Bryskin v Mann
2018 NY Slip Op 32080(U)
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Supreme Court, New York County
Docket Number: 653348/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
--X
MATTHEW BRYSKIN and EDWARD LUKASHOK,

Plaintiffs,

-against-

ERIC MANN, THE MANN GROUP, LLC and JOHN DOES 1-10,

Defendants.
--X

DECISION AND ORDER
Index No.: 653348/2016

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

I. BACKGROUND

In this action for breach of contract, plaintiffs seek to recover $1.5 million in "promote" fees owed by defendant Eric Mann ("Mann") based on plaintiff Matthew Bryskin's ("Bryskin") introductions to investors who provided over $35 in equity and debt to fund real estate projects directed by defendant Mann. Defendants respond that the relevant agreements are voidable, as they were entered into at the urging of defendants' counsel plaintiff Edward Lukashok ("Lukashok"), in violation Rule 1.8 of the New York Rules of Professional Conduct. The Rule requires a lawyer who proposes to enter into a business relationship with a client to advise the client in writing to obtain independent counsel, and to obtain written consent. Neither was done here.

II. FACTS[1]

Mann has been involved in the real estate industry for over two decades, including as a teacher in the masters real estate program at New York University. His projects include purchase and sale of co-ops and multiple family homes.

Lukashok served as legal counsel regarding several transactions managed by Mann. Prior to 2005, Lukashok represented Mann personally. Thereafter, when Mann transitioned to operating the business through limited liability company vehicles, Lukashok likewise transitioned to

[1] As this is a motion for partial summary judgment, these facts are taken from the parties' 19-a statements (SUMF, NYSCEF Docs. No. 118, 120, and 155), except as noted.

representing those entities. Lukashok did not have a written retainer agreement with either Mann or the entities.

In May 2012, Lukashok introduced Mann to attorney Bryskin who had clients interested in investing in real estate (Lukashok Affd. ¶ 3, Doc. No. 109). In an agreement signed by Mann, Bryskin and Lukashok, each in his personal capacity and dated May 23, 2012, Mann for himself and as owner of the Mann Group and affiliated companies formed for the purpose of investing and acquiring interests in real estate, Bryskin and Lukashok agreed to coordinate equity investments in real estate projects directed by Mann. Bryskin agreed to "seek out investment capital through investors" (Doc. No. 64), in return for which Mann would pay Bryskin 20% of the "Promote Fees" paid to Mann in connection with two projects identified in the agreement ("the May Agreement"). The agreement also contains an acknowledgment that Lukashok had "facilitated" the introduction of the parties (*i.e.* Mann and Bryskin). The agreement makes no provision for any payment by Mann to Lukashok but instead states that "[i]n total Matthew Bryskin and Edward Lukashok will receive 20% of the . . . promote fees" *(id.)*. The agreement is silent as to how the fee paid to Bryskin would be apportioned between Bryskin and Lukashok *(id.)*.[2] As to future projects, if Bryskin and Lukashok brought in investors, Mann agreed to pay them "at least 20%" of the promote fees paid to Mann and in addition "a reasonable increase in gross compensation that should be paid to Matthew Bryskin and Edward Lukashok as integral parts' of the business operations of the Mann Group" *(id.)*. What would constitute "a reasonable increase in gross compensation that should be paid out to . . . Bryskin and . . . Lukashok" was left for future negotiation. The May Agreement also provided that "Bryskin will have the opportunity to invest . . . $25,000 in the two projects" *(id.)*. His investment would not be subject to promote fees *(id.)*.

Mann disclaims that he understood the contract when he signed the May Agreement or that he used his own judgment in deciding to sign it. He insists he relied on his counsel, Lukashok (Opp. Br., p. 8). Lukashok and Bryskin state that Mann was well aware of the terms of the May Agreement (Lubashok Affd. ¶ 4, Doc. No. 109 and Bryskin Affd., Doc. No. 57 ¶ 12).

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[2] Lukahok submitted an affidavit confirming that payment is owed to Bryskin and that he expects to get only "a small part for having introduced Mann to Bryskin" (Lukahok Affd., ¶ 17, Doc. No. 109). He also confirmed that he did not split fees with Bryskin (id., ¶ 7).

In July 2012, Mann purchased the property at 211 Knickerbocker Ave (the Knickerbocker Property), through 211 Knickerbocker Associates, LLC, using at least $700,000 from investors introduced by Bryskin. In October 2012, Mann acquired a property located at 1407 Fulton St., Brooklyn (the Fulton Property), through 1407 Fulton Associates, LLC, using at least $575,000 of equity provided by Bryskin's investors.

In December 2012, Mann sought investors for a much larger project, the purchase of five properties (the QJMS Properties). In an "Amendment" dated December 17, 2012, the parties added the five properties and altered the compensation arrangement to provide that "Matthew Bryskin and Edward Lukashok will receive a total of 37.5% percent of the promote fees or fees paid out to Eric Mann or any ownership interest, the Mann Group or affiliates receive from the operation of the [five] real estate [projects] . . ."(the "December Amendment" and together with the May Agreement, "Agreements") (Doc. No. 102). The December Amendment also provides that "[i]n addition, the fee sharing applies to . . . promote fees which relate to return of capital or a refinance or at the sale of the properties" (*id.*). As in the May Agreement, the December Amendment does not address the allocation of fees between Bryskin and Lukashok.

Also in December, Lukashok loaned Mann $260,000 secured by a promissory note signed by Mann in his personal capacity (the "Note") (Doc. No. 112). On December 26, 2012, defendants acquired the QJMS Properties through QJMS, LLC. Lukashok served as counsel to the LLC (Lukashok Aff'd ¶ 11 and Mann SUMF, ¶ 101). Bryskin performed analyses of the potential investment and provided it to the investors (*id.*, ¶ 56). Mann used $2.3 million from Bryskin's investors to acquire the QJMS Properties. Mann repaid the Note on or about December 28, 2012.

Between June 2013 and May 2015, Mann acquired properties at 199 Cook Street, Brooklyn [(the Cook Property]), 215 Knickerbocker Avenue, Brooklyn (the Knickerbocker Property) 1045 Uniont Street, Brooklyn (Union Street Property) and 196 Hancock St, Brooklyn (the Hancock Property) Bryskin Affd. ¶ ¶ 37, 44, 50 and 56. For most of these acquisitions Bryskin performed an analysis of the investment for his investors (Mann SUMF ¶¶ 60-67 *see also* Bryskin Affd. ¶ ¶ 32, 38, 46).

At some unspecified time in 2014, Mann started raising concerns that the payment contemplated by the May Agreement was unfair and indicated a desire to come to a new agreement. On May 20, 2014, he asked Bryskin to send him "all the agreements we entered

together" (*id.*, ¶ 68). Bryskin produced the May Agreement. On May 22, 2014, Mann sent the May Agreement to his brother-in-law, attorney Marc Elefant, asking him to review it (*id.*, ¶ 70). On June 10, 2014, Mann paid defendants over $48,000, representing 20% of the promote fee he received in connection with sale of the Hancock Property (*id.*, ¶ 71). At that time, Mann did not express any reservations about making the payment (*id.*, ¶ 73). Nevertheless, he continued to take investments through Bryskin's investors, including acquisition of a property in May 2015 (Bryskin Affd ¶ 56). Over the course of 2015-2016, defendants received various fees in connection with the Knickerbocker Property but did not pay plaintiffs pursuant to the May Agreement (*id.* ¶¶ 80-82, 85-86).

In their answer, defendants generally deny the complaint and assert that the Agreements are voidable because, as defendants' lawyers, plaintiffs were barred from entering into the Agreements without first advising Mann in writing of the advisability of seeking independent legal counsel and obtaining his written consent as is required under Rule 1.8 (Answer with Counterclaim, Doc. No. 22). Plaintiffs did neither. Defendants also counterclaim seeking a declaration that the Agreements are void and that defendants are entitled to no compensation under either agreement (Counterclaim ¶ 20, Doc. No. 22).

III. Arguments

A. Plaintiffs' Arguments in Support of Partial Summary Judgment

Plaintiffs move for partial summary judgment on the first cause of action, for a declaration that plaintiffs have satisfied their obligations pursuant to the Agreements and are entitled to be paid, and on the fifth cause of action, for breach of contract, based on defendants' failure to pay fees owed. Plaintiffs also seek to dismiss the counterclaim as well as the third (Rule 1.8), sixth (duress), and seventh (unclean hands) affirmative defenses.

Plaintiffs argue Mann has admitted that neither Bryskin nor Lukashok represented the defendants at the time the parties entered into the Agreements. Thus, the defense that the Agreements are voidable should be rejected. The Agreements should be interpreted according to their plain meaning and Mann's claim that he did not read the agreements is not a defense (Memo at 15). Mann admits that Lukashok has not served as his personal attorney since 2005 (*id.* at 15-16, citing SUMF ¶ 9; *see also* Mann Deposition Transcript at p. 60:4-9, Doc. No. 115 [Mann Tr]).

Even if Lukashok was Mann's attorney, the Agreements are not voidable (Memo at 16-17, citing *Greene v Greene*, 56 NY2d 86, 92 [1982] ["An attorney is not prohibited from entering into a contract with a client. He must do so, of course, with respect to his retainer for legal services. And, although it is not advisable, an attorney may also contract with a client with respect to matters not involving legal services, or in addition to legal services. Thus a contract between an attorney and his client is not voidable at the will of the client"] [internal citations omitted]). Such a contract may be voidable if the attorney "got the better of the bargain, unless he 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" (*id.*). Plaintiffs argue that all of the terms of the Agreements were disclosed to the defendants, that the defendants negotiated the terms which were important to them, and that the defendants admitted to having received the better of the bargain (Memo at 17-18, citing SUMF, ¶ 75, citing Mann Tr. at 257-58, Doc. No. 116 [acknowledging Mann was able to do more and bigger deals with plaintiff's participation than previously, and that plaintiffs have not received anything pursuant to the Agreements, except for $48,000]). Looking at the Agreements, plaintiffs did not get the better of the bargain. They only got paid if the Mann was paid a promote fee. The parties shared the risk, similar to a contingency fee arrangement. Further, defendants could have avoided paying plaintiffs entirely, simply by obtaining financing elsewhere (Memo at 19).

Allowing defendants to void the Agreements would be inequitable. It is undisputed Bryskin introduced investors to defendants, fulfilling plaintiffs' obligation. Defendants should not be allowed to avoid paying (*id.* at 19-20). Plaintiffs compare this case to *Charlebois v J.M. Weller Associates, Inc.* (72 NY2d 587, 589 [1988]). In *Charlebois*, the plaintiff sought to void a construction contract because the defendant building contractor was not a licensed engineer. That court held that the contract, which required work to be done by a licensed engineer, could not be voided, as the engineer who actually did the work was properly licensed. The unlicensed defendant in that case did not attempt to contract to perform work requiring a license. The court noted, hypothetically, that, even if there had been a violation of the statutory licensing requirement, the work was completed by the proper, licensed, person, and that "forfeitures by operation of law are strongly disfavored as a matter of public policy and the Charleboises' efforts to use that concept as a sword for personal gain rather than a shield for the public good should not be countenanced" (*id.* at 595). The focus should be on the substance, rather than the form (*id.*).

Further, defendants ratified the Agreements by accepting the performance of the plaintiffs (Memo at 21). Defendants received over $15 million in equity investments and over $20 million in debt financing made by investors introduced by Bryskin. Defendants paid plaintiffs approximately $48,000 pursuant to the May Agreement. Mann never claimed the May Agreement was unfair until 2014. Even then, he continued to accept more money from Bryskin's investors into 2015 (Memo at 22). Defendants' entry into the December Amendment also served to ratify the terms of the May Agreement (*id.* at 23).

A violation of Rule 1.8, if such a violation existed, does not create a cause of action, without more (Memo at 24, citing *Kallman v Krupnick*, 67 AD3d 1093, 1096 [3d Dept 2009] ["violation of a disciplinary rule does not, without more, generate a cause of action"]). A violation of that rule, does not, alone, make the agreements voidable.

B. Defendants' Arguments in Opposition

Defendants contend Lukashok was Mann's personal attorney, (Opp. at 1, Doc. No. 119). Defendants offer evidence that Lukashok served as Mann's personal attorney and/or as the lawyer for entities owned by Mann at various points in time (Lukashok Tr., at 22-23, Doc. No. 148). The evidence includes a memorandum Lukashok wrote to Mann, giving Lukashok's opinion that the May Agreement was fair (Mann SUMF ¶ 137) and bills for legal services to Mann's entities which Lukashok sent to Mann (*see* Docs. No. 122-28).

Defendants also argue Bryskin represented Mann, in coordination with Lukashok (Opp at 6). The Closing Summary for the sale of the Hancock Property shows Eric Mann as one of the sellers, and Lukashok and Bryskin as attorneys for the sellers (Doc. No. 132).[3]

Defendants maintain that even if plaintiffs only represented the companies, Rule 1.8 still applies (*id.* at 1-2, 18-19). Mann was the principal of those entities and plaintiffs' representation of the entities created a fiduciary relationship with Mann (*id.* at 18, citing no law). Plaintiffs do not claim to have complied with the requirements of Rule 1.8. Defendants argue that "[o]nce the plaintiff has provided evidence to establish an attorney-client relationship at the time contract was entered into, the execution of the contract and evidence from which it might be inferred that the

[3] Bryskin notes correctly that "196 Hancock Street Associates" was the "seller" and that Mann was not the "client". He also states that he attended the closing on behalf of the investors only (Bryskin Affd. ¶ ¶ 6-7, Doc. No. 57).

client acted without independent advice, the burden is on the defendant to establish that the contract was fair and well understood by [the] client" (*id.* at 15, quoting *McMahon v Eke-Nweke*, 503 F Supp 2d 598, 604 [EDNY 2007] [discussing a breach of fiduciary duty claim]). The relationship contemplated by the Agreements also created conflicts between Bryskin and his client/investors.

Plaintiffs' argument that the Agreements are fair because defendants got the better of the deal also fails. The question should not be whether defendants have the better part of the bargain now, but whether they would if the Agreements were enforced. These Agreements are unfair because plaintiffs did not have risk and their compensation vastly exceeded the industry standard (Opp. at 2). Bryskin drafted the May Agreement and Lukashok told Mann it was fair (*id.* at 8). Mann had never taken investments from non-family members or entered into such an agreement previously and he relied on plaintiffs' counsel (*id*). The May Agreement provided plaintiffs with compensation on all future deals in which their investors participated (*id.*). The 2012 December Amendment was demanded by plaintiffs when the prospect of the QJMS transaction arose even though the investors had already been introduced (*id.* at 9).

Mann did not ratify the Agreements (*id.* at 23). In early to mid-2014, Mann realized the Agreements were unfair and inconsistent with industry norms, which would have provided for a fee of 2-3% of the equity placed, rather than 20-37.5% of the promote fees, especially given that Mann shouldered all of the risk (Opp at 10). Until this litigation began, Mann thought the parties could renegotiate the Agreements and come to a more equitable arrangement. Unlike *Charlebois*, which involved only a technical violation of the statutory requirement, here, the plaintiffs flouted ethical rules and abused the attorney/client relationship, warranting invalidation of the Agreements. (*id.* at 24). This was no technical violation. That Rule 1.8 does not give an independent cause of action is irrelevant. Here, that rule provides a ground for not enforcing unfair agreements (*id.*).

C. Plaintiffs' Reply

Plaintiffs argue the court should ignore Mann's self-serving affidavit as far as it contradicts his deposition testimony (Reply at 4-9, Doc. No. 152). Further, the unilateral belief of the client is not dispositive. Many of the facts put forth by Mann are irrelevant, such as Bryskin's relationship with his investors clients, Mann's personal history with Lukashok, and the work Mann did on the QJMS Properties (*id.* at 10). As far as there are questions about the enforceability of

the May Agreement, Mann ratified it by continuing to work under its terms and accept the benefits, even after the time he claimed the terms to be unfair. Further, he never made a proposal to plaintiffs for new terms (*id.* at 14).

IV. DISCUSSION

A. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra*; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

B. Breach of Contract

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

C. Enforceability of the Contract

It is undisputed that Mann, Lukashok and Bryskin are the parties to the May Agreement and December Amendment and that each signed in his individual capacity (Docs. No. 64 and 102). Plaintiffs performed. Specifically, prior to May 23, 2012, Lukashok "facilitated" the introduction of Bryskin to Mann and, once the May Agreement was signed, Bryskin produced investors for the two real estate projects directed by Mann listed therein. The investors put millions into projects but Mann failed to pay Bryskin. Plaintiffs have been damaged as a result of Mann's breach (Mann Tr., pp. 18-22, Doc. No. 115). Thus, plaintiffs have established all of the elements of a cause of action for breach of contract.

Defendants seek to avoid liability by claiming the Agreements are unenforceable because Bryskin and Lukashok were Mann's personal lawyers and that by inducing Mann to sign the Agreements, plaintiffs violated Rule 1.8 of the New York Code of Professional Conduct ("Rule 1.8"), thereby excusing Mann's performance under the Agreements. Rule 1.8 applies only if the lawyer is engaged in the provision of legal services to the client at the time the business agreement is formed. Because plaintiffs have shown that there are no triable issues of fact establishing that Bryskin ever undertook to provide legal services to Mann or to any of his entities, Rule 1.8 does not apply and the defense fails as to him. Regarding Lukashok, there are material issues of fact that preclude rejection of this defense as to him.

Although Mann makes bald self-serving assertions to the contrary, Bryskin did not represent Mann or any of the entities he controlled when the parties signed the May Agreement or at anytime thereafter (Bryskin Affd, ¶ 4). He did not split fees with Lukashok (*id.* and Lukashok Affd. ¶ 7). In May 2012, Mann and Bryskin had only recently been introduced by Lukashok. The May Agreement was negotiated by Mann and Bryskin at arms length (Mann Tr. 134:7-135:8, Doc. No. 116). The May Agreement shows unambiguously that its purpose was to coordinate "equity investment in real estate projects directed by . . . Mann" (Doc. No. 64). Bryskin's role is stated clearly as "seek[ing] out investment capital through investors on [two specific] projects." Lukashok had already served a minor role specified for him as having "facilitated the introduction of the parties" (*i.e.* Mann and Bryskin) *(id.)*.[4] There is no evidence that Mann ever asked Bryskin to represent him or that Bryskin ever offered to do so. Mann did not sign an engagement agreement with Bryskin (Mann Rule SUMF, ¶ 12). Mann never made a retainer deposit, received an invoice for professional services or paid Bryskin attorney fees (*id.* ¶ 13) and Lukashok and Bryskin did not split fees (Lukashok Affd. ¶ 7 and Bryskin Affd. ¶ 4).[5] Instead, after signing the May Agreement, Mann got access to investors on a scale he did not have previously (Mann SUMF, ¶ 133). At his deposition, Mann admitted that he was able to add seven deals to his resume that were of a magnitude greater than any deals he had done previously (Mann Tr., pp. 257-258, 49-50).[6]

Following his success relating to the May Agreement (involving two properties), Mann signed the December Amendment acknowledging Bryskin's role in getting his clients to invest in five additional properties, referred to as the "QJMS Property" (*id.*, ¶¶ 50-58). This was, by far, the largest project Mann had undertaken to that point. It was more than six times larger than the

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[4] At his deposition Mann admitted that he was introduced to Bryskin by Lukashok (Doc. No. 115, p. 14:16-18) and that only Bryskin was able to introduce investors (*id.*, lines 10-15).

[5] According to Mann, his attorney client relationship with Bryskin "began when Mr. Lukashok said to [Mann] that Mr. Bryskin would be backing him up on legal work [Lukashok] performed for [Mann]" (Mann Affd ¶ 19, Doc. No. 121).

[6] In an affidavit, Mann states that Bryskin represented him in real estate transactions over a five year period (Mann Affd. ¶ 4, Doc. No. 81, Tr. 60:22-61:1). He testified that the parties came to a meeting of the minds regarding representation "through Lukashok" (Mann Tr. 61:17-20 *see also* Mann Affd. ¶ 19 [Doc. No. 121]) and that he and Bryskin "spoke about" Bryskin representing Mann in real estate transactions involving the investors (Mann Tr. 60:22) (*id.* 63:3). Mann acknowledged that he never signed a retainer agreement with Bryskin and that all of the deals where Bryskin is alleged to have represented Mann involved the investors ((*id.*, 65:6-12 and 65:21-66:5). Notably, by 2012 Mann was doing all of his deals through LLCs,. Further, in all of the deals involving the investors (*id.*, 65:13-66:13). The court notes that in largest deal reflected in the record, Bryskin represented the investors, not the Mann entity QJMS Operating Agreement, p. 27, Doc. No. 103). Defendants have not shown that either of them had established an attorney-client relationship with Bryskin at anytime.

prior deals (*id.*, ¶ 50). Mann's partnership with Bryskin and Lukashok and his acceptance of the fruits of Bryskin's efforts continued for years, after December 2012 (Bryskin Affd, ¶ ¶ 37, 44, 49, 56).

Regarding Lukashok, there is ample evidence that he was Mann's lawyer prior to 2005 and transitioned into an attorney-client relationship with the Mann entities thereafter, including during the period at issue (Mann Tr., p. 90, Doc. No. 115, and Lukashok Tr. 20:21-21:6, 22:6-23, Doc. No. 148). Although Mann claims Lukashok also represented him personally, he conceded that in any deal since 2005, to the extent Lukashok represented anybody, he represented a limited liability company (Mann Tr., p. 60, Doc. No. 115). As discussed above, by 2012 Mann conducted his real estate business using the LLC vehicle. The sole exception was representation relating to a closing on his home in 2007.

Mann claims, but cites no law in support, that even if Lukashok represented Mann's businesses, Rule 1.8 applies because Mann was the managing member and sole principal of those entities (Opp., p. 18). Mann submits an affidavit in which he asserts that Lukashok represented both the LLCs and Mann in his personal capacity (Doc. No. 121, ¶ 4 and Mann SUMF ¶ 98). However, as demonstrated by plaintiffs, "there is a significant difference between representation of an entity versus its members where the members have divergent interests. (*See Finkelman v Greenbaum*, 14 Misc 3d 1217 [A], 836 NYS 2d 484 [Sup Ct Nassau Cty 2007] . . ., *see also Campbell v McKeon*, 75 AD 3d 479, 481 [1st Dept 2010] [A lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent the individual.])".

In support of his claim that Lukashok represented him personally, Mann sites several invoices for legal services addressed to him at his office (Mann Affd ¶ ¶ 6 and 7). The invoices all reference work performed in connection with various limited liability companies (*see* Docs No. 122-28). Lukashok confirms that he "only represented the entities that Mann used to acquire real estate" (Lukashok Affd. ¶ 7).

As this is a motion for partial summary judgment, the court shall scrutinize the record in a light most favorable to defendants and give defendants the benefit of every favorable inference (*see Rotuba Extruders*, 46 NY 2d at 231). Applying this standard, the court finds that there is a material issue of fact as to whether Lukashok was providing legal services to Mann in his personal

capacity at the time he passed along, with recommendation, the draft May Agreement. Specifically, the triable issue concerns his role in negotiation of the May Agreement (*see* Doc. No. 141, pp 91-92). Further, it appears that, at that time, Mann was the 100% owner of his entities. This suggests that the interests of Mann and his entities were aligned at that time. Lukashok admits that he represented Mann's entities throughout the time period at issue. Also, there are issues of fact as to the significance of the statement at section 15.1 of the QJMS LLC Operating Agreement that "Edward Lukashok . . . has represented [Mann]"[7].

However, these facts are of no moment on this motion. Under the terms of the May Agreement, neither Mann nor Lukashok owes the other anything. Only Bryskin is obligated to provide services to Mann and Mann's obligation for payment runs to Bryskin only. Any sums Lukashok may receive are to be paid out of money earned by Bryskin (Doc. No. 64). The May Agreement is silent as to how Bryskin and Lukashok will share the sums earned by Bryskin. The December Amendment does not alter this structure. Thus, assuming that Rule 1.8 applies to Lukashok and that the Agreements are voidable as to him, Mann's obligation to Bryskin remains and the Agreements are enforceable.

Rule 1.8 of the Rules of Professional Conduct provides:

> (a) A lawyer 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:
> (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

It is undisputed that 2 and 3 did not occur. "Once the plaintiff has provided evidence to establish an attorney-client relationship at the time contract was entered into, the execution of the contract and evidence from which it might be inferred that the client acted without independent advice, the

[7] The Operating Agreement confirms that Bryskin represented the investors, not Mann (Doc. No. 130, p. 29).

burden is on the defendant to establish that the contract was fair and well understood by client" (*McMahon v Eke-Nweke*, 503 F Supp 2d 598, 604 [EDNY 2007], citing *In re Howell*, 215 NY 466 [1915]). The terms of the transaction were "fully disclosed and transmitted in writing in a manner that [could] be reasonably understood by the client." Mann could have, and did, comprehend the terms of the Agreements and knew what would be owed to Bryskin under what circumstances. The question remaining is whether the transaction was fair and reasonable. That is a question of fact. However, the question need not be answered because, as discussed above, Rule 1.8 does not apply to Bryskin, the only person to whom Mann owes obligations under the terms of the Agreements.

Nevertheless, in the interest of completeness, the court will consider Mann's claim regarding the fairness of the percentage of the promote fees owed to Bryskin under the terms of the Agreements. Mann asserts (but offers no admissible evidence in support) that a normal contract would have been for a 2 or 3 percent share, and the Agreements called for 20-37 percent. He compares apples to oranges. The 2 and 3 percent refer to percentages of the investment. Plaintiffs provided Mann access to over $35 million in equity investments and debt financings (2-3% would be about $711,000 to $1,058,000). The Agreements provided for a share of profit. Mann received over $4 million (so the amount due plaintiffs would be somewhere between $800,000 and $1,500,000). Although plaintiffs stand to make more money using the formula agreed to by the parties, plaintiffs also took risk along with Mann. If Mann made less they would make less (Mann Tr., pp. 38-39, Doc. No. 115) and they would make nothing if they failed to produce investors. The Agreements are neither unfair nor unreasonable.

In any event, partial summary judgment must be granted to both plaintiffs because the undisputed evidence establishes that Mann ratified the contracts when, being fully aware of the terms and failure to obtain written consent, he continued to operate under the terms of the Agreements and to reap the substantial rewards that flowed from new investments procured by Bryskin (Mann Tr., p. 82:17-21, Doc. No. 115). "Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it" (*Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013] citing *Dinhofer v Medical Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]; *Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 493-494 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]).

While Mann states he wanted to renegotiate the Agreements, he did not repudiate them, even after he concluded they were unfair. Nothing other than a desire to continue to access capital with the assistance of plaintiff's investors and thereby grow the business, prevented Mann from terminating the Agreements. Having enjoyed the benefits, defendants will not be heard to complain that they were deprived of the opportunity to get independent counsel or give consent. Rule 1.8 being the sole reason for Mann's refusal to honor his end of the bargain, the motion for partial summary judgment shall be granted.

The court has considered defendants' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that, the motion of plaintiffs for partial summary judgment, is GRANTED; and it is further

ORDERED that as to the first cause of action for a declaratory judgment it is hereby declared that plaintiffs have satisfied all of their contractual obligations pursuant to the Agreements and are entitled to payment due and owing thereunder; and it is further

ORDERED that the motion is GRANTED as to the fifth cause of action for breach of contract against defendant Eric Mann and in favor of plaintiffs Matthew Bryskin and Edward Lukashok; and it further

ORDERED that the counterclaim and the third, sixth and seventh affirmative defenses of defendants are hereby DISMISSED; and it is further

ORDERED that the portion of plaintiff's action which seeks damages is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiffs shall, within 15 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.

DATED: August 24, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.