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

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JOSEPH KORFF,

Plaintiff,

-against-

Index No. 601425/2003
Motion Date: 10/30/2015
Motion Seq. No. 008, 009

RICHARD A. CORBETT, THE CONCORDE COMPANIES, formerly known as International Plaza, a Florida Partnership, HALL OF FAME ASSOCIATES, a Florida Partnership, and a successor, HALL OF FAME ASSOCIATES LTD., a Florida Partnership, and CSAT, INC., a Delaware Corporation,

Defendants.

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BRANSTEN, J.

Motion sequence numbers 008 and 009 are consolidated herein for disposition.

In motion sequence number 008, Defendants Richard A. Corbett ("Corbett"), the Concorde Companies ("Concorde"), Hall of Fame Associates, Hall of Fame Associates Ltd., and CSAT, Inc. ("Defendants") move for summary judgment under CPLR § 3212. In motion sequence number 009, Plaintiff Joseph Korff ("Korff") moves for partial summary judgment on liability on the breach of contract claim, and seeks damages of approximately $1.5 million. Plaintiff also seeks summary judgment dismissing each of Defendants' affirmative defenses. For the reasons that follow, Plaintiff and Defendants' motions each are granted in part and denied in part.

I. Background

In 1979, Defendants Corbett and Concorde acquired the lease for a 135-acre property adjacent to the Tampa International Airport (the "Property") in Tampa Bay, Florida.[1] (Compl. ¶¶ 8-9). Defendants hired Plaintiff Joseph Korff, an attorney, to assist in the development of the then-vacant lot. *Id.* The compensation arrangement between the parties was memorialized in a written letter agreement (the "Agreement"). (Compl. ¶¶ 11-12; Ex. A). The Agreement provides, in its entirety:

> Dear Dick,
>
> At least one of us had in mind a 50-50 partnership several years ago. To avoid unproductive controversy:
>
> A. All my firm's legal bills and interest thereon from time to time outstanding will be cleared up out of the first available financing sources. You will pay $25,000 per month against such bills until that time.
>
> B. The equivalent of $500,000 plus interest at 15% per annum from September 5, 1985 will be paid to [Joseph Korff] from the first decent term financing source (for example: sale, lease, joint venture, or more than 3 years overall financing).
>
> C. You will pay upon receipt by International Plaza, its partners or affiliates, 5% of gross receipts...until $26,250,000 is paid when the percentage will be 10%. You will determine increases above that percentage amount in your sole discretion.
>
> Sincerely,
>
> [signed]
> Joseph Korff
>
> Agreed to and accepted by:
>
> Richard A. Corbett on behalf of himself

[1] The Concorde Companies were formerly known as International Plaza, Inc. ("International Plaza"), a Florida entity owned by Corbett. (Compl. ¶ 5).

and all entities in which he has an interest

_____[signed]_____
Richard A. Corbett

...

International Plaza
a Florida General Partnership

by: _____[signed Richard A. Corbett]_____

Id. at Ex. A.

In or about November 1992, Korff agreed to subordinate his right to payment of Defendants' indebtedness to CHAR, Inc. (the "Subordination Agreement").[2] (Compl. ¶ 13). Pursuant to the Subordination Agreement, Korff promised not to initiate proceedings for payment against Defendants until CHAR was fully repaid. *Id.* However, as per the agreement, failure by Korff to initiate such proceedings would not constitute a waiver of the right. *Id.* By no earlier than 1999, Defendants obtained significant financing, and were able to repay CHAR in full. (Compl. ¶ 13). Since 1999, Plaintiff alleges, Defendants have continued to receive gross receipts from developments on the Property. (Compl. ¶¶ 16-17).

According to Plaintiff, Defendants have failed to honor the Agreement by paying Korff his share of gross receipts. (Compl. ¶ 20). In 2003, Plaintiff filed this action, asserting causes of action for breach of contract, unjust enrichment, declaratory

[2] CHAR is allegedly an entity wholly-owned by the family of Corbett's wife who agreed to finance Defendants to prevent default. (Compl. ¶ 14).

judgment, and an accounting. In response, Defendants allege the following affirmative defenses against the enforcement of the Agreement: duress, release, statute of limitations, lack of consideration and mutuality of obligation, estoppel, lack of personal jurisdiction, mistake, and unclean hands.

II. Discussion

Before this Court are the parties' motions for summary judgment. In their motion, Defendants seek dismissal of the complaint in its entirety. First, they argue that the Agreement is void for several reasons, including lack of consideration, or in the alternative, is unenforceable. Defendants also argue that the statute of limitations bars Plaintiff's claims. In addition, Defendants seek dismissal of Plaintiff's unjust enrichment claim.

In his motion for partial summary judgment, Plaintiff affirmatively seeks judgment on his breach of contract claim. Korff also maintains that each of Defendants' affirmative defenses must be dismissed.

A. Summary Judgment Standard

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18

N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...") (citations omitted).

B. Law of the Case

In support of his motion seeking judgment on his breach of contract claim, Plaintiff first argues that the First Department's 2005 decision regarding Defendants' motion to dismiss conclusively establishes that there was a valid agreement between the parties, thus barring Defendants' dismissal arguments. In that decision, the First

Department concluded that Plaintiff sufficiently alleged the existence of the Agreement, such that his breach of contract claim survived Defendants' motion to dismiss. *See Korff v. Corbett*, 18 A.D.3d 248 (1st Dep't 2005).

"[D]ecisions of the Appellate Division made in a case, whether correct or incorrect, are the law of the case until modified or reversed by a higher court." *Bolm v. Triumph Corp.*, 71 A.D.2d 429, 434 (4th Dep't 1979). However, the doctrine of the law of the case "applies only to legal determinations resolved on the merits." *Perini Corp. v. City of New York*, 122 A.D.3d 528, 528-29 (1st Dep't 2014) (internal citations omitted). The doctrine does not apply when "a summary judgment motion follows a motion to dismiss [because] the scope of review is distinct." *Riddick v. City of New York*, 4 A.D.3d 242, 245 (1st Dep't 2004) (internal citation omitted). In addition, the doctrine does not apply when new evidence comes to light following the initial ruling. *See, e.g., Holloway v. Cha Cha Laundry*, 97 A.D.2d 385, 386 (1st Dep't 1983) (explaining that a court may then reconsider a question or issue).

A motion to dismiss is addressed to the pleadings, and, on such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (citation omitted). On a summary judgment motion, as previously explained, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law,

tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or the motion will be granted. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985) (reversing the motion court's order granting the defendants' cross-motion for summary judgment where they failed to demonstrate, with admissible proof, that the claims against them should be dismissed).

On appeal from the motion court's order dismissing Plaintiff's complaint, the First Department addressed Plaintiff's allegations as set forth therein, and found Plaintiff sufficiently pleaded causes of action for breach of contract and unjust enrichment. *See Korff v. Corbett,* 18 A.D.3d 248, 250-51 (1st Dep't 2005). With respect to the motions for summary judgment, this Court has a different task, and must determine whether Plaintiff has proven his claims based on the evidence adduced during lengthy discovery, including the thousands of relevant pages produced after the First Department rendered its decision. In light of these facts, the doctrine of law of the case does not apply, and Defendants' arguments are not barred on this ground.

C. Affirmative Defenses

Korff next seeks dismissal of each affirmative defense asserted by Defendants in their answer. Conversely, Defendants argue that such defenses, with four exceptions,[3] mandate dismissal of the breach of contract claim.

1. Consideration

In support of their ninth and tenth affirmative defenses for lack of consideration, Defendants contend that the Agreement is based on unrecited past consideration, and, therefore, is barred by General Obligations Law (GOL) § 5-1105. Plaintiff disagrees, countering that the Agreement is supported by valid, present consideration.

Section 5-1105 of the GOL provides that "[a] promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed." Thus, to be enforceable under GOL § 5-1105, the writing must include a recitation of past consideration, and the past consideration must be clear from the face of the document,

[3] Defendants do not oppose dismissal of the second, twelfth, thirteen, and fourteenth affirmative defenses – payment in full, mistake, unilateral mistake, and lack of personal jurisdiction.

without resort to extrinsic evidence. *Clark v. Bank of N.Y.*, 185 A.D.2d 138, 140-41 (1st Dep't 1992).

Further, a well-established law of contract interpretation provides that:

> [i]n interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.
>
> Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.

American Express Bank v. Uniroyal, Inc., 164 A.D.2d 275, 277 (1st Dep't 1990) (internal citations omitted). Indeed, "[w]hether or not a writing is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

By its terms, the Agreement is supported by valid, sufficiently recited past consideration. Paragraph 2 provides for the following compensation: "$500,000 plus interest at 1.5% per annum from September 5, 1985 will be paid to [Korff] from the first decent term financing source." The description of the moment that payment becomes due demonstrates that Korff agreed to forbear, until then, from collecting the sums owed to him, beginning in September 1985. Forbearance on a debt constitutes sufficient

consideration, as a matter of law. *See Nolfi Masonry Corp. v. Lasker-Goldman Corp.*, 160 A.D.2d 186, 187 (1st Dep't 1990) ("[G]ood faith relinquishment of a cause of action, even one which proves to be unenforceable, constitutes valid consideration."); *see also Holt v. Feigenbaum*, 52 N.Y.2d 291, 299 (1981) (same). Indeed, as noted by the First Department, "the language used suggests that this amount had already been earned by plaintiff." *Korff v. Corbett*, 18 A.D.3d 248, 250 (1st Dep't 2005).

Moreover, this Court concludes Paragraph 3 is also supported by valid, sufficiently recited past consideration. Pursuant to Paragraph 3, "[Corbett] will pay upon receipt by International Plaza, its partners or affiliates, 5% of gross receipts...until $26,250,000 is paid when the percentage will be 10%...." The contracting parties utilize terms clearly demonstrating that the purpose of the agreement is to settle past disagreements regarding Korff's payment for work performed on the project.

Accordingly, Korff's motion for summary judgment dismissing the ninth and tenth affirmative defenses is granted, and Defendants' motion is denied.

2. Indefiniteness, Meeting of the Minds & Ambiguity

Next, Defendants argue that Paragraph 3 is nonetheless unenforceable on the grounds that certain material terms are indefinite or uncertain, and that there was no meeting of the minds with respect to those material terms. These arguments correspond to Defendants' eighth affirmative defense. In opposition, Korff contends that the material

terms disputed by Defendants are, at most, ambiguous; that, at all relevant times, "gross receipts" was accorded its commonly understood meaning; and that the differing definitions suggested by Defendants raise triable issues sufficient to preclude summary judgment. This Court agrees with Korff.

i. Meeting of the Minds

"Even if parties intend to be bound by a contract, it is unenforceable if there is no meeting of the minds." *Gessin Elec. Contrs., Inc. v. 95 Wall Assoc., LLC*, 74 A.D.3d 516, 518 (1st Dep't 2010). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Follender v. Prior*, 63 A.D.3d 1458, 1459 (3d Dep't 2009) (internal quotation omitted). Indeed,

> [N]ot all terms of a contract need be fixed with absolute certainty; 'at some point virtually every agreement can be said to have a degree of indefiniteness . . . While there must be a manifestation of mutual assent to essential terms, parties also should be held to their promises and courts should not be "pedantic or meticulous" in interpreting contract expressions.'

Express Indus. & Term. Corp. v. New York State Dept. of Transp., 93 N.Y.2d 584, 590 (1999) (quoting *Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989)). "Imperfect expression does not necessarily indicate that the parties to an agreement did not intend to form a binding contract. A strict application of the definiteness doctrine could actually defeat the underlying expectations of the contracting

parties." *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91 (1991).

The plaintiff bears the burden of demonstrating that a meeting of the minds occurred. *See Gold Coast Advantage, Ltd. v. Trivedi*, 105 A.D.3d 571, 571 (1st Dep't 2013) (affirming the dismissal of the complaint where the plaintiff did not meet the burden). The issue of whether there has been a meeting of the minds "is generally one of law, properly determined on a motion for summary judgment." *Central Fed. Sav. v. National Westminster Bank, U.S.A.*, 176 A.D.2d 131, 132 (1st Dep't 1991).

Again, the Agreement is a letter from Korff to Corbett, and signed by each of them in an individual capacity. Corbett also executed the letter agreement in his representative capacity, on behalf of "all entities in which he has an interest," and International Plaza. The letter begins, "[a]t least one of us had in mind a 50-50 partnership several years ago. To avoid unproductive controversy..." Those words indicate a mutual acknowledgement that a dispute existed between the parties, and further expressed clear intent to resolve the "unproductive controversy." Accordingly, this language demonstrates the contracting parties' unambiguous intent to enter into an enforceable contract. Therefore, Defendants' dismissal argument is rejected and their affirmative defense asserting no meeting of the minds is dismissed.

ii. Ambiguity

Despite the parties' clear "meeting of the minds," the Agreement's reference to "gross receipts" in Paragraph 3 is ambiguous. Defendants contend that their payment obligation, if any, hinges upon the meaning of the phrase "gross receipts," making it a material term of the Agreement. Since the Agreement does not define "gross receipts," rendering it ambiguous, the introduction of extrinsic evidence is permitted.[4] *See Smith v. Smith*, 277 A.D. 694, 695 (1st Dep't 1951) ("Where words used in a written contract are susceptible of more than one interpretation… parol evidence may be admissible to clear up any ambiguity in the language employed.").

Considering the parties' deposition testimony, it is clear to this Court that triable issues remain as to the intended meaning of "gross receipts." In 2014, Corbett testified that he did not recall whether he understood the meaning of Paragraph 3. In addition, Corbett stated that he found "gross receipts" as used in Paragraph 3 to be ambiguous and confusing, and that he had no recollection of ever having discussed the term in connection with the Agreement with Korff. (*See* Richard A. Corbett Apr. 2, 2014 Dep. Tr. at 549:18-550:19, 552:4-7, 557:19-23).

On the other hand, Korff testified that he recalled discussions with Corbett concerning "gross receipts" from 1990, although he did not recall the details. (*See* Joseph

[4] It should be noted that the First Department explained that parol evidence is admissible "to the extent that any of the agreement's terms may be ambiguous..." *Korff v. Corbett*, 18 A.D. 3d 248, 251 (1st Dep't 2005).

Korff Jan. 23, 2014 Dep. Tr. 286:3, 289:11). Korff testified that he did not recall discussions with Corbett about whether loans, sales of portions of the ground lease, and the sale of a partnership interest fell under "gross receipts." *Id.* at 291:15-292:8, 294:16-24, 298:17-21.

Despite Defendants' contention, this Court's April 3, 2014 decision on Korff's motions to compel discovery did not reject Plaintiff's proffered definition of "gross receipts." In the order, the Court granted, in part, Korff's motion to compel Defendants' compliance with certain discovery requests, finding that Korff's definition of the word "receipts" "goes far beyond the commonly understood meaning of the term" because Korff included funds not actually received by International Plaza or its partners or affiliates, but, instead, were projections of future receipts. (*See* April 3, 2014 Decision and Order, Dkt. No. 118 at 5-6). The Court did not, however, explicitly define the phrase.

Again, though Defendants' argue otherwise, Korff's admittedly deliberate choice not to define "gross receipts," and to permit it to remain ambiguous in order to "avoid wordsmithing battles with [Corbett]" does not render the letter agreement unenforceable. Instead, it supports a finding of triable issues sufficient to preclude summary judgment on the parties' intended definition of "gross receipts" for purposes of the breach of contract claim. (*See* Korff Jan. 23, 2014 Dep. Tr. 290:14-20; *see* Charles Rubenstein, Esq. Feb. 28, 2014 Dep. Tr. 17:13-18:2, 86:15-87:16; Melanie Craig Feb. 11, 2014 Dep. Tr. 51:5-52:17).

Further, the ambiguity of "gross receipts" precludes Plaintiff's request for summary judgment on damages, since the definition, pursuant to Paragraph 3, will determine the date at which the interest to be paid by Defendants increased from 5% to 10%. Indeed, the parties' damages expert witnesses proffer contradictory opinions regarding the sources of income to be included in the definition of "gross receipts."

For example, Plaintiff's damages expert, Gene Williams, prepared a Valuation Report dated October 3, 2014 (Affirmation of Carl Oberdier ("Oberdier Affirm.") Ex. 61 ("October 2014 Valuation Report")), in which he appraised Plaintiff's present economic interest in the International Plaza project, based upon his interpretation of the Agreement. In the October 2014 Valuation Report, Williams reviewed the fair market value of the property, from 1994 through 2014, the tax documents generated by the companies that he believed should be included, such as CSAT, L.P., along with other documents, and concluded that the fair market value of Korff's interest in the project was approximately $46.4 million, plus interest. (*See* October 2014 Valuation Report at 18). In his calculations, Williams applied a 5% interest rate until Korff's interest reached $26,250,000, and then applied a 10% interest rate. *See id.*

Meanwhile, Defendants' damages expert, James Donohue, in his July 11, 2014 Report, *see* Oberdier Affirm. Ex. 64, concluded that Plaintiff's expert, in his June 2, 2014 Valuation Report should not have included cash received by CSAT, L.P. in the "gross receipts" compensation calculation, since such cash was not generated by International

Plaza. *Id.* at § IV. Donohue also concluded that Williams made a number of unfounded assumptions in calculating the fair market value of the International Plaza project on various dates. *Id.* § V.

Thus, the parties offer competing, commercially reasonable interpretations of the disputed terms that raise genuine triable issues of fact sufficient to preclude summary judgment in favor of *either party* on the breach of contract cause of action and damages.

iii. Indefiniteness

In addition, Defendants argue that the contract lacks a definite term of duration, thus rendering the paragraph unenforceable. However, as a matter of law, such silence does not render an agreement unenforceable. *See, e.g., Bennett v. Atomic Prods. Corp.*, 132 A.D.3d 928, 929-30 (2d Dep't 2015) (internal citations omitted) ("Contracts containing no definite term of duration are terminable at will. … In the absence of an express term fixing the duration of the contract, the courts may inquire into the intent of the parties and supply the missing term if duration may be fairly and reasonably fixed by the surrounding circumstances and the parties' intent.").

Paragraph 2 of the Agreement specifies that Defendant' payment obligation of $500,000 to Plaintiff accrues on "the first decent term financing source." Though the parties dispute the meaning of the phrase "the first decent term financing source," since the phrase is followed by clear and concrete examples of what the contracting parties

intended in choosing those words, *i.e.*, "(for example: sale, lease, joint venture, or more than 3 years overall financing)," the Court concludes the phrase is not ambiguous.

Paragraph 3, however, does not provide a term of duration for Defendants' payment obligation, nor may one be implied from the following language: payment at 5% "until $26,250,000 is paid when the percentage will be 10%." Further, the record is not clear as to whether the parties intended Paragraph 3 to govern their business relationship in perpetuity, whether they intended Paragraph 3 to remain in effect following Korff's termination, or whether they intended the payment obligation to cease at termination, or upon any other date. Though Defendants maintain otherwise, this does not render the contract unenforceable, but Defendants' payment obligation remains terminable at will. *See Bennett v. Atomic Prods. Corp.*, 132 A.D.3d 928, 929-30 (2d Dep't 2015). Accordingly, Defendants' affirmative defense asserting indefiniteness is dismissed.

3. Legal Ethics and Unconscionability

Next, in their fourth, fifth, and eleventh affirmative defenses, Defendants argue that Korff did not meet the heightened ethical and legal obligations imposed upon him as Corbett's attorney. In addition, they assert that Korff violated the Rules of Professional Conduct in procuring Corbett's signature on the Agreement and cannot demonstrate that Corbett fully understood the letter agreement's essential provisions. Defendants further

contend that the Agreement's terms are unconscionable. In opposition, Korff argues that he fully complied with his ethical duties as Corbett's attorney and used no duress or undue influence in obtaining Corbett's signature on the letter agreement. On this point, the parties have raised triable issues sufficient to preclude summary judgment.

In *Matter of Lawrence v. Graubard Miller*, the Court of Appeals reaffirmed that the "general rule" of "enforc[ing] clear and complete documents . . . according to their terms," in the absence of incompetence, deception, or overreaching, applies to lawyer fee agreements just as it does to other commercial contracts. *Lawrence*, 24 N.Y.3d 320, 341 (2014). Moreover, "[a] revised fee agreement entered into after the attorney has already begun to provide legal services is reviewed with even heightened scrutiny, because . . . the opportunity for exploitation of the client is enhanced." *Id.* at 336 (citing *Matter of Howell*, 215 N.Y 466, 472 (1915)).

The 1990 New York Rules of Professional Conduct, which govern Korff's conduct with respect to the 1990 Agreement, provides that an attorney "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless the client has consented after full disclosure." Rules of Professional Conduct (22 NYCRR 1200.0 DR 5-104 (A) (the "Business Transactions Rule")). Attorneys are further prohibited from charging excessive fees. *Id.*; DR 2-106. "A fee is clearly excessive when after a review of the facts, a lawyer of ordinary prudence would

be left with a definite and firm conviction that the fee is in excess of a reasonable fee." *Id.*; DR 2-106 (B).

In 1990, the Business Transactions Rule applied only where "the client expect[ed] the lawyer to exercise his professional judgment therein for the protection of the client." (NYC Bar Op., Formal Op. 2000-03 (citations omitted)). If no such expectations existed, then the requirements imposed by that rule would not be necessary. *Id.* Whether an individual can reasonably expect an attorney to exercise professional judgment in his or her behalf is a "highly fact-specific inquiry." *Matter of Ioannou*, 89 A.D.3d 245, 250 (1st Dep't 2011).

In such a situation, the attorney bears the burden of demonstrating that the agreement is "fair, reasonable, and fully known and understood by their clients." *Albunio v. City of New York*, 23 N.Y.3d 65, 71 (2014). "Even in the absence of any indication of fraud or undue influence on the part of the attorney, the agreement may still be invalid unless [the attorney] can show that the client was fully aware of the consequences and that there was no exploitation of the client's confidence in the attorney." *Schlanger v. Flaton*, 218 A.D.2d 597, 602 (1st Dep't 1995) (internal quotation omitted).

The parties' deposition testimony and the opinions rendered by their legal ethics experts raise triable issues regarding Corbett's understanding of Korff's role with regard to the Agreement, and whether Korff's conduct with respect to the Agreement comes within the Business Transactions Rule and Korff's fiduciary obligations to Corbett.

Defendants contend that Corbett did not know or fully understand the terms of the Agreement and that his signature would entitle Korff to a percentage of the gross profits in perpetuity. In addition, Defendants note that Korff drafted the Agreement without Corbett's input and bullied Corbett into executing it, while Corbett was on his way to the airport for a month-long family vacation in Africa. *See* Eiseman Aff. ¶¶ 28-31.

Plaintiff, however, maintains that no incompetence, deception, or overreaching occurred, and that Corbett negotiated the Agreement's terms for more than five months, proposed essential terms, and signed it twice, and that the change from an equity interest to a percentage of the gross receipts was Corbett's idea. Indeed, Korff's assistant took the minutes of those negotiations, and prepared internal memoranda summarizing the meetings that include drafts of what was later incorporated into the Agreement. *See* Melanie Craig Dep. Tr. 139:7-142:15.

With respect to the application of the Business Transaction Rule, Korff's legal ethics experts, Professors Roy D. Simon, Jr. and Professor Bruce A. Green, both opined that the 1990 letter agreement did not come within the scope of the Rule. The experts found, in effect, that the adversarial context of the negotiations between Korff and Corbett that culminated in the Agreement in July 1990 demonstrates that Corbett could not have expected Korff to exercise his professional judgment for Corbett's protection, and that, in any event, the fees were not excessive. *See* Simon Expert Report, ¶¶ 9, 19, 25; Green Rebuttal Expert Report at 1.

On the other hand, Defendants' legal ethics expert, Hal R. Lieberman, opined that the Business Transactions Rule applies because, when the negotiations are considered in the context of the ongoing attorney-client relationship of approximately 12 years between Korff and Corbett, it is clear that Corbett relied on Korff to protect his interests. *See* Lieberman Expert Report at 1, 16.

Notwithstanding Korff's exhortations, the fact that Corbett is a sophisticated business person is irrelevant. "[T]he Code of Professional Responsibility places the burden upon counsel, irrespective of the sophistication of the client, to obtain his consent after full disclosure before entering into a business transaction . . . where the differing interests of counsel and . . . client may interfere with the exercise of professional judgment for the client's protection." *Forest Park Assoc. Ltd. Partnership v. Kraus*, 175 A.D.2d 60, 62 (1st Dep't 1991).

Additionally, issues of fact also remain as to the excessiveness of Korff's claimed fee, which at $46 million, Defendants argue is excessive by any standard. Korff's expert, Professor Simon, opined that "[i]n light of Defendants' insolvency and the bleak prospects of the International Plaza project as of July 1990, these risks [shouldered by Korff] went beyond the ordinary risks of nonpayment that any attorney who does not receive full payment in advance assumes." (Simon Expert Report, ¶ 8 (b)). Both Simon and Green noted that Korff was in no better position than Corbett to predict that International Plaza would turn mature into a lucrative success, commensurately

increasing the value of Korff's rights under the letter agreement. *See* Simon Expert Report, ¶¶ 12, 27; Green Rebuttal Expert Report at 5-6.

In opposition, Defendants' expert Lieberman maintained just the opposite—that the fees were excessive, and violated the Code of Professional Responsibility. *See* Hal Lieberman Aug. 14, 2014 Dep. Tr. 32:20-34; Lieberman Report at 17-18. Thus, there is a dispute of material fact as to the excessiveness of Korff's fee.

Further, "an unconscionable contract is generally defined as one which is so grossly unreasonable as to be [unenforceable according to its literal terms] because of an absence of meaningful choice on the part of one of the parties [procedural unconscionability] together with contract terms which are unreasonably favorable to the other party [substantive unconscionability]." *Lawrence v. Miller*, 24 N.Y.3d at 336-37 (internal quotation marks and citation omitted). A fee agreement can be unconscionable at inception, or "may become unconscionable in hindsight, if 'the amount becomes large enough to be out of all proportion to the value of the professional services rendered.'" *Id.* at 339 (quoting *King v. Fox*, 7 N.Y.3d 181, 191 (2006)).

Given the above observations, including the experts' opinions and the fact that Korff seeks a fee of $46 million, triable issues also remain as to whether the Agreement was unconscionable. Therefore, summary judgment on the fourth, fifth, and eleventh affirmative defenses is denied.

4. Duress & Undue Influence

The parties next dispute whether the letter agreement was a product of duress or undue influence, whether the third affirmative defense of duress and undue influence should be stricken, and whether the letter agreement's terms and Korff's conduct were unconscionable.

A "contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will." *Sosnoff v. Carter*, 165 A.D.2d 486, 491 (1st Dep't 1991) (internal quotation omitted). "One who would repudiate a contract procured by duress must act promptly or he will be deemed to have elected to affirm it." *Edison Stone Corp. v. 42nd St. Dev. Corp.*, 145 A.D.2d 249, 253 (1st Dep't 1989) (internal quotation omitted); *Livathinos v. Vaughan*, 121 A.D.3d 485, 486 (1st Dep't 2014). Inasmuch as a contract procured by duress is not void, but voidable, a contracting party may ratify it "by 'remaining silent or acquiescing in the contract for a period of time after he has the opportunity to avoid it' or by 'acting upon it, performing under it, or affirmatively acknowledging it.'" *VKK Corp. v. National Football League*, 244 F.3d 114, 123 (2d Cir. 2001) (internal citation omitted).

As previously explained, triable issues exist with respect to the negotiation and establishment of the fee agreement sufficient to preclude summary judgment.

In addition, the record does not conclusively demonstrate that Corbett promptly repudiated the Agreement. Craig's alleged verbal notification to Korff that Corbett did not agree with the Agreement's terms does not constitute repudiation. Corbett alleges that, upon his return from Africa, he verbally advised Korff that he did not agree with the Agreement's terms. Apparently, Corbett did not request return of the executed Agreement. Korff denies that such conversation took place.

Further, the record also fails to establish, as a matter of law, that Corbett ratified the Agreement. Corbett was, at all relevant times, represented by legal counsel not affiliated with Korff or his law firms, yet he did not seek their advice until 1992, when he asked one of those attorneys regarding about his rights and obligations under the Agreement. Despite Korff's repeated contentions, Defendants' silent acquiescence to Korff's execution of the Subordination Agreement does not constitute Defendants' concession that the Agreement was valid and enforceable. In fact, the Subordination Agreement contains no reference to the Agreement itself.

Finally, Defendants' failure to make any payments due under the Agreement and Korff's failure to request such payments do not constitute conclusive proof that both sides considered the Agreement as void and without effect. The record includes evidence that Korff continued to represent Corbett during that period, that Korff would, at times, fail to press Corbett for payment of his legal fees, and that the International Plaza project did not begin to generate any profits until the late 1990s or early 2000s.

Accordingly, Plaintiff's motion for summary judgment as to the third affirmative defense is denied.

5. Timeliness

Next, Defendants contend in their seventh affirmative defense that Korff's claims under Paragraph 2 of the Agreement are barred by the six-year statute of limitations for breach of contract claims.

Pursuant to CPLR § 213(2), a claim for breach of contract is governed by a six-year statute of limitations. Where the claim is for payment of a sum of money allegedly owed pursuant to a contract, and payment is subject to a condition, the obligation to pay arises, and the cause of action accrues, when that condition has been fulfilled. *Hahn Auto. Warehouse, Inc. v. American Zurich Ins. Co.*, 18 N.Y.3d 765, 770 (2012).

The record conclusively demonstrates that "more than 3 years overall financing" was obtained by Concorde no later than February 17, 1994, when Concorde and CHAR entered into the Waiver, Consent and First Agreement of Amendment of the Term Loan Agreement ("Loan Amendment Agreement"), amending an existing term loan agreement dated June 15, 1992 between them. *See* Loan Amendment Agreement § 2(b)(ii). The Loan Amendment Agreement expressly provided for overall financing by CHAR for four years, from February 17, 1994 to February 17, 1998. *See id.* In addition, that agreement expressly provided that CHAR would advance Concorde up to $1.6 million for the

"General Funding Requirement," and also another $1.6 million for "environmental remediation work." *See* Loan Amendment Agreement, Annex II, §§ 1, 2.

Korff's contention that CHAR did not provide any overall financing, but, instead, merely provided reimbursement for certain of Defendants' pre-approved operating expenses, at CHAR's discretion is unavailing. Loan funds equal to $3.2 million were available for Concorde's use for a four-year period, and Concorde did, in fact, draw from those monies.

Korff's contention that the November 6, 1992 Subordination Agreement between Korff and CHAR tolled the running of the statutory period applicable to Korff's claim is similarly without merit. As discussed above, the Subordination Agreement is silent regarding the 1990 Agreement, and any tolling on the limitations period applicable to Korff's claims. In any event, Defendants were not a party to the Subordination Agreement, and a nonparty to a tolling agreement is not bound by that agreement. *See Andy Warhol Foundation for the Visual Arts, Inc. v. Federal Ins. Co.*, 189 F.3d 208, 217 (2d Cir. 1999).

Contrary to Korff's contention, Defendants' sale of their leasehold in 1997 is irrelevant to this issue because it occurred four years later, and, therefore, cannot be the "first financing source," as per Paragraph 2 of the Agreement. Thus, the limitations period on Korff's claim to enforce Paragraph 2 began to run no later than February 17, 1994, when Concorde and CHAR executed the loan amendment agreement. Korff

commenced this action on May 2, 2003, well over six years later. Therefore, the branch of the first cause of action for breach of Paragraph 2 time-barred, and Defendants' motion for summary judgment on that branch of the claim is granted.

However, the branch of the claim to enforce Paragraph 3 of the Agreement is timely asserted. Defendants' payment obligations under Paragraph 3 are recurring, as noted above, and each failure to remit the required percentage of gross receipts constitutes a separate, actionable breach. *See Knobel v. Shaw*, 90 A.D.3d 493, 494 (1st Dep't 2011).

6. 1992 Settlement and Release

Next, Korff moves to strike Defendants' sixth affirmative defense of release. The release at issue is a settlement agreement executed in March 1992 in connection with a legal fee dispute between Korff's law firms and Defendants for legal services rendered prior to January 1, 1989. The settlement agreement provides, in relevant part, that Defendants' payment of the settlement amount is in "full and final satisfaction, payment and settlement of all fees and charges for legal services rendered . . . by any Plaintiff or by any partner of any Plaintiff, or by . . . Joseph Korff . . . from January 1, 1989 through June 30, 1992." (Settlement Agreement, ¶ 2).

To the extent that Korff seeks to recover legal fees for services rendered during that time period, such claim is barred by the release. However, to the extent that Korff seeks to recover fees other than legal fees, the claim is not barred.

7. Estoppel

Korff's motion to strike Defendants' seventeenth affirmative defense of estoppel is denied. "An estoppel defense may also be invoked where the failure to promptly assert a right has given rise to circumstances rendering it inequitable to permit the exercise of the right after a lapse of time." *Matter of Ettore I. v. Angela D.*, 127 A.D.2d 6, 12 (2d Dep't 1987). Triable issues exist regarding whether the more than 25-year delay between the underlying events and the present, consisting of a delay in commencing this action, and in prosecuting the action, were caused by solely by Korff, and have directly resulted in a significant increase in the interest allegedly owed. Korff will be estopped from benefitting from his delay, if any, in exercising his rights.

8. Defendants' Remaining Affirmative Defenses

Finally, those branches of Korff's motion to strike defendants' second (payment in full made), twelfth (mistake), thirteenth (unilateral mistake), and fourteenth (lack of personal jurisdiction) affirmative defenses are granted without opposition, and these affirmative defenses are stricken.

D. *Additional Arguments Raised by Defendants*

In addition to raising arguments based on their affirmative defenses, Defendants contend that Korff's breach of contract claim merits dismissal on other grounds.

1. Termination

Defendants argue that the breach of contract claim fails because Corbett terminated his attorney-client relationship with Korff, mid-project, on March 1, 1994. "In New York, clients have always enjoyed the unqualified right to terminate the attorney-client relationship at any time without any obligation other than to compensate the attorney for 'the fair and reasonable value of the *completed services*.'" *In re Thelen LLP*, 24 N.Y.3d 16, 28 (2014) (emphasis in original) (internal citation omitted). Thus, insofar as Korff claims his services as Corbett's attorney were terminated prior to completion of a matter, *i.e.*, prematurely, he has no actionable breach of contract. *See Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York*, 302 A.D.2d 183, 187 (1st Dep't 2002) (explaining that in this case an attorney is limited to three remedies: retaining lien, charging lien, and quantum meruit).

However, to the extent that Korff seeks payment for services rendered before termination, or those services rendered as a consultant, the termination of the attorney-client relationship is of no import.

2. CSAT and Gross Profits

Defendants next seek to limit the scope of damages by asserting that CSAT's gross profits do not fall within the scope of the Agreement, since CSAT was not, at the time the Agreement was executed, an International Plaza partner or affiliate. Although, as discussed above, the meaning of "gross receipts" is disputed, the parties agree that CSAT is not, and has never been, a partner of International Plaza. "Absent explicit language demonstrating the parties' intent to bind future affiliates of the contracting parties, the term 'affiliate' includes only those affiliates in existence at the time that the contract was executed." *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 246 (2014). Moreover, the contracting parties' use of the present tense, and failure to use any "forward looking language" in Paragraph 3 demonstrates their intent to exclude any future partners and affiliates. *Id.* at 246.

Nonetheless, Korff maintains that CSAT is the alter ego of Corbett and Concorde, an entity owned and controlled by Corbett in existence on the date Corbett executed the Agreement. In New York, "[t]hose seeking to pierce a corporate veil . . . bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998). Thus, to pierce the corporate veil, Korff must demonstrate that (1) Corbett and Concorde exercised complete domination over CSAT with respect to the enforceability of

the Agreement, the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against Korff that resulted in Korff's injury. *See Sheridan Broadcasting Corp. v. Small*, 19 A.D.3d 331, 332 (1st Dep't 2005).

Korff does not contend, and has not shown, that Defendants used CSAT to perpetrate any improper conduct with respect to the Agreement. An inference or abuse of the corporate structure will not arise where the company at issue was not created for an improper purpose. *Joseph Kali Corp. v. A. Goldner, Inc.*, 49 A.D.3d 397, 399 (1st Dep't 2008). And further, though Korff has shown some indicia of common ownership, Korff has wholly failed to allege any facts from which an abuse of the corporate structure may be inferred by the trier of fact.

For these reasons, the Court agrees with Defendants and concludes that CSAT's gross profits do not come within the scope of the Agreement.

E. *Unjust Enrichment*

Finally, Defendants seek summary judgment on the second cause of action for unjust enrichment. A plaintiff seeking to recover under a claim for unjust enrichment must demonstrate that the plaintiff bestowed a benefit upon the defendant, that the benefit remains with the defendant, and that the defendant has not adequately compensated the plaintiff for that benefit. *See Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 120-21 (1st Dep't 1998). A court may dismiss an unjust enrichment claim as a matter of law

where the evidence shows inequitable conduct by the plaintiff or where the plaintiff was compensated. *See 1133 Taconic, LLC v. Lartrym Servs., Inc.*, 85 A.D.3d 992, 993 (2d Dep't 2011); *Meghan Beard, Inc. v. Fadina*, 82 A.D.3d 591, 593 (1st Dep't 2011). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987); *Rashid v. B. Taxi Mgt. Inc.*, 107 A.D.3d 555, 556 (1st Dep't 2013).

This claim is barred by the existence of a written contract governing the claim. Therefore, even if proven, Korff's contentions that Korff put extraordinary time and effort into the International Plaza project, and that Corbett's involvement was minimal and inconsistent, do not provide a basis upon which to grant judgment for unjust enrichment. .

Further, the unjust enrichment claim is time-barred for the same reasons that the claim to recover pursuant to Paragraph 2 is time-barred. "Under New York law, there is no identified statute of limitations period within which to bring a claim for unjust enrichment, but where . . . the unjust enrichment and breach of contract claims are based upon the same facts and pleaded in the alternative, a six-year statute of limitations applies." *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dep't 2013).

Accordingly, Defendants' motion for summary judgment dismissing the unjust enrichment claim is granted.

F. *Declaratory Judgment and Accounting*

The final two counts in the complaint seek a declaratory judgment and an accounting.

In support of summary judgment, Defendants merely state that the declaratory judgment claim hinges "on the validity of the [Agreement] and/or on the claim for unjust enrichment..." (Defs.' Moving Br. at 3.) The Court already has ruled that Korff's claim for breach of contract fails on timeliness grounds as to Paragraph 2. *See supra* Pt. II.C.5. In addition, the Court held that CSAT, L.P. is not Defendants' partner, affiliate, or alter ego and its gross revenue does not come within the scope of Paragraph 3 of the Agreement. *See supra* Pt. II.D.2. Accordingly, Defendants' motion for summary judgment is granted as to the declaratory judgment claim and otherwise is denied.

Since Korff offers no argument in his opposition brief in support of the accounting claim, Defendants' motion for summary judgment is granted and the accounting claim is dismissed.

III. Conclusion

Accordingly, it is

ORDERED that motion sequence number 008 is granted insofar as summary judgment is granted in favor of Defendants on the branch of the first cause of action to enforce Paragraph 2 of the Agreement on the ground that the claim is time-barred, on the

second cause of action for unjust enrichment, and on the fourth claim for an accounting, and those claims are dismissed with prejudice; and it is further

ORDERED that motion sequence 008 is granted as to the third cause of action for a declaratory judgment to the extent that this court declares that CSAT, L.P. is not Defendants' partner, affiliate, or alter ego and its gross revenue does not come within the scope of Paragraph 3 of the letter agreement; and it is further

ORDERED that motion sequence 008 is otherwise denied, and the breach of contract claim to enforce Paragraph 3 is severed, and shall continue; and it is further

ORDERED that motion sequence number 009 is granted to the extent that summary judgment is granted in Plaintiff's favor on Defendants' second, ninth, twelfth, thirteen, and fourteen affirmative defenses, as well as the eighth affirmative defense insofar as it asserts the invalidity of the Agreement on indefiniteness and failure to have a meeting of the minds, and those defenses are dismissed; and it is further

ORDERED that motion sequence 009 is otherwise denied, and the remaining affirmative defenses are severed, and shall continue.

Dated: June 15, 2016

ENTER:

Hon. Eileen Bransten, J.S.C.