prepared by the

accounting firm of Ernst & Young in connection with the REIT and reflected Cole's anticipated ownership interests in these properties as listed in the REIT documents. There is no evidence that Macklowe was even aware that these K-1's had been issued to Cole and, in fact, he testified that he was not. In any event, after Cole's resignation in 1999, amended tax returns were filed for each of the entities for which a K-1 had been issued to Cole deleting Cole from the list of persons holding an interest.

10. Cole's Salary and Bonuses From September, 1994 to April, 1999

As already noted, in June, 1990, Cole's base annual salary was reduced from $180,000 to $144,000. In June, 1997, Cole was made President of the organization. Nevertheless, his base salary remained at $144,000 until sometime in 1998, at which time it was increased to $375,000. It remained at $375,000 up to the time of Cole's resignation, in April, 1999.

In addition to his base salary, Cole also received a number of bonuses during this period. As the court has already discussed, the $2.5 million cash bonus which Macklowe awarded him in August, 1994 was, at Cole's request, not actually paid until September, 1995. In 1996, Macklowe gave Cole a block of Planet Hollywood stock that was valued at approximately $302,000. In February, 1997, Macklowe authorized a payment to Cole of $500,000 out of the sale of a building located at 465 Park Avenue which yielded a profit of approximately $3 million. Finally, as already noted, in 1998, Macklowe authorized a payment to Cole of $565,000 from the sale of residential condominiums at 245 Seventh Avenue. However, for tax purposes, Cole once again chose to defer payment. By the time he left the company, he had not yet received any payment on this bonus and Macklowe

thereafter never made any such payment.

Over the final 56 months of Cole's employment, from the Fall of 1994 when Macklowe orally advised Cole that he had decided to give him a 10% equity interest in all investment projects going forward to the end of April, 1999 when Cole submitted his resignation, Cole received compensation totaling approximately $4.3 million, an average annual salary of approximately $921,000. Over his entire 11-year career with Macklowe, Cole received a total of $5,347,449, representing an average annual compensation of approximately $484,000. Moreover. as a result of the various tax shelters which he received from Macklowe, as well as the rabbi trust which he himself established, Cole paid little, if any, income tax on the multi-million dollar compensation which he received from the early 1990's until the time of his resignation.

Discussion

1. The Enforceability of the Provisions in the 1996 and 1998 Agreements Relating to Cole's Equity Interests in Certain Macklowe Properties

As already discussed, the July 22, 1996 agreement between Cole and Macklowe purported to memorialize Macklowe's 1994 oral representation that he wished to provide Cole with an equity interest in all properties which his company thereafter purchased. The agreement listed the properties in which Cole claimed to have an equity interest. In the November 20, 1998 addendum to this agreement, additional properties were listed in the first paragraph. In this action, Cole asserts that the two agreements are enforceable, binding contracts which give him an equity interest in the listed properties and in all other properties which the Macklowe organization acquired between the time that the addendum

was signed and Cole's resignation.[5] In opposition, Macklowe argues that, at least with regard to the issue of Cole's equity interests, the agreements are non-binding preliminary agreements which anticipated that Cole would not actually receive an equity interest in Macklowe's properties until the execution of a formal, operating agreement for a limited liability company which would own 99% of these properties.[6]

A. The Applicable Law

As the party seeking to enforce the agreements, Cole bears the burden of establishing that a binding contract was made. *See Allied Sheet Metal Works v. Kerby Saunders, Inc.*, 206 AD2d 166, 169 (1st Dept 1994).

In *Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher*, 52 NY2d 105, 109 (1981), the Court of Appeals observed that a contract is a "private 'ordering' in which a party binds himself to do, or not to do, a particular thing" and that "before one may secure redress in our courts because another has failed to honor a promise, it must appear that the promisee assented to the obligation in question." The existence of a binding contract to

---

[5] Since the court has already found that Macklowe advised Cole that he did not agree to the second and third paragraphs of the addendum and since the enforceability of the first paragraph listing additional properties covered by the July, 1996 agreement necessarily turns on the enforceability of that earlier agreement, the court's discussion with respect to Cole's equity interests will be limited to whether the July, 1996 agreement is binding on Macklowe. Moreover, the court notes that Cole has not seriously argued that Macklowe's general oral offer in 1994 of an equity interest in his properties was itself binding and the court will not therefore discuss the enforceability of this offer.

[6] There is no merit to Cole's argument that the judge who initially presided over this case, Hon. Richard F. Braun, has already rejected Macklowe's argument that the agreements are non-binding preliminary agreements. In denying Macklowe's motion to dismiss, Justice Braun made it clear that he was determining only that Cole's breach of contract allegations fell within a cognizable cause of action.

which all parties assented is not, however, dependent on a particular party's subjective intent reflecting a real but unexpressed state of mind. *See Brown Bros. Electrical Contractors, Inc. v. Beam Constr. Corp.*, 41 NY2d 397, 399 (1977). Rather, in determining whether the parties entered into a contractual agreement, there must be an objective manifestation of mutual assent which leads each of the parties to reasonably believe that the other party intends to enter into a binding contract. *See Farnsworth on Contracts*, Vol 1, § 3.6, pp. 169-170 (1990). This objective manifestation is found in the parties' express words and deeds, which are to be interpreted in view of the "attendant circumstances, the situation of the parties, and the objectives they were striving to attain." *Brown Bros. Electrical Contractors, Inc. v. Beam Constr. Corp.*, 41 NY2d at 400.

Under this objective approach, a party who signs a writing will not be bound by its terms if he did not intend to be bound and if the other party knew or should have known of this intention. *See* 1 Farnsworth on Contracts, § 3.7, p.172; Restatement (Second) Contracts § 27, Comment b (2005). The issue of whether a party should be bound to a writing which he signed arises frequently where, as here, (1) the writing expressly contemplates a later, more formal writing, (2) the party asserts that he did not intend to be bound until the execution of that later writing and (3) the later writing is never executed. *See, e.g., Brown v. Cara*, 420 F3d 148 (2nd Cir 2005); *Adjustrite Syst. v. GAB Business Servs.*, 145 F3d 543 (2nd Cir 1998); *Reprosystem, B.V. v. SCM Corp.*, 727 F2d 257 (2nd Cir 1984); *Central Fed. Savings v. National Westminster Bank*, 176 AD2d 131 (1st Dept 1991); *Jaffer v. Miles*, 134 AD2d 572 (2nd Dept 1987).

Generally, where the parties contemplate further negotiations and the execution of

a formal instrument, a preliminary agreement does not create a binding contract. *See Adjustrite Syst. v. GAB Business Servs.*, 145 F3d at 548; *Shann v. Dunk*, 84 F3d 73, 77 (2nd Cir 1996). However, the mere fact that the parties wish to memorialize their agreement in a formal document does not prevent the informal agreement from taking effect in the event the formal document is never executed. *See Reprosystem, B.V. v. SCM Corp.*, 727 F2d at 261. The key is the intent of the parties, *i.e.*, whether they intended to be bound prior to the execution of a formal agreement. *Id.* at 261.

In this respect, under the contract law of this State, the party claiming that the parties did not intend to be bound until they have executed a formal document embodying their agreement must prove either that both parties understood they were not to be bound until such execution or that the other party should have known that the disclaiming party did not intend to be bound before the formal contract was signed. *See Reprosystem, B.V. v. SCM Corp.*, 727 F2d at 261. *See also V'Soske v. Barwick*, 404 F2d 495, 499 (2nd Cir 1968). In considering this issue, the courts "must be wary of 'trapping parties in surprise contractual obligations that they never intended' to undertake." *Adjustrite Syst. v. GAB Business Servs.*, 145 F3d at 548 (citation omitted).

B. Cole Knew or Should Have Known That Macklowe Did Not Intend To Be Bound By The July 22, 1996 Agreement

Here, the circumstances leading to the signing of the July 22, 1996 agreement, the terms of the agreement and the parties' subsequent conduct, viewed together, *see Behar v. Mawardi*, 268 AD2 400, 401 (2nd Dept 2000) and *Jaffer v. Miles*, 134 AD2d 572, 573 (2nd Dept 1987), compel the conclusion that, with respect to the issue of Cole's equity interests

in Macklowe's properties, (1) Macklowe did not intend to be bound by the terms of the agreement until an operating agreement for a limited liability company in which Cole would hold a specified interest was fully executed and (2) Cole knew or should have known that Macklowe did not intend to be bound before the operating agreement was signed.[7]

i. The Circumstances Under Which the July, 22, 1996 Agreement Was Signed

As to the circumstances under which the July, 1996 agreement was signed, it is undisputed that at the time Cole walked into Macklowe's office and presented him with the unsolicited page-and-a-half "memorialization" of Macklowe's general offer to him a year earlier of a 10% equity interest in all future projects, Macklowe's lawyers and accountants, at Macklowe's request, had already been working out the details for almost six months of an operating agreement for a partnership which was intended to implement Macklowe's offer. It can also not be disputed that, in creating a partnership whose members were to include himself, the members of his family and Cole, Macklowe intended to continue his past business practices of wielding absolute control over the cash which his company generated so that he would be the sole arbiter of when to take cash out of the company and would be able to treat his portfolio as a pool in which revenues from one property could be used to support other properties or make new investments. In addition, Macklowe clearly intended to implement his 1994 offer to Cole by including

---

[7] An operating agreement for a limited liability company is the sort of formal document which the parties to a preliminary agreement may contemplate as necessary in order for the agreement to be binding. *See S.L.S.M.C., Inc. v. Bruce S. Brickman & Assocs., Inc.*, 277 AD2d 184 (1st Dept 2000).

terms in the operating agreement which Cole had not addressed, such as his entitlement to recoup his invested capital, plus interest, before distributing any funds to the other members, including Cole, the control of the company by his son Billy upon his death or retirement and the non-transferability of Cole's 10% interest in the proposed partnership.

As already noted, these were all terms which were being ironed out over an extended period by Macklowe's attorneys and accountants. The court is not persuaded that Macklowe, despite the substantial ongoing efforts that had been made to create a partnership which included these terms, was somehow willing to short-circuit this entire process and be contractually bound to give Cole a 10% interest in his properties in the absence of Cole's agreement to these terms. This is especially true in view of the fact that this supposedly-binding document consisted of merely five paragraphs, was drafted by Cole, a non-lawyer, was not reviewed by any of Macklowe's attorneys or accountants, and was presented to Macklowe without any prior notice. Indeed, it is notable that the document was signed by Macklowe almost immediately after Cole handed it to him and just as Macklowe was leaving on a vacation. *See Henchman's Leasing Corp. v. Condren*, 1989 WL 11440 at 7 (SDNY).

As already discussed, Macklowe testified that he signed the document because it did not contain any terms which were inconsistent with what he had intended and that he wished to accommodate a trusted assistant who was seeking to document a verbal offer of equity participation which Macklowe had made a year earlier. He also testified that when he signed the agreement he did not believe that ownership of any property had thereby been transferred to Cole and that he intended to do so only through the execution of a

limited partnership agreement. According to Macklowe, the ownership of real estate in his organization is a serious and complicated matter which would hardly be expected to be conveyed without taking into account all of the documentation necessary to establish a legal interest.

From this testimony, it is reasonable to conclude that, by signing the agreement in 1996, Macklowe merely agreed to agree that Cole would receive a 10% equity interest in future projects and accepted a commitment to make a good faith effort to complete a final agreement which would actually give Cole such an interest. *See Adjustrite Syst. v. GAB Business Servs.*, 145 F3d at 548.[8] What is clear is that, given the circumstances under which it was signed, Macklowe could not have intended to be bound by the terms of the July, 1996 agreement until an operating agreement for a limited liability company had been finalized.

It is also clear that Cole knew or should have known that Macklowe did not intend to be bound by the July, 1996 agreement. At the time he handed the agreement to Macklowe, Cole knew that Macklowe's advisors had been working on an omnibus document which would, *inter alia*, implement Macklowe's 1994 offer of equity participation.[9] He also knew that Macklowe controlled his cash, pooled the revenue from

---

[8] For this reason, the fact that the agreement was notarized is not dispositive since it merely indicated to Macklowe that some legal obligation was being imposed and not that he was bound by the terms therein in the absence of a formal agreement fully documenting Cole's equity interests.

[9] Macklowe testified that Cole would periodically inquire about what he was doing to document Cole's interests and that Cole was told that Macklowe's attorneys were working on the matter. This testimony makes sense since it is logical to assume that, having written into the agreement that the full documentation of his

his properties into a single "concentration" account and sought a return on his investment which included interest. Indeed, as already noted, he knew from the status reports on the Coolidge investments in which Macklowe had given him an equity interest that Macklowe treated the various investments as a pool and applied a 10% interest rate to his invested capital. In addition, knowing that Macklowe historically was the sole owner of his properties, that no other non-family member had ever held any equity interests in Macklowe's investments and that Macklowe intended to share or transfer ownership exclusively to Cole and to the members of Macklowe's immediate family, Cole should have known that Macklowe would likely wish to limit Cole's ability to sell his own interest to a stranger. Under these circumstances, the court does believe that it would have been reasonable for Cole to think that Macklowe actually intended to be bound to give Cole a 10% equity interest in all of his future real estate projects by a five-paragraph, informal document, drafted by a nonlawyer, which was inconsistent with the way Macklowe ran his business.[10] Cole should not have thought that this document was anything more than an agreement to agree.

ii. The Language of the July 22, 1996 Agreement

The language of the July, 22, 1996 agreement supports this conclusion. While stating that Macklowe "holds" equity interests in certain properties for Cole's

---

interests would be completed upon Macklowe's return from vacation in August, 1996, Cole would ask Macklowe about the status of this documentation.

10 Indeed, Cole had no reason to believe that, without any discussion, Macklowe would want him to have the right to transfer his interests, in whole or in part, to strangers.

benefit, the document goes on to advise that these interests will be "fully documented." As already noted, while not dispositive, the inclusion of such language ordinarily indicates that the parties did not intend to create a binding contract. *See Adjustrite Syst. v. GAB Business Servs.*, 145 F3d at 548. Cole, however, contends that this reference to later documentation was inserted by him for his own benefit because he needed formal documents to support a prospective loan application. He denies that it reflected his belief either that additional terms were necessary in order to effectuate his receipt of an equity interest in Macklowe's properties or that a formal contract was necessary in order to bind Macklowe to his offer of such an equity interest.

In making this argument, Cole is expressing his own subjective intent on the issue, which is irrelevant in determining whether there is a binding contract. *See Brown Bros. Electrical Contractors, Inc. v. Beam Constr. Corp.*, 41 NY2d at 399. There is no evidence that, by his words or deeds, Cole conveyed this intent to Macklowe.[11]

Cole also contends that the provision in the agreement which mandates that, in the event of Macklowe's death, the proper documentation be completed and executed by Macklowe's designee, trustee or successor suggests that the preparation of any such documents is ministerial and not substantive. The court disagrees. This provision merely signifies that Macklowe's offer to Cole of an equity interest should survive his death in the event that the necessary documents had not yet been finalized.

---

[11] In any event, irrespective of Cole's purpose for inserting the provision, it is clear that its inclusion was meaningful to Macklowe since it was consistent with his intention to implement his 1994 oral offer to Cole by drafting an operating agreement creating a limited liability company in which Cole had a 10% interest.

In any event, the agreement contains critical language which is ambiguous and which, as such, requires the sort of detail and fleshing out which Macklowe was attempting to provide through the operating agreement for MPL and MAL. Thus, in stating that Cole's interests are "non-contributory," the agreement does not even attempt to define the term. On the one hand, a non-contributory interest could mean only that, as a partner or member, Cole would not be not be responsible for capital calls or for any other payment into the company of any of his own funds, such as monies which he actually received from his salary, private investments or partnership distributions. The draft operating agreements for MPL and MAL, which provide for the treatment of Macklowe's portfolio as a pool in which revenues from one property could be used to support other properties or new investments, are consistent with such an interpretation. On the other hand, the reference to "non-contributory" interests could also mean, as Cole suggests, that his portion of the profits realized from any particular building, even if it had not yet been distributed to him, could not be used to fund the operation or purchase of any other building. In view of the millions of dollars which were implicated, one would expect that such a critical term would be defined if no other substantive agreement were anticipated. The failure of the agreement to do so suggests to the court that further substantive documentation was, indeed, anticipated by both parties.[12]

Cole nevertheless argues that because a number of statements in the agreement

---

[12] In any event, any ambiguity as to the completeness of the agreement should be construed against Cole since he was the party who drafted the document and Macklowe signed it without the benefit of legal advice. *See Saxon Capital Corp. v. Wilvin Assocs.*, 195 AD2d 429430 (1st Dept 1993). *See also Henchman's Leasing Corp. v. Condren*, 1989 WL 11440 at *8.

refer to Cole's interests in the present or past tense,[13] the agreement reflects the fact that these equity interests had already been acquired and that no further agreement was necessary to bind Macklowe. However, since the agreement also uses the future tense in providing that Cole's equity interests "will" be in the form of limited partnership or membership interests, the use of language in the past or present tense is ambiguous and not dispositive of the question of whether both parties intended that the agreement would immediately give Cole an enforceable interest in the specified real estate projects.

Citing *Adjustrite Syst. v. GAB Business Servs.*, 145 F3d at 549, Cole also argues that the absence of any language expressly reserving the right of either party not to be bound in the absence of a later writing is a compelling indication that the parties did, in fact, intend to be bound. However, in *Adjustrite*, the court found that the absence of a reservation-of-rights clause was not dispositive. *Id.* at 550, n.7. Indeed, the court in *Adjustrite* held that the failure of the agreement to expressly state that it was a binding agreement was a factor supporting the conclusion that the agreement was not a fully binding preliminary agreement. *Id.* at 449.

iii. The Subsequent Conduct of the Parties

The conduct of the parties subsequent to their execution of the July, 1996 agreement also supports the court's conclusion that the terms of the agreement were not binding. After the agreement was signed, Macklowe and his advisors continued to work on

---

[13] The agreement states that Macklowe "holds" equity interests on Cole's behalf, that Cole's interests "are" non-contributory, that the effective date of Cole's interests "is" the date when the property was acquired and that the properties listed are properties in which Cole "has" an equity interest.

drafting an operating agreement for a limited liability company in which Cole would have a 10% interest. There is no evidence that the July, 1996 agreement was even considered by Macklowe or his advisors in the course of their efforts between July, 1996 and April or May, 1997 to finalize such an operating agreement, much less that they changed or added terms to the operating agreement on account of the July, 1996 document. Clearly, Macklowe did not believe that the July, 1996 agreement precluded him from giving Cole a 10% interest in a limited liability company in which Macklowe would control the distribution of cash, pool his investments, recover his invested capital along with interest and limit transferability.

It is true that, at first glance, it would appear that Macklowe acted as if Cole already owned an equity interest in his properties by filing a draft registration statement with the SEC with respect to the creation of the REIT which represented that Cole owned certain properties and assets. However, a closer examination shows that this representation was made only because, in order to set up the REIT with Cole holding the equity interest which Macklowe had offered, it was determined that Cole should be deemed to own an interest in various Macklowe properties which would then be contributed to the public company. Indeed, Cole has not suggested how he could have otherwise received an interest in the REIT at its inception. Thus, the representation made in the draft registration statement reflected not actual ownership pursuant to the July, 1996 agreement but, rather, the expectation that Cole would be given an interest in the company and an attempt to do so through the creation of the REIT.

It is also true that the Macklowe organization's CFO, Kevin Neuner, authorized

the issuance of a number of K-1 tax forms listing Cole as having an interest in a particular LLC. However, as the court has already stated, the issuance of these K-1 forms did not signify that Cole held an actual interest in any LLC or property but, rather, reflected Cole's anticipated ownership interests in these properties as listed in the REIT documents. Moreover, there is no evidence that Macklowe was aware that these K-1's had been issued to Cole and after Cole's resignation in 1999, amended tax returns were filed for each of the entities for which a K-1 had been issued to Cole deleting Cole from the list of persons holding an interest.

In arguing that Macklowe intended the July, 1996 agreement to be binding, Cole points out that Macklowe subsequently made two payments to him from profits which two of Macklowe's projects yielded.[14] Clearly, Macklowe wished to reward Cole for his loyalty and work through the generous payment of a portion of his profits on a particular project. As already noted, he first did so in 1994, well before his execution of the written agreement in July, 1996. The fact that he later made two payments to Cole does not establish that he considered himself bound by the terms of the July, 1996 agreement to do so. Indeed, neither of the two payments even reflected the terms of the July, 1996 agreement since the amount authorized exceeded the 10% interest which was specified in that agreement. Moreover, Macklowe notably did not authorize payments to Cole from the proceeds of a number of projects where sales were made during this period. In fact, it was

---

[14] As already noted, one of the payments was made in February, 1997 for $500,000 out of the sale of a building which yielded a profit of $3 million. The second was an offer of $565,000 in 1998, the payment of which Cole, for tax purposes, chose to defer.

for this reason that Cole included two of those projects in the November 20, 1998 addendum as properties to which he was entitled to receive a distribution.[15] Clearly, in the absence of a binding operating agreement, Macklowe considered such payments to be entirely discretionary.

As to Cole, he certainly should have realized after the execution of the July, 1996 agreement that Macklowe did not consider the agreement to be binding without a later formal agreement. The evidence shows that Cole was aware that the lengthy process of drafting an operating agreement continued after the agreement was signed and that the terms of his equity interest had not yet been finalized. In April or May, 1997, Cole was provided with a detailed summary of the latest draft of the MPL operating agreement. As already noted, under this draft, Macklowe was entitled to treat his portfolio of properties as a pool, unilaterally control the distribution of cash to other members, recoup his invested capital, with interest, before making any distribution and deny Cole any right to transfer or alienate his interest. After Cole objected to two of the terms contained therein,[16] he and Macklowe discussed alternatives on which they could agree.

Finally, in signing the November 20, 1998 addendum which Cole had presented to him, Macklowe not only advised Cole that he did not agree, as the second and third

---

15 As already discussed, the court credits Macklowe's testimony that he advised Cole that he did not agree with the two paragraphs in the addendum in which Cole claimed he was entitled to these payments.

16 Notably, Cole did not object to Macklowe's right to pool or control the distribution of cash. Rather, his only objections were to the non-transferability of his interest and to the extent of Billy Macklowe's control of the company after he had succeeded his father.

paragraphs indicated, that he was contractually bound under the July 22, 1996 agreement to distribute the proceeds of the sale of a listed property to Cole, but also wrote on the front page of the document that there were five specific issues which needed to be addressed.

Thus, Cole was aware that the July, 1996 agreement did not contain a number of important terms which Macklowe intended to attach to his offer of a 10% equity interest. Under the circumstances, he should have been aware that in the absence of an agreement on these terms, Macklowe did not intend to be bound by the limited terms contained in the July, 1996 agreement.

C. The Four-Factor Test Applied By the Federal Courts Supports this Court's Conclusion that the July 22, 1996 Agreement Is Not Binding

This conclusion is supported by the four-factor test, discussed extensively by both sides, which the federal courts have used in determining whether the parties to a preliminary agreement calling for the execution of a formal document intended to be bound in its absence. *See Adjustrite Syst. v. GAB Business Servs.*, 145 F3d at 543.[17] *See also Reprosystem, B.V. v. SCM Corp.*, 727 F2d at 257; *Henchman's Leasing Corp. v. Condren*, 1989 WL 11440 at *7. Under this test, the courts consider (1) the language of the agreement, (2) whether there has been partial performance by one party which has been accepted by the party disclaiming the contract, (3) whether any essential or significant

---

[17] Although he argues that the July, 1996 agreement is binding under an *Adjustrite* analysis, Cole also asserts, as a threshold matter, that the agreement is not a preliminary agreement which is even subject to such an analysis because it is a self-contained binding agreement. This contention is without merit since it assumes the ultimate question of whether the parties intended the agreement to be binding in the absence of a later writing which they expressly contemplated.

terms of the contract remain open and (4) whether the agreement is the type of agreement which is usually committed to a more formalized writing.

As to the language, the court has already found that the wording of the agreement, which indicates that Cole's equity interests will be fully documented at a later date, suggests that the parties did not understand themselves to have made a binding agreement. *See Henchman's Leasing Corp. v. Condren*, 1989 WL 11440 at *3.

As to partial performance, Cole contends that this factor favors his interpretation of the agreement because he worked for years at a reduced salary and provided sweat equity to the Macklowe organization both before and after the agreement was signed. However, Cole failed to submit any evidence establishing the compensation which someone with his experience and background was, at that time, normally paid for the services he provided. Moreover, Cole's contention that he was underpaid because his annual salary had been reduced in 1990 from $180,000 to $144,000 and then remained at that level until 1997 ignores the fact that he received over $3 million in additional compensation during this period, not to mention the use through Macklowe of tax shelters and a deferred compensation plan.

Indeed, as already discussed, Cole actually received an annual compensation of approximately $484,000 over his entire 11-year career with Macklowe and an annual compensation of approximately $921,000 from the Fall of 1994 when Macklowe orally advised him that he had also decided to give him a 10% equity interest in all investment projects going forward to the end of April, 1999 when Cole submitted his resignation. Given this level of compensation and the absence of any evidence that Cole ever advised

Macklowe that the continued performance of his services was conditioned on his receipt of an equity interest in Macklowe's properties, there is no support for Cole's assertion that Macklowe's acceptance of his work after the execution of the July, 1996 agreement should be considered an acknowledgment by Macklowe of the binding nature of the agreement.[18]

As to the absence of essential terms, the court has already found that, given the nature of Macklowe's organization and the past business practices which Cole was surely aware of, any binding agreement to give Cole an equity interest in Macklowe's properties should necessarily have included terms relating to Macklowe's continued control of the distribution of cash, his continued ability to use his properties as a pool, the expenses, including interest, he was entitled to recover before distributing any revenue to Cole and the transferability of Cole's interests to a third-party. As already discussed, these critical issues were not even addressed in the July, 1996 agreement but, significantly, were addressed, at Macklowe's request, by his advisors in drafting an operating agreement for a limited liability company in which Cole would be a member.

Finally, the execution of a formal agreement is entirely appropriate and expected where an employer who operates a large organization owning numerous buildings worth hundreds of millions of dollars offers to give an employee an equity interest in these

---

[18] Although Cole was otherwise well compensated during his years with Macklowe, the court does not agree with Macklowe that the July, 1996 agreement was not supported by any consideration such as Cole's sweat equity. The value of the equity interests which Macklowe offered Cole clearly exceeded the salary and other compensation which Cole had received. As such, it was hardly, as Macklowe has suggested, a mere bonus. Rather, the proposed equity interest would, in effect, have become Cole's primary source of remuneration for the services, or sweat equity, he provided to the organization.

properties. The court notes that, after the trial on liability, Cole stipulated that his equity interests in Macklowe's properties are worth no less than $30 million. The idea that Macklowe, without even consulting his own attorneys, would intend to be bound by a five paragraph document not even prepared by a lawyer but, rather, by Cole himself, is a proposition which this court finds to be highly unlikely and inconsistent with the prudent ownership and operation of a real estate business having such magnitude.

It is true, as Cole points out, that relatively short and simple agreements involving substantial monetary amounts have been found by the courts to be binding, including agreements which provide a party with an interest in the profits of a particular business. *See Leon v. Martinez*, 84 NY2d 83, 88-89 (1994); *Speelman v. Pascal*, 10 NY2d 313, 319-20 (1961); *Rubenstein v. Rosenthal*, 140 AD2d 156, 158-60 (1st Dept 1990); *Canet v. Travelstead*, 917 F Supp 969 (EDNY 1996). In these cases, however, the courts found that the agreements were enforceable because, unlike here, they contained all of the essential terms.[19] Indeed, the brevity and simplicity of the July, 1996 agreement, as well as the fact that it was drafted by a non-lawyer, is not *per se* dispositive of the issue. Rather, as already noted, it is only one of a number of factors to be considered in determining whether an

---

[19] In addition, these cases were decided in a different context from the present action. In *Leon v. Martinez*, which merely involved the assignment of a percentage of the plaintiff's recovery in a tort case, the court found only that the complaint stated a cause of action and expressly noted that no opinion was being made as to the enforceability of the assignment. Neither *Speelman v. Pasacal* nor *Rubenstein v. Rosenthal* was a contract case. Rather, in both matters, the courts determined that an effective gift had been made, employing an analysis under the law of gifts different from the test used in determining whether there has been an enforceable contract. As to *Canet v. Travelstead,* as discussed below, it is readily distinguishable from this case.

agreement is binding in the absence of a more formal writing. *See Adjustrite Syst. v. GAB Business Servs.*, 145 F3d at 543; *Reprosystem, B.V. v. SCM Corp.*, 727 F2d at 257; *Henchman's Leasing Corp. v. Condren*, 1989 WL 11440 at *3. In this case, given the nature of Macklowe's operation and the amount involved, it is a factor which supports the conclusion that, in the absence of a later formal writing, the July, 1996 agreement did not provide Cole with an enforceable right to a 10% interest in Macklowe's future projects.

D. *Canet v. Travelstead* Is Readily Distinguishable

Cole has relied extensively on the decision in *Canet v. Travelstead*, 917 F Supp at 969. In *Canet*, the court enforced an oral agreement between a real estate developer, Gooch Ware Travelstead, and an employee, Eduardo Canet, whom he hired as his "right-hand man." The court found that Travelstead had induced Canet to leave his job with a Mexican company named Grupo Alfa by promising that, in addition to an annual salary of $100,000, Canet would receive a substantial cash bonus every year and an equity interest in all developing projects which, depending on the project, could take the form of a profit interest or a partnership. As Macklowe has in this case, Travelstead argued that his offer of equity participation was, at most, an unenforceable agreement to agree. Applying the four factors used by the federal courts to determine whether an agreement in which the parties contemplate a later writing is enforceable, the court found that Travelstead's argument was without merit. Its findings in that case are, however, readily distinguishable from the different set of facts found herein.

First, as to the language Travelstead used in orally making his offer, the court found that there was no evidence that Travelstead had ever indicated to Canet that he did

not intend to be bound in the absence of a formal written agreement and that Canet therefore had no reason to believe that Travelstead did not intend to be bound. In making this finding, the court notably discredited Travelstead's testimony that, in fact, he did not intend to be bound by the terms of his oral offer until a formal writing was executed. *Canet*, 917 F Supp at 991. Here, in contrast, the court has found that there was substantial evidence supporting Macklowe's contention that (1) he did not intend to be bound by the terms of the July, 1996 agreement until an operating agreement for an LLC had been finalized and (2) Cole knew or should have known of Macklowe's intentions.

Second, the court in *Canet* found that the oral agreement was partially performed by both parties. *Id.* at 991-992. Central to this finding was the fact that Canet had been induced to leave his former job in order to go to work for Travelstead on the basis of Travelstead's offer of equity participation. Here, Cole had already been employed by Macklowe for over six years by the time of Macklowe's oral offer of equity participation and over 8 years by the time of the July, 1996 agreement. Moreover, he had already received a $2.5 million bonus. Not only was there no evidence that Cole was underpaid, there was no evidence, other than Cole's testimony, which the court discounted, that he was induced to remain with Macklowe on account of Macklowe's offer.

Third, the court in *Canet* found that all essential terms either had ultimately been agreed upon or could be filled in by the court. In reaching this conclusion, the court emphasized that it is the aim of contract law to gratify expectations arising out of an intended contractual agreement even though the agreement sought to be enforced was informal or in need of further proceedings. *Id.* at 992, citing *Teachers Ins. & Annuity Ass'n*

of America v. Tribune Co., 670 F Supp 491, 498 (SDNY 1987). Here, however, the court has found that Macklowe did not expect to be bound to give Cole an equity interest in his projects without an LLC operating agreement which addressed in detail the unaddressed and unresolved issues of pooling, control of cash, return of investments and transferability of membership, and that Cole himself should not have expected otherwise. Indeed, unlike here, there was no evidence that Travelstead had been preparing any formal documents which attempted to address any of the terms which he claimed were open.

Finally, the court in *Canet* found that the absence of a formal contract, despite the amount of money involved, was not dispositive since there was no evidence that Travelstead made a practice of putting employment contracts in such a form. *Id.* at 993. Unlike Macklowe, Travelstead did not own and operate an ongoing real estate organization. He essentially worked on a project-by-project basis as part of a business relationship he maintained with First Boston. Each of the properties he developed was treated as discrete from the other. In contrast, the Macklowe organization owns, operates and maintains numerous buildings worth hundreds of millions of dollars whose revenues and expenses were treated as interrelated. It is an organization which Macklowe wholly owns and controls. He clearly intended this ownership and control to remain within his family, with the exception of his offer to Cole. Macklowe reasonably believed that, consistent with his past business practices, a formal operating agreement for a limited liability company which would own all future projects was the appropriate vehicle for giving Cole an interest in the organization's properties. As already discussed, the court agrees.

Accordingly, the court has concluded that, in signing the July 22, 1996 agreement and November 20,1998 addendum, Macklowe did not intend to be legally obligated to provide Cole with an equity interest in various properties in the absence of an operating agreement for a limited liability company in which Cole would have a 10% interest. Cole's claim for breach of contract based on these two documents must therefore be denied.[20]

2. The $565,000 Bonus Which Macklowe Offered to Cole Is Enforceable

At trial, Macklowe conceded that he had authorized a payment to Macklowe of $565,000 from the sale of residential condominiums at 245 Seventh Avenue. Cole and CFO Kevin Neuner both testified that Cole was, in fact, offered this amount but that, for tax purposes, he never received any payment on this bonus. Neuner testified that, at Cole's request, the payment was deferred so that it could be "restructured" with another transaction. Clearly, there was an understanding that Cole would ultimately receive the payment when the other transaction was completed. Although the other transaction was ultimately completed, Macklowe has refused to pay Cole any of this $565,000 bonus.

---

[20] In addition to alleging breach of contract, Cole has asserted a claim that 10% of each of the properties in which he allegedly has an equity interest are held by Macklowe in a constructive trust on his behalf. This argument is without merit. In order to establish a constructive trust, a plaintiff must show, *inter alia*, a transfer of property or interests by him to the defendant in reliance on the defendant's promise. *See Sharp v. Kosmalski*, 40 NY2d 119, 121 (1976). Here, since there was never a binding contract giving him an equity interest in any of Macklowe's properties, Cole is unable to show that he transferred any property or interests to Macklowe. *See Mance v. Mance*, 128 AD2d 448 (1st Dept 1987). Although Cole contends that the services he performed for Macklowe constituted the sweat equity which he provided in exchange for an interest in Macklowe's properties, he was, as the court has previously discussed, otherwise well compensated for his work through his receipt of salary, bonuses and benefits such as advantageous tax shelters. *Id.* at 448.

A bonus which is offered to and accepted by an employee is enforceable. *See Rubenstein v. Rosenthal*, 140AD2d at 158. Here, Macklowe clearly intended to make an immediate payment of a $565,000 bonus to Cole. Although Cole chose not to take actual payment at that time, his response to the offer was clearly an acceptance of the money in the form of a request that payment be deferred. Neither Macklowe nor Neuner ever indicated or even suggested that the offer would be withdrawn if Cole refused immediate payment or that, by requesting that payment be deferred, Cole had put himself in jeopardy of losing the bonus. The court therefore concludes that Macklowe's offer of the $565,000 bonus is enforceable. *Id.* at 158.

It is true that Cole's pleadings do not allege that the authorization of this payment was a gift or bonus from Macklowe. Rather, Cole has alleged that the offer was made as part of Macklowe's performance of his contractual obligations under the July 22, 1996 agreement. Nevertheless, for the reasons already discussed, the evidence at trial supports the theory that the bonus offer is enforceable and the court has the power to amend pleadings to conform to the proof. *See Rubenstein v. Rosenthal*, 140AD2d at 158; CPLR 3025(c). Although Cole never asserted this theory, Macklowe should hardly be surprised or prejudiced by the court's findings since Macklowe himself has asserted throughout these proceedings that the $565,000 payment was intended as a bonus.

3. Cole's Right to Purchase an Apartment at 145 East 76th Street

Under the fourth paragraph to the November 20, 1998 addendum, Macklowe agreed that Cole has the right to purchase an apartment at 145 East 76th Street at cost. He also agreed that although a specific apartment had not yet been selected, the apartment

Cole was entitled to purchase would be "consistent with the current floor plans of the building" and would contain a maid's room.

Unlike Macklowe's argument with respect to the July, 22, 1996 agreement and the November 26, 1998 addendum which relate to Cole's equity interests, Macklowe has not claimed that he did not intend to be bound to his written agreement to give Cole the right to purchase an apartment. Nor has he argued that the fourth paragraph of the addendum was merely an unenforceable agreement to agree. Indeed, when asked at his deposition why he ultimately refused to sell an apartment to Cole in the building at 145 East 76th Street, Macklowe responded that he was simply not motivated to do so.

In opposing Cole's attempt to enforce the fourth paragraph of the addendum, Macklowe has nevertheless asserted three grounds for denying Cole's claim to an apartment.[21]

First, he argues that the claim has already been denied by Justice Richard F. Braun in a decision dated October 11, 2000 and that this court is bound by the law of the case.

---

[21] Notably, Macklowe has not argued that the first three paragraphs of the addendum are not severable from the fourth paragraph and that his intention not to be bound by the provisions relating to Cole's equity interests necessarily means that the provision giving Cole the right to purchase an apartment is therefore unenforceable. Any such argument would, in any event, be without merit. It is well settled that different provisions in a single agreement are severable so that the annulment of one does not annul the others where, by their terms, nature and purposes, they are not dependent upon each other and may otherwise stand alone. *See Apostolos v. R.D.T. Brokerage Corp.*, 159 AD2d 62, 65 (1st Dept 1990); Williston on Contracts, § 45.1, p 262 (4th ed. 2000). It is also well settled that employment contracts are divisible. *See Hadden v. Cons. Edison Co. of NY*, 34 NY2d 88, 97 n.9 (1974). Here, the paragraphs relating to Cole's equity interests clearly stand alone from the paragraph relating to his purchase of an apartment and, indeed, the parties have not suggested otherwise.

This argument is without merit. Cole's initial complaint contained two causes of action, one seeking specific performance and the other seeking monetary damages, which related to his contractual right to purchase apartment 7B in the building. These claims were based on both the addendum and on the March, 1999 contract which Cole and Lennox 76 signed for the sale of apartment 7B. In dismissing these two causes of action, Justice Braun held that the complaint did not state a cause of action with respect to the Lennox 76 contract since Lennox 76 is not a party herein and since Macklowe, who signed the contract, did not do so in his individual capacity. Justice Braun also found that the complaint failed to state a cause of action with respect to the addendum since the complaint sought specific performance for the sale of a particular unit, apartment 7B, whereas the addendum merely obligated Macklowe to offer Cole an apartment in the building. Consistent with this ruling, Cole subsequently served an amended complaint in which the first two causes of action omitted any reference to apartment 7B or to any other particular apartment and, instead, sought to enforce his right under the addendum to an apartment in the building. Thus, contrary to Macklowe's argument, these two causes of action are not barred by any previous ruling in this case by Justice Braun and adequately state a cause of action.

Macklowe's second argument is that the fourth paragraph of the addendum was superseded by the Lennox 76 contract. This argument is based on a provision in the Lennox 76 contract which states that it supersedes "any and all understandings between the parties and constitutes the entire agreement between them...." The problem with this argument is that, as Justice Braun held, the parties to the Lennox 76 agreement were Cole and Lennox 76 whereas the parties to the addendum were Cole and Macklowe. If Cole is

unable to enforce the Lennox 76 agreement as against Macklowe individually on the ground that Macklowe was not a party to that agreement in his individual capacity, the provision in the Lennox 76 agreement which states that it supersedes all prior agreements between the parties can hardly apply to an agreement involving a non-party, Macklowe.[22]

Macklowe's third argument is that enforcement of the fourth paragraph of the addendum is barred under the statute of frauds which applies to contracts for the sale of real property. *See* General Obligations Law § 5-703(2). Under this provision, a written agreement can be enforced only where it identifies the parties, describes the subject matter, states the essential terms and is signed by the party to be charged. *See 160 Chambers Street Realty Corp. v. Register of the City of New York*, 226 AD2d 606, 607 (2nd Dept 1996). *See also RAJ Acquisitions Corp. v. Atamanuk*, 272 AD2d 164 (1st Dept 2000).

Here, Macklowe contends that the addendum is unenforceable because, by failing to identify a particular apartment and providing only that Cole was entitled to purchase an apartment in the building, it failed to adequately describe the subject matter and lacked an essential term. The court disagrees. The addendum identified the exact building in which Cole would be entitled to purchase an apartment and described the physical parameters which any such apartment must meet.[23] Since both parties agreed that they should be bound by these terms, that there was no need at that time to identify the particular

---

22 Indeed, Macklowe's argument before Justice Braun that he was not a party to the Lennox 76 contract is inconsistent with his argument herein that the parties to that contract and to the addendum were the same.

23 As to price, the addendum stated that the purchase price would be "at cost." Macklowe has not argued that, given this understanding, the absence of a specific price fails to satisfy the statute of frauds.

apartment which Cole would purchase and that no further bargaining was necessary, the agreement should be enforced. Indeed, Macklowe has not provided the court with any rationale under the statute of frauds for not enforcing such an agreement. Thus, although no particular unit is identified, the court is persuaded that the addendum adequately describes the property to be purchased and includes all essential terms.

Macklowe also argues that the addendum is unenforceable because it was not signed by the party to be charged, Lennox 76, but by an individual, Macklowe, who was not the actual owner of the building. Although, within the meaning of the statute of frauds, the party "to be charged" is invariably the titular owner of the property, the court has not found any case which has suggested that such formal ownership is an inflexible requirement. Where, as here, the party who signs a contract to sell real property owns 100% of the entity which holds actual title,[24] he is clearly the real party being charged with the obligation to sell and his failure to do so should not be countenanced by a rigid application of the statute of frauds which, exalting form over substance, rewards him for breaching the agreement and penalizes the other party. The statute of frauds was not designed to afford persons a means of evading their obligations and should not be used as a bar to the enforcement of a contract fairly and admittedly made. *See Morris Cohon & Co. v. Russell*, 23 NY2d 569, 574 (1969) (quoting from 4 Williston, Contracts [3rd ed.], § 567A, pp. 19-20). *See also Concordia General Contracting v. Peltz*, 11 AD3d 502, 503 (2nd Dept 2004); *McCormack v. Grumman American Aviation Corp.*, 111 AD2d 2, 3 (1st

---

[24] As already noted, Macklowe individually owns 99% of each limited liability company which holds title to a particular property. The remaining 1% is owned by a corporation which is wholly-owned by Macklowe.

Dept 1985). Under the circumstances, the court concludes that since Macklowe is, for all intents and purposes, the party to be charged with the sale of an apartment to Cole, the addendum satisfies the statute of frauds requirements. As such, the fourth paragraph of the addendum is enforceable and Cole is entitled to specific performance and/or monetary damages as a result of Macklowe's breach of this agreement.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on January 10, 2006 at 2:00 p.m. for a conference to discuss whether specific performance is still feasible, whether a trial on the damages which Cole has suffered by reason of Macklowe's breach of the fourth paragraph of the addendum is necessary and whether an order or judgment should be settled prior to any such damages trial.

The foregoing constitutes the order and decision of the court.

Dated: New York, New York
January 3, 2006

MARYLIN G. DIAMOND
J.S.C.