Weisenfeld v Iskander
2019 NY Slip Op 31191(U)
April 16, 2019
Supreme Court, New York County
Docket Number: 651436/2016
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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TINA S. WEISENFELD,

Plaintiff,

-against-

SAMEH S. ISKANDER, MICHAEL F. BISHAY, INTERVEST DEVELOPMENT CORP., 610 REALTY, LLC and JOHN DOES 1-25,

Defendants,

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TINA S. WEISENFELD and DAVID J. WEISENFELD, derivatively on behalf of 165 ISKAY ASSOCIATES, L.P.,

Plaintiffs,

-against-

SAMEH S. ISKANDER, MICHAEL F. BISHAY, INTERVEST DEVELOPMENT CORP., and 610 REALTY, LLC,

Defendants,

-and-

165 ISKAY ASSOCIATES, L.P.,

Nominal Defendant.

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DECISION AND ORDER
Index No.: 651436/2016

Mot. Seq. No.: 003

Index No.: 652184/2018

Mot. Seq. Nos.: 002-003

O. PETER SHERWOOD, J.:

In *Tina S. Weisenfeld v Iskander, et. al* (Index No. 651436/2016) (the "2016 Action"),[1] defendants Sameh S. Iskander ("Iskander"), Michael F. Bishay ("Bishay"), Intervest Development Corp. ("Intervest"), and 610 Realty, LLC ("610 Realty") (collectively, "Defendants") move pursuant to CPLR 3212 for summary judgment dismissing the verified second amended complaint

1 Citations to the record in the "BACKGROUND" and "2016 Action" sections of this Decision and Order refer to documents filed electronically in the 2016 Action. Cites to documents in the "2018 Derivative Action" section refer to documents located at Index No. 652184/2018.

("Complaint") (motion sequence number 003) (Doc. No. 106). In *Tina S. Weisenfeld and David J. Weisenfeld v Iskander, et. al* (Index No. 652184/2018) (the "2018 Derivative Action"), the same four defendants move pursuant to CPLR 3211 (a)(7) to dismiss the second, third, fourth and fifth causes of action of the verified amended complaint, and to strike the demand for punitive damages (motion sequence number 002). Plaintiffs Tina S. Weisenfeld ("Weisenfeld") and David J. Weisenfeld ("D. Weisenfeld" and together with Tina, "Plaintiffs") oppose and move for partial summary judgment as to liability (motion sequence number 003) (Doc. No. 40). Defendants cross-move for a stay or to adjourn the Plaintiffs' motion for partial summary judgment (Doc. No. 44).

On the motions for summary judgment and partial summary judgment, the facts are taken from the parties' Rule 19-a statements unless noted. Plaintiff's statement is referred to as "PSOF ¶ ___" (e-filed at Doc. No. 166). Defendants' response is referred to as "DSOF ¶ ___" (e-filed at Doc. No. 132).

In the 2016 Action, Weisenfeld claims that during the course of a dinner meeting, her father, Kenneth Stark ("Stark"), an attorney (now deceased), entered into an agreement with defendants Iskander and Bishay, his clients, whereby Stark was promised the right to receive 20% of all income, profits, and gains earned by the general partner of a real estate partnership that he was going to create for his client, defendant Iskay Limited Partnership (Iskay). The promise is evidenced by the phrase "20% of GP inc to me," on handwritten notes the three initialed.

In the 2018 Derivative Action, Plaintiffs challenge the right of Defendants to be indemnified for legal costs they incurred in defending the 2016 Action as the General Partner and the principals of the General Partner under the terms of the Iskay Limited Partnership Agreement.

BACKGROUND

I. The Facts

Stark was the real estate attorney for Iskay and defendants Intervest and 610 Realty, and the personal attorney for individual defendants Iskander and Bishay for over 15 years until Stark's death (DSOF ¶¶ 1, 29; PSOF ¶¶ 1, 29). Stark died in 1996 (DSOF, ¶ 2). Individual defendants Iskander and Bishay are the officers and directors of Intervest, the former General Partner of Iskay, a limited partnership, and are business partners and real estate developers

(Derivative Action complaint, ¶¶ 5-6, 11, 18). 610 Realty is a limited liability company and the present General Partner of Iskay (*id.*, ¶ 8).

During an informal dinner meeting on March 22, 1994, with Iskander and Bishay, Stark drafted handwritten notes on one page (the "Notes") (DSOF, ¶ 11; PSOF ¶ 11). The Notes have two sections. The upper section outlined partnership financial and other business terms (the proposed payment waterfall) relating to a real estate limited partnership known as Iskay, which Stark was going to establish in connection with two buildings in Manhattan that Iskander and Bishay intended to purchase (DSOF ¶ 13; PSOF ¶ 13; *see* Doc. No. 114). The lower section, appearing below a line drawn in the middle of the page, had the subject heading "Mngmt" (management), and consisted of three separately numbered items: (1) "6 % of rents collected – 1/6 to me," refers to rental income the as yet unidentified general partner would be receiving for managing and operating the buildings (DSOF ¶ 15; PSOF ¶ 15); (2) "10% of construction . . . [not exceeding] $10,000 . . .," refers to additional monies sought by Stark that he would bill the partnership, in the guise of legal fees, in the event there was other than "CPC" (Community Preservation Corp.) construction activity undertaken and supervised by the partnership management (DSOF ¶ 16; PSOF ¶ 16); and (3) "20% of GP inc to me" (DSOF ¶ 17; PSOF ¶ 17). There is no definition for the term "inc" or "20% of GP inc" in the Notes (DSOF ¶ 18; PSOF ¶ 18). Stark, Iskander, and Bishay initialed the Notes dated 3/22/94 (DSOF ¶ 19; PSOF ¶ 19). The Notes do not refer to any consideration or other promise by Stark for the benefit of Iskander, Bishay, or the "GP." They also do not include the words "agree" or "agreement", and there is no proof that the original copy of the Notes were ever delivered to Iskander or Bishay (DSOF ¶¶ 19-21; PSOF ¶¶ 19-21).

Weisenfeld claims, based on conversations that she says she had with her father, that the consideration provided by Stark consisted of his agreement to help find investors to provide the equity necessary to buy the properties (PSOF ¶¶ 21-22). There is no written documentation of such a promise (DSOF ¶ 54; PSOF ¶ 54). Weisenfeld also asserts that the words "20% of GP inc to me" means that she is entitled to 20% of the taxable income realized by the General Partner, over all the years involved (PSOF ¶¶ 21-22). She is unaware of any explanation having been

given by Stark to Iskander and Bishay regarding the meaning of "GP inc," "inc" or "income" (DSOF ¶ 27; deposition of Tina Weisenfeld, dated Oct 23, 2017 [Weisenfeld tr] at 360-361 Doc. No. 117).

The limited partnership agreement for Iskay, which was drafted by Stark and dated June 7, 1994, provides that Intervest was the General Partner with various management duties. It refers to various "distributions" to be made to the partners, including a list of priorities in payment in the event there is a net cash proceeds from a refinancing or sale of all or part of the properties (Limited Partnership Agreement § 3, Doc. No. 112). The agreement was executed by Intervest and the 21 limited partners, including Stark and Weisenfeld, as well as plaintiff's sister Betsy Stark (who has since assigned over her rights thereunder to plaintiff). Of the 21 limited partners in Iskay, only Weisenfeld, her sister Betsy, and Edward Leshaw had not previously invested in Iskander/Bishay projects (DSOF ¶ 64; PSOF ¶ 64). The Limited Partnership Agreement makes no reference to any agreement entered into in March 1994, and does not acknowledge or reference the Notes (DSOF ¶ 23). It also does not include any definition of the term "income" or "GP inc" (*id.*). The Limited Partnership Agreement made no mention of any consideration being paid, or to be paid, to Stark for his allegedly having found equity investors for the partnership (DSOF ¶ 55; PSOF ¶ 55; *see also* Weisenfeld tr at 82).

The Limited Partnership Agreement set forth the rights and obligations of Intervest, and permits it to be compensated by Iskay and receive "fee income" for various management services, both foreseen and unforeseen, that the General Partner might provide (Limited Partnership Agreement §§ 4.1 and 4.2, Doc. No. 112). Section 4.8 of the Limited Partnership Agreement provided that the General Partner would not be liable to the partnership or the partners for good faith acts, and that it shall be indemnified and held harmless by the partnership "from and against any and all claims, demands, actions, suits or proceedings, civil, criminal, administrative or investigative" in which the General Partner is involved by reason of its management of the partnership affairs, "whether or not they continue to be such at the time any liability or expense is paid or incurred" (*id.* § 4.8 at 14).

An Operating Agreement for 610 Realty, dated as of June 8, 1995, also drafted by Stark and his law firm, similarly contained no definition for the term "income" (DFOS, ¶ 24; PSOF ¶ 24).

In December 1994, Stark make a written assignment, to plaintiff Weisenfeld, of Stark's alleged right to receive "20% of all General Partner income, paid or accrued, on account of, or from, [Iskay]" (DFOS ¶ 3; PSOF ¶ 3; *see* 2016 second amended complaint Doc. No. 110). Stark faxed it to Iskander and Bishay and asked them to sign in the space for their signatures next to the word "consent" (DFOS ¶ 41; PSOF ¶ 41). Iskander states, in his affidavit, that he did not recall any explanation by Stark regarding this document, just that he and Bishay should sign it and send it back to him (affidavit of Sameh S. Iskander, dated July 31, 2018, ¶ 47). Iskander and Bishay signed it on behalf of Intervest (Assignment, Doc. No. 122).

In December 2015, Defendants executed a contract to sell a portfolio of properties, including the Iskay properties (affidavit of Tina Weisenfeld, ¶ 34 Doc. No. 145). On May 9, 2016, the sale closed and Iskay distributed a total of $26,302,822.20 to Iskay's partners, including plaintiff. Over $13 million was distributed to 610 Realty, as Iskay's General Partner (*id.*, ¶ 35).

II. Pleadings in the Two Actions

Weisenfeld commenced the 2016 Action asserting four causes of action: breach of contract based on the Notes; breach of the duty of good faith, which has been dismissed; promissory estoppel; and unjust enrichment (second amended complaint, Doc. No. 110). Defendants filed an answer denying all material allegations, and asserting various affirmative defenses, including, lack of consideration, indefiniteness, ambiguity, and Stark's alleged unethical acts and omissions (Doc. No. 111). Discovery has been completed (Doc. No. 104).

On July 10, 2018, Weisenfeld and her husband David Weisenfeld commenced the 2018 Derivative Action, as limited partners on behalf of Iskay, to recover damages arising out of Defendants' allegedly improper use of Iskay's funds to pay the attorneys' fees and costs that they personally incurred in defense of the 2016 Action. Plaintiffs assert the 2018 action does not involve claims that implicate Iskay. The 2018 complaint alleges five causes of action: (1) declaratory judgment that section 4.8 of the Limited Partnership Agreement does not authorize the use of Iskay's funds to pay Defendants' defense costs in the 2016 Action; (2) breach of fiduciary duty based on the same use of Iskay's funds for defense costs; (3) misappropriation of Iskay's funds

to pay fees and costs; (4) conversion based on the same use of Iskay's funds; and (5) unjust enrichment for the same use of Iskay's funds (exhibit J to affirmation of Scott T. Tross in opposition [Tross opp]).

2016 ACTION

I. Defendants' Arguments

Defendants move for summary judgment in the 2016 Action seeking dismissal of all claims. They argue that the Notes do not constitute a contract as they fail to refer to any consideration given by Stark, a necessary element of an enforceable agreement (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Weisenfeld's claim that Stark orally agreed to find investors is not supported by any admissible evidence. Virtually all of the investors in the project had invested previously in Iskander/Bishay projects. Only one relatively significant investor ($100,000), Edward LeShaw, had not invested previously in Iskander/Bishay projects. Plaintiff and her sister Betsy were new investors but contributed only $25,000 each (DFOS ¶¶ 64-66). Defendants maintain that without the required consideration, the contract is void *ab initio* (*see Flemington Natl. Bank & Trust Co. v Domler Leasing Corp.*, 65 AD2d 29, 36-37 [1st Dept 1978], *affd* 48 NY2d 678 [1979]).

Defendants further argue that there was no meeting of the minds as to the material terms of the Notes. They point to Weisenfeld's deposition testimony in which she stated she was unaware of Stark having explained to Iskander and Bishay the meaning of the words "GP inc," or whether he told them that the words were intended to give him a 20% interest in the distribution to be made to the General Partner upon a sale of the partnership assets. They contend the Notes are fatally indefinite, as they fail to define "GP inc," and there is no definition provided in the Limited Partnership Agreement or in the Operating Agreement. Weisenfeld stated at her deposition that the word had various meanings (Weisenfeld tr at 119, 121, 128, 157, 158, 163-164, 300, Doc. No. 117). Her own expert, however, testified that it meant "net income" (deposition of Kenneth Weissenberg ["Weissenberg tr"] at 24-25). The Notes also fail to identify the specific party to be bound. While the Notes were initialed by Stark, Iskander and Bishay, there is no language that they agreed, and no proof of an intent to agree. Further, if the court finds the Notes ambiguous, such ambiguity must be construed against Stark as the drafter, as he was the attorney

for the Defendants, and failed to advise them of his conflict in interest and to seek independent counsel (*see* DR 5-104 [A]; *Greene v Greene*, 56 NY2d 86, 92 [1982]; *Forest Park Assoc. Ltd. Partnership v Kraus*, 175 AD2d 60, 62 [1st Dept 1991]). Moreover, the context of the Notes, that is, that the phrase appears under the heading "Mngmt" (for management fees), implies that the type of income referred to by "GP inc" is management-related income. They urge that a general partner's carried interest (its right to distributions upon sale or other capital event) is different than the various forms of management fee income a general partner might receive, and that Weisenfeld's use of the word "income" to mean such carried interest flies in the face of customary usage and accepted practice (*see* report of Jeffrey Moerdler [defendants' expert] at 6, Doc. No. 127).

Defendants seek dismissal of the promissory estoppel claim because the promise of "GP inc" is too ambiguous to be enforced (*see Benham v eCommission Solutions, LLC*, 118 AD3d 605, 607 [1st Dept 2014]), and the assignment from Weisenfeld's father in December 1994 did not assign such claims to her (*see Dexia SA/NV v Morgan Stanley*, 41 Misc 3d 1214 [A], 2013 NY Slip Op 51696 [U] [Sup Ct, NY County 2013] [tort claims do not automatically pass to an assignee], *affd* 135 AD3d 497, 497 [1st Dept 2016] [assignment must contain some language that shows intent to transfer tort rights]). Morever, both the promissory estoppel and unjust enrichment claims are barred by Weisenfeld's assertion of an express contract (*Parker Realty Group, Inc. v Petigny*, 14 NY3d 864, 865-866 [2010]).

II. Plaintiff's Opposition

Weisenfeld contends that there are fact questions about whether there was no meeting of the minds. She argues that initialing the Notes clearly establishes Defendants' intent to be bound, and Defendants performed by making payments to her of the 1/6 of 6% of rents collected (management) payment. She claims this was a personal obligation of Iskander and Bishay, not of the General Partner or partnership. She also argues that Defendants' signatures on the assignment from her father of the "GP inc" payment confirmed the existence of the enforceable obligation, and the meaning ascribed to that promise by Stark. She submits a fax she sent to Bishay on June 11, 1998, in which she stated that she and her sister share the right to "20% of all General Partner income" (Weisenfeld aff, exhibit F, Doc. No. 151). She further asserts

Iskander verbally assured her they would make the payment when the General Partner received taxable income (Weisenfeld aff, ¶¶ 23, 25, Doc. No. 145).

Weisenfeld argues "GP income" is sufficiently definite, and she accepts Iskander's prior statement that it means taxable income. She asserts "GP income" is not ambiguous, and the extrinsic evidence of the December 1994 assignment shows that it means general partner "income, paid or accrued, or account of, or from, [Iskay]." Weisenfeld also urges the contract should not be construed against her, because there is no ambiguity, and the parties fully negotiated its terms (*see Westfield Family Physicians, P.C. v HealthNow N.Y., Inc.*, 59 AD3d 1014, 1016 [4th Dept 2009]).

As to consideration, she urges it is an issue of fact, and submits her testimony that her father told her the Defendants did not have the equity to purchase the properties, and he agreed to find them investors to provide equity in exchange for the management payment and the GP income payment. She further argues Defendants should be barred from asserting lack of consideration at this late date, as they waived that argument. She contends issues of fact are raised as to Stark's alleged breaches of his duties as Defendants' attorney. Specifically, Defendants are sophisticated investors who could not reasonably have understood Stark was representing them in connection with the contract created by the Notes. Plaintiff argues she is not estopped from enforcing the contract based on section 7.1 of the Limited Partnership Agreement, which prohibits the General Partner from assigning all or any portion of its interest in Iskay unless it obtains the prior written consent of at least 51% of the partners. She asserts that the Notes, themselves obligated Iskander and Bishay to pay Stark. So section 7.1 is irrelevant.

With respect to the promissory estoppel and unjust enrichment claims, Weisenfeld contends she is permitted to pursue them as alternatives to the breach of contract because Defendants are disputing the existence of an enforceable agreement. She argues the promise was unambiguous. Further, she contends the assignment does more than just assign contract rights.

III. Defendants' Reply

Defendants assert there is no reference to consideration in the Notes and no evidence of any oral promise that Stark would find investors, that Defendants needed him to find investors, or that he actually brought in equity to fund the project. Weisenfeld lacks the personal knowledge

to state that her father found the necessary equity, or that Defendants needed him to fund the project. Her interpretation of the term "income" is based on inadmissible hearsay, and is contrary to custom and usage. They maintain that Weisenfeld's assertion that the Notes were negotiated is created out of whole cloth. They argue that because Stark was their attorney, Weisenfeld bears the burden of proving the agreement was fair, and that they, as the clients, were "fully aware of the consequences" of the contract (*Schlanger v Flaton*, 218 AD2d 597, 602 [1st Dept 1995]), irrespective of their "sophistication" (*Forest Park Assoc. Ltd. Partnership*, 175 AD2d at 62).

IV. Discussion

To determine whether a contract exists, "the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction" (*Central Fed. Sav. v National Westminster Bank, U.S.A.*, 176 AD2d 131, 132 [1st Dept 1991], citing *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). The plaintiff must demonstrate an offer, acceptance, consideration, mutual assent and the intent to be bound (*Matter of Civil Serv. Empls. Assn., Inc. v Baldwin Union Free Sch. Dist.*, 84 AD3d 1232, 1233-1234 [2d Dept 2011]). There must be proof of mutual assent to the essential terms and conditions, and the manifestation of such assent must be sufficiently definite to assure that the parties are truly in agreement with respect to all material terms (*Joseph Martin, Jr., Delicatessen*, 52 NY2d at 109; *see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). A "mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr., Delicatessen*, 52 NY2d at 109). If the alleged contract "is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Edelman v Poster*, 72 AD3d 182, 184 [1st Dept 2010]). In addition, under the doctrine of definiteness, the court must be able to determine what, in fact, the parties agreed to in order to enforce a contract (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991]; *see Korff v Corbett*, 18 AD3d 248, 250 [1st Dept 2005] [agreement language indicated meeting of minds, refers to consideration, specifies amount clearly agreed to]). A term such as price, or amount of compensation, is a material term, and a contract is unenforceable if it is not definite as to that term (*Joseph Martin, Jr., Delicatessen*, 52 NY2d at 109; *see Eagle v Emigrant Capital Corp.*, 2016 WL 410072, * 4 [Sup Ct, NY County 2016] [collecting cases where promise

for equity interest or share of profits was unenforceable for lack of definiteness]; *Foster v Kovner*, 2012 NY Slip Op 30125 [U], *8 [Sup Ct, NY County 2012] ["10% equity interest" term is too indefinite to be enforced]). The issue of whether a contract exists is generally one of law, which can properly be determined on a summary judgment motion (*Central Fed. Sav., U.S.A.*, 176 AD2d at 132; *see Consolidated Edison Co. of N.Y. v General Elec. Co.*, 161 AD2d 428, 429-430 [1st Dept 1990]).

In the instant case, the Notes do not indicate a present intent to be bound. There is nothing in the Notes to show the parties agreed to the material terms, including the identity of the party or parties to be bound. Also, the Notes are too vague to ascertain what was promised in order for the court to enforce it. For example, the court cannot determine from the Notes what the parties attending the dinner actually agreed to with regard to the critical words "GP inc." Accordingly, the alleged contract fails for lack of definiteness (*see Joseph Martin, Jr., Delicatessen, Inc.*, 52 NY2d at 109; *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482-483 [1989] [if a contract is not reasonably certain in the material terms, it cannot be enforced], *cert denied* 498 US 816 [1990]; *see Foros Advisors LLC v Digital Globe, Inc.*, 333 F Supp 3d 354, 360-363 [SD NY 2018] [where material terms are missing, preliminary agreement is merely an agreement to agree]). "GP inc" is not defined and cannot be ascertained from extraneous sources. Even assuming "inc" refers to "income," that term was not defined. It has multiple meanings. The Limited Partnership Agreement uses the word "income" three times: (1) in section 3.1 regarding "Books and Records," providing that there would be an annual balance sheet indicating the amount of each partner's distributive share "of all items of income, gain, loss, deduction or credit for Federal income tax purposes;" and (2) sections 3.5 and 7.8 ("Allocation" and "Transfer of Limited Partner Interests") which refer to items of "income, gain, loss, deduction or credit" (Limited Partnership Agreement at 5-7, 21-22, Doc. No. 112). These references clearly indicate the agreement differentiates between "income" and "gain," which is in contrast to Weisenfeld's argument that "income" means the partnership gain upon the sale of its assets.

While Weisenfeld contends the term means the General Partner's taxable income, that definition does not appear in the Notes or the Limited Partnership or Operating Agreements. Her interpretation that the word "income" refers to the General Partner's distribution upon a sale of the

partnership's assets (that is, its carried interest) is not a customary usage of that term (*see* report of Jeffrey Moerdler at 6, Doc. No. 127). In fact, at her deposition, Weisenfeld testified to various conflicting definitions, stating it meant she would "get 20% of the cash that came out of the deal" (Weisenfeld tr at 119, 128, 300, Doc. No. 117), and that she would get paid only if there was "taxable income" (*id.* at 121), and that it is a general word and "can mean all types of income" (*id.* at 157), and that it "suggests" gross income and "it depends upon how you define gross income" (*id.* at 157-158). Despite Weisenfeld's claim that her father told her that provision meant he was to receive 20% of the GP's income, including cash distributed from the sale of the partnership's assets, the assertion is both self-serving and hearsay. It is not admissible proof. Her own expert, Noel Cunningham, testified that the term income has a broad array of meanings in accounting and financial circumstances, and that gross income, net income, and taxable income are all possible meanings (deposition of Noel Cunningham ["Cunningham tr"] at 50-51, Doc. No. 126). Another of Weisenfeld's experts, Kenneth Weissenberg, testified it meant "net income" (deposition of Kenneth Weissenberg ["Weissenberg tr"] at 24-25, Doc. No. 128). Weisenfeld does not rely on any extrinsic evidence, other than these expert reports, to show an industry standard or customary usage, or otherwise provide an objective basis for filling in the price term of this alleged agreement (*see Hecht v Helmsley-Spear, Inc.*, 65 AD3d 951, 951 [1st Dept 2009] [agreement for severance benefits lacked terms as to amount, timing, and no method or custom for determining same, dismissed as fatally indefinite]). On the other hand, Defendants presented proof that "income" does not refer to carried interest (*see* report of Jeffery Moerdler at 6, Doc. No. 127).

The court notes the Limited Partnership Agreement provides strong evidence the attendees of the dinner meeting did not intend the phrase "GP inc" to refer to a payment upon the sale of the partnership assets, as such an interpretation likely would run afoul of the provision in section 3.6 (c) of the Limited Partnership Agreement, which sets out the priorities for payment in the event the proceeds were not reinvested in the property or retained by Iskay for the continuance of the business (Limited Partnership Agreement § 3.6 [c], Doc. No. 112).

Moreover, even if the ambiguous phrase "GP inc" could be construed, Defendants persuasively argue it should be construed against Stark as the drafter, particularly because he was the attorney for the individual defendants, the General Partner, and the partnership. It is a well-

settled rule that ambiguities in an agreement will be construed against the party who prepared or presented it (*Taylor v United States Cas. Co.*, 269 NY 360, 364 [1936]; *151 W. Assoc. v Printsiples Fabric Corp.*, 61 NY2d 732, 734 [1984]).

In addition, as an attorney, Stark's conduct must conform to the attorney disciplinary rules. Specifically, DR 5-104 (A) provides that "'[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein ... unless the client has consented after full disclosure'" (*Schlanger*, 218 AD2d at 601, quoting DR 5-104 [A]). While Stark is not prohibited from entering into a contract with his clients, such an agreement "is not advisable" (*Greene*, 56 NY2d at 92; *Schlanger*, 218 AD2d at 601). If he does, the agreement will be construed most favorably for his clients (*Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 177 [1986]; *Morrison Cohen Singer & Weinstein v Network Indus. Corp.*, 292 AD2d 153, 154 [1st Dept 2002] [ambiguities in retainer agreement construed against drafter, particularly when it is drafted by sophisticated counsel]; *Schlanger*, 218 AD2d at 601-02). Even without any evidence of undue influence or fraud by the lawyer, "the agreement may still be invalid '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'" (*Schlanger*, 218 AD2d at 602, quoting *Greene*, 56 NY2d at 92). The burden is on the attorney, notwithstanding the sophistication of the clients, to obtain the clients' "consent after full disclosure before entering into a business transaction, such as the one in issue, where the differing interests of counsel and the client may interfere with the exercise of professional judgment for the client's protection (DR 5-104 [A])." (*Forest Park Assoc. Ltd. Partnership*, 175 AD2d at 62). Rule 1.8 of the New York Rules of Professional Conduct requires a lawyer who proposes to enter into a contract with his or her client to advise that client, in writing, to seek independent counsel and to obtain the client's written consent (*Bryskin v Mann*, 2018 NY Slip Op 32080 [U] [Sup Ct, NY County 2018] [Sherwood, J.]).

There is no proof in the record that Stark disclosed his conflict and obtained Defendants' consent, or advised Defendants to obtain independent counsel. The lack of disclosure and consent also invalidates Iskander and Bishay's consent to the December 1994 Assignment to Weisenfeld. Defendants have presented proof that this document was represented to them by Stark as a "consent," and was faxed to them with Stark's signature already on it. Iskander and

Bishay were instructed to sign it on behalf of Intervest as a consent to an assignment by Stark to his daughters, Tina and Betsy. It states that Stark was assigning his right to "20% of all General Partner income, paid or accrued, on account of, or from, [Iskay]" (Doc. No. 122). It was not explained to Defendants (Iskander aff, ¶¶ 47, 49, 51-52; Weisenfeld tr at 238, Doc. No. 107 and 117). Weisenfeld stated at her deposition (again with hearsay testimony) that Stark was concerned about the handwritten Notes being informal and wanted something "more formal with [Iskander's and Bishay's] signatures on it" to provide evidence of the agreement and "what it meant" and to "explain the intent of the language" in the Notes (Weisenfeld tr at 238, 248, Doc. No. 117). As with the Notes, the "consent" does none of that. It does not define "income" or indicate that it meant a capital distribution upon a sale of Iskay's assets.

Stark appears to have exploited Defendants as his clients through not only a failure to disclose, but also by pursuing affirmative steps (i.e. the additional "consent" to assignment) to benefit himself (and his daughters) at the expense of his clients (*see Schlanger*, 218 AD2d at 601 [summary judgment granted to client seeking rescission of agreements with attorney]). Regarding Weisenfeld's claim that Stark's clients were sophisticated businessmen, the obligation to obtain the clients' consent after full disclosure applies "irrespective of the sophistication of the client" (*see Johnson v Proskauer Rose LLP*, 129 AD3d 59, 73 [1st Dept 2015] [internal quotation marks and citation omitted]).

There is no proof Stark disclosed his conflict in presenting the "consent," or advised Defendants that they should seek independent counsel. In fact, Iskander states unequivocally it was his understanding "never contradicted by Kenneth Stark, that Stark was acting as *our* attorney and would be exercising his professional judgment on our behalf" (Iskander aff, ¶ 49, Doc. No. 107 [emphasis in original]), and it never occurred to him Stark was "negotiating" or would "trick" him into signing an assignment consent document "for the purpose of confirming an agreement that I never made with him" (*id.*, ¶ 50). Iskander insists he received no disclosure from Stark regarding the significant risks associated with such a business transaction, nor was he given any explanation, much less a clear one, of the terms of the transaction (*id.*, ¶ 52).

Defendants have established there was an attorney-client relationship and they did not act with independent counsel. Thus, Weisenfeld has the burden to establish the contract was both

fair and well understood by Defendants as the client (*see McMahon v Eke-Nweke*, 503 F Supp 2d 598, 604 [ED NY 2007], citing *In re Howell*, 215 NY 466 [1915]; *Bkyskin*, 2018 NY Slip Op 32080 * 12-13). Rule 1.8 of the Rules of Professional Conduct, in subsection (1), provides that the transaction must be "fair and reasonable to the client and the terms of the transaction [must be] fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client." Here, Weisenfeld presents no proof of either of these elements. While Weisenfeld is correct that the Code of Professional Responsibility and the Disciplinary Rules are not the basis for a cause of action against Stark, the Code and Rules provide a framework for determining the validity and enforceability of the alleged contract. The court concludes that the Notes and the December 1994 Assignment are not enforceable.

The absence of admissible evidence of consideration is a separate and independent reason for rejection of Plaintiffs' claim. Consideration is a required element of an enforceable contract (*see Harris*, 79 AD3d at 426). An agreement based on past consideration is not enforceable unless there is a writing clearly describing such consideration. (General Obligations Law § 5-1105; *Clark v Bank of N.Y.*, 185 AD2d 138, 140-141 [1st Dept 1992]). There is no proof of consideration given or performed here. While, ordinarily, the adequacy of consideration may be a factual issue (*see Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 438-439 [1st Dept 1995]), where there is no mutual exchange of promises between the parties, the promisor is not obligated to do anything, and the promisee gains nothing, there is no consideration as a matter of law (*see NCSPlus Inc. v WBR Mgt. Corp.*, 37 Misc 3d 227, 236 [Sup Ct, NY County 2012]).

Here, the Notes make no reference to any consideration, or to any undertaking Stark made for the benefit of Iskander, Bishay, or the General Partner (DFOS ¶ 54; PSOF ¶ 54). The Limited Partnership Agreement also makes no reference to any consideration being paid, (DFOS ¶ 55; PSOF ¶ 55). Weisenfeld's contention that the consideration was Stark's oral promise to find investors to provide the equity needed for the project is not based on any admissible evidence. Her testimony as to what her father told her is not admissible. Her argument for ratification based on Defendants' payment of 1% of the rental income to her fails to raise a triable issue that Defendants also agreed to pay 20% of the General Partner's carried interest upon sale of the

property. Defendants are entitled to summary judgment dismissing the claim for breach of contract.

Plaintiff's promissory estoppel claim also must be dismissed. In order to establish this claim, a plaintiff must show (1) a clear and unambiguous promise; (2) reasonable reliance on the promise; and (3) injury caused by the reliance (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011]). As discussed above, Weisenfeld relies on the alleged promise of "20% of GP inc." Such promise is not clear and unambiguous (*see Benham*, 118 AD3d at 607 [where contract fails for lack of definiteness in material terms, promissory estoppel claim also fails]; *Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463 [1st Dept 2012] [promissory estoppel claim dismissed because no clear and unambiguous promise]; *New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004] [same]).

Weisenfeld's claim for quantum merit relief under a theory of unjust enrichment also must be dismissed. It is "indistinguishable from [the] . . . claim for breach of contract," seeking precisely the same damages as that claim (*Benham*, 118 AD3d at 607; *Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 484 [1st Dept 1991]), and must be dismissed as duplicative of the failed contract claim (*see Glinskaya v Zelman*, 128 AD3d 771, 772 [2d Dept 2015] [quantum merit and unjust enrichment are not simply devices to give effect to an unenforceable contract]; *Mark Bruce Intl., Inc. v Blank Rome, LLP*, 60 AD3d at 551; *see also Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-791 [2012] ["unjust enrichment is not a catchall cause of action to be used when others fail" and not available where simply duplicates or replaces a contract claim]).

2018 DERIVATIVE ACTION

I. Defendants' Arguments

Defendants move to dismiss all claims except the first, for a declaratory judgment based on breach of contract. They argue that each of the four subsequent claims, for breach of fiduciary duty, misappropriation, conversion, and unjust enrichment, is redundant of the first, breach of contract, claim, and is insufficiently pleaded.

The breach of fiduciary duty claim fails because Plaintiffs do not allege conduct that rises to the level of an independent tort, and the claim lacks the requisite specificity (*see* CPLR 3016

[b]). Plaintiffs' claim is that Defendants took action in contravention of the indemnification provision in the Limited Partnership Agreement, which is a breach of contract, not a tort. In addition, this claim simply duplicates the first cause of action asserting identical damages (*see Retty Fin. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341, 341 [1st Dept 2002]).

Defendants also contend the misappropriation and conversion claims are simply attempts to repackage a contract claim as a tort cause of action (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 306 [1st Dept 2003]).

The unjust enrichment claim fails because there is a contract, the Limited Partnership Agreement, that governs the subject matter of Plaintiffs' claims (*see Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003]).

Finally, the request for punitive damages should be stricken because there is no allegations of tortious conduct that is "intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (*Bishop v 59 W. 12th St. Condominium*, 66 AD3d 401, 402 [1st Dept 2009] [internal citation omitted]).

II. Plaintiffs' Opposition and Motion for Partial Summary Judgment

In opposition to the motion for summary judgment and in support of their motion for partial summary judgment, Plaintiffs assert Weisenfeld's claim in the 2016 Action is personal in nature, and not against Iskay. Therefore, the use of partnership funds to pay personal expenses is a breach of Defendants' fiduciary duties. They argue Plaintiffs are not asserting Defendants breached the Limited Partnership Agreement; they could not, since Iskander and Bishay are not parties to that agreement. Plaintiffs then argue that the same conduct by Defendants constituted both a breach of contract and of fiduciary duties, because they used Iskay funds to pay their personal legal fees. They further argue this also constituted a misappropriation, as Defendants derived a personal gain at the expense of Iskay. On the conversion claim, Plaintiffs urge that Defendants converted the Iskay reserve fund to pay their personal legal costs, interfering with Iskay's right to possess, use and distribute those funds. Finally, on the unjust enrichment claim, Defendants were enriched by their use of Iskay's funds to pay their personal defense costs at Iskay's

expense. Defendants intentionally used Iskay's funds, and, therefore, should be subject to punitive damages.

On the motion for partial summary judgment, Plaintiffs assert, in a single paragraph, that it is undisputed Defendants used Iskay's funds to pay their personal legal fees, and, as a matter of law, that was unjustified under section 4.8 of the Limited Partnership Agreement.

III. Reply and Cross Motion to Stay/Adjourn Partial Summary Judgment

In opposition to the partial summary judgment motion and in support of their further cross motion for an order staying or adjourning it, Defendants assert that Plaintiffs' cross-motion is procedurally improper: (1) Plaintiffs failed to participate meaningfully in discovery (token production of 10 documents and Weisenfeld has not appeared for her already - noticed deposition); and (2) the motion is not supported by an affidavit by a person with knowledge. They seek a stay or adjournment, until the court decides the summary judgment motion in the 2016 Action. They contend the 2016 Action initially asserted an accounting claim (withdrawn), and includes claims relating to the General Partner's management of partnership affairs, as evidenced by Weisenfeld's document requests in that action seeking documents relating to: (1) marketing for sale of the Iskay properties; (2) Iskay; (3) purchase of the Iskay properties; (4) Iskay's financial records and work papers; (5) documents or communications describing, referring, or concerning in any way the membership or partners of Islay; and (6) documents, calendars or calendar entries concerning meetings or conferences between Iskander and Bishay regarding Iskay (Affirmation of Sarah Schacter, dated August 30, 2018 [Doc. No. 49 requests 11, 14, 22, 38, 57, 107). Defendants produced thousands of pages of documents in response. Weisenfeld also asserts claims against both Intervest, the original General Partner, and 610 Realty, the current General Partner. Defendants further point to the fact that the portion of the Notes giving rise to the 2016 Action includes "GP inc" under the heading "Mngmt" because it was for management fees. Therefore, the very broad indemnification clause in the Limited Partnership Agreement applies (*see Crossroads ABL LLC v Canaras Capital Mgt., LLC*, 105 AD3d 645, 646 [1st Dept 2013]), and Plaintiffs cannot meet their burden of showing the absence of triable issues regarding liability.

IV. Plaintiffs' Reply to Cross Motion

In response, Plaintiffs finally state why they believe they have demonstrated liability on all five causes of action. Regarding the declaratory claim, Plaintiffs argue that while the language may be broad, the claims in the 2016 Action involve "personal promises" made by the "Managing Defendants," (not defined) and, as such, are not authorized under section 4.8 of the Limited Partnership Agreement. Plaintiffs summarily claim that Defendants have admitted to using Iskay's funds to pay legal fees in connection with the "'Managing Defendants' personal promises" (plaintiffs' memorandum in further support at 6, 7, and 8). As to Defendants' procedural arguments, Plaintiffs contend their submission of the verified complaint and their attorney's affirmation with documentary exhibits is sufficient, and the material dispositive facts are summarized in the preliminary statement in the memorandum.

V. Discussion, 2018 Derivative Action

A. Motion to Dismiss

A claim for breach of fiduciary duty which simply duplicates a breach of contract claim cannot stand (*Elmrock Opportunity Master Fund I, L.P. v Citicorp N. Am., Inc.*, 155 AD3d 411, 411-412 [1st Dept 2017] [fiduciary duty claim dismissed as duplicative where fiduciary claim pleaded against all three defendants, including the defendant which entered into the contract, and is based on the obligations set forth in the contract]; *Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 489 [1st Dept 2017] [duplicative of contract claim]; *Ellington v Sony/ATV Music Publ. LLC*, 85 AD3d 438, 439 [1st Dept 2011] [fiduciary breach claim dismissed as duplicative of contract claims]; *Retty Fin.*, 293 AD2d at 341-342 [same]; *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000]).

Plaintiffs' first claim in this action, while styled as a declaratory judgment, is a breach of contract claim. It alleges that the 2016 Action does not involve Intervest's or 610 Realty's management of Iskay's affairs, only personal promises of "Defendants" to pay Stark an amount based on the General Partner's income, and, thus, the indemnification provision in section 4.8 of the Limited Partnership Agreement does not authorize the payment of Defendants' legal costs in that action (Derivative complaint [amended] ¶¶ 29-35, Doc. No. 16).[2] The breach of fiduciary

2 Nevertheless, plaintiffs chose to sue Intervest and 610 Realty (*see* Doc. No. 28). Plaintiffs also sought an

duty claim alleges that those same facts constitute a "breach of Defendants' fiduciary obligations to Iskay," and it does not seek relief that is separate and distinct from the damages recoverable on the first cause of action (*id.*, ¶ 39). Section 4.8 of the Limited Partners Agreement contains a broad indemnification provision and if legal fees were paid in violation of that provision, it was a breach of the Agreement. In addition, Plaintiffs do not plead an independent tort. They are suing Defendants as the General Partner and the principals of the General Partner, a relationship that was created by the parties' agreement, the Limited Partnership Agreement (*see Panattoni Dev. Co., Inc. v Scout Fund 1-A, LP*, 154 AD3d 555, 557-558 [1st Dept 2017]). The Limited Partnership Agreement "cover[s] the precise subject matter of the alleged fiduciary duty," and, thus, the claim should be dismissed (*Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 302 [1st Dept 2008] [internal quotation marks and citation omitted]). All of the Defendants are subject to the Limited Partnership Agreement, either as the General Partner (Intervest and 610 Realty) or the principals of the General Partner (Iskander and Bishay). Plaintiffs also do not allege conduct that rises to the level of an independent tort, only that Defendants paid money in violation of the agreement, which is a breach of contract claim. A plaintiff must also allege a fiduciary duty claim with specificity as required under CPLR 3016 (b). Here, Plaintiffs group the "Defendants" together and make no specific allegations against them. Further, plaintiffs are seeking the return of the legal fees, the same damages sought on the first cause of action. Thus, the breach of fiduciary claim is duplicative of the breach of contract claim and is barred.

The misappropriation and conversion claims also are based on the same facts underlying the breach of contract claim and must be dismissed as duplicative (*see ABL Advisor LLC v Peck*, 147 AD3d 689, 690 [1st Dept 2017] [conversion claim dismissed as duplicative of breach of contract claim]; *M.D. Carlisle Realty Corp. v Owners & Tenants Elec. Co. Inc.*, 47 AD3d 408, 409 [1st Dept 2008] [same]; *Kurzman Karelsen & Frank v Kaiser*, 283 AD2d 330, 331 [1st Dept 2001] [money had and received and conversion claims dismissed as duplicative of breach of contract claim]). In addition, a claim for conversion of money may be pursued only when there is a specific and identifiable fund, and an obligation to return or otherwise treat the fund in a particular

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accounting of Iskay's books and records which is a claim against the company (*see id.* at ¶ 267). These and other actions related to the 2016 Action are examples of matters that caused Iskay, the general partners and the principals of the general partners to expend Iskay funds.

manner (*see M.D. Carlisle Realty Corp. v Owners & Tenants Elec. Co. Inc.*, 47 AD3d at 409; *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1st Dept 1990]). While Plaintiffs generally point to the Iskay Reserve Fund (a fund reserved after the distributions to all partners upon the sale of the properties for any post-sale costs to Iskay) as the specific, identifiable fund, this fund constitutes commingled funds (i.e., funds for miscellaneous outstanding debts of Iskay commingled with funds to pay potential legal fees), and is incapable of being converted (*see Auguston v Spry*, 282 AD2d 489, 491 [2d Dept 2001]).

Regarding the alleged misappropriation, Plaintiffs argue neither partners nor directors nor officers of a corporation are permitted to derive a personal profit at the expense of the partnership or corporation (*see Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 385 [1st Dept 1992] [misappropriation and conversion of lawsuit settlement funds in which plaintiff had immediate right or secured interest in funds]; *Matter of Greenberg [Madison Cabinet & Interiors]*, 206 AD2d 963, 964 [4th Dept 1994] [corporate officer/director unilaterally seized corporate assets to transfer to his new corporation, and used new corporation to usurp corporate opportunities]). Plaintiffs claim that the funds "Defendants," again without indicating which defendants, used for their personally incurred legal costs are the same funds being pursued in the first cause of action. Like the fiduciary duty claim, these claims are duplicative of the breach of contract claim.

The unjust enrichment claim fairs no better. It, too, is duplicative of the breach of contract claim (*Coast to Coast Energy, Inc.*, 149 AD3d at 489). In light of the valid contract claim, this quasi-contract claim is barred (*Panattoni Dev. Co., Inc. v Scout Fund I-A,* LP, 154 AD3d at 557 [where no one claims contract does not cover parties' dispute, unjust enrichment claim dismissed]; *ABL Advisor LLC*, 147 AD3d at 690 [existence of express contracts bar unjust enrichment claim]; *Ellington*, 85 AD3d at 439 [unjust enrichment claim not viable where valid contract claim]).

The unjust enrichment claim as against individual defendants Iskander and Bishay also fails, even though they are not individually parties to the Limited Partnership Agreement. This is because Plaintiffs claim their alleged additional share of the proceeds from sale of the Iskay properties was distributed to the General Partner, not directly to Iskander and Bishay. As alleged, it was the General Partner who purportedly was unjustly enriched, not the individuals.

Plaintiffs' request for punitive damages also must be dismissed. Plaintiffs' primary and only remaining claim is contract-based, and there is no allegation that Defendants' conduct was directed at the public generally, or that their conduct involved a high degree of moral turpitude (*see Mountain Cr. Acquisition LLC v Intrawest U.S. Holdings, Inc.*, 96 AD3d 633, 635 [1st Dept 2012] [private transaction, no harm to public, and no showing of high degree of moral turpitude]; *Segal v Cooper*, 49 AD3d 467, 468 [1st Dept 2008]; *Steinhardt Group v Citicorp*, 272 AD2d 255, 257 [1st Dept 2000] [punitive damages dismissed where a private transaction, with no allegation of egregious tort directed at public at large]).

B. Plaintiffs' Motion for Partial Summary Judgment

In the motion for partial summary judgment, plaintiffs argue it is undisputed that Defendants used Iskay's monies to pay legal costs they personally incurred in defending the 2016 Action, and, as a matter of law, it was not justified under section 4.8 of the Limited Partnership Agreement for Defendants to do so. Plaintiffs claim defense of the 2016 Action did not involve Defendants' management of the affairs of the partnership.

Defendants argue, properly, that Plaintiffs do not make arguments to support their motion until their reply, which is improper. Accordingly, these arguments may not be considered.

This procedural argument aside, plaintiffs have not met the high standards for a grant of summary judgment. There are several factual issues that either are in dispute or support dismissal of plaintiffs' claims, including whether Iskander and Bishay entered into personal agreement to pay Stark 20% of the general partner's carried interest upon sale of Iskay's properties; whether Stark agreed to locate investors equity for Iskay; whether consent was given by the limited partners to the replacement of Intervest with 610 Realty; and whether the General Partner provided notice, in writing, to the limited partners regarding the payment of defense costs out of Iskay's reserve fund (*see* Doc. No. 53).

In any event, under section 4.8 of the Limited Partnership Agreement, Defendants were entitled to have their defense costs in the 2016 Action paid by the partnership. Section 4.8 provides that the General Partner would be indemnified "from and against any and all claims, demands, actions, suit, proceedings, civil . . . , in which they may be involved, as parties, or otherwise, by reason of their management of the affairs of [Iskay]" (affirmation of Sarah Schacter

in support of defendants' motion, Limited Partnership Agreement § 4.8 at 14; Doc. No. 48). Although it also provides that the general partner "shall not be entitled to indemnification hereunder for any conduct arising from . . . a matter unrelated to the management of the Partnership affairs by the General Partner" (*id.*), as discussed above, the complaint in the 2016 Action includes allegations that relate directly to the partnership.

This indemnification provision is similar to one at issue in *Crossroads ABL, LLC v Canaras Capital Mgt., LLC* (35 Misc 3d 1238 [A], 2012 NY Slip Op 51042 [U] [Sup Ct, NY County 2012] [Fried, J.], *affd* 105 AD3d 645, 647 [1st Dept 2013]), which provided that the plaintiff limited liability company:

> "shall . . . be indemnified and held harmless by the Company from and against any and all losses, claims, damages, liabilities and expenses . . . in connection with any and all claims, demands, actions, suits or proceedings (civil, criminal, administrative or investigative) . . . in which [plaintiff] may be involved, as a party or otherwise, by reason of [plaintiff's] service to, or on behalf of, or management of the affairs of, the Company"

except for gross negligence or willful misconduct (*Crossroads ABL, LLC*, 35 Misc 3d 1238 [A] at *1). That court found this provision "extremely broad," that the company was obligated to indemnify plaintiff to the extent that the action involved plaintiff by reason of its service to, or management of the affairs of the company, and analyzed each cause of action to determine if they fell within the indemnification provision (*id.* at * 1, *affd* 105 AD3d at 647).

Here, Plaintiffs fail to make even a prima facie showing of the inapplicability of section 4.8. Their conclusory argument that Defendants do not dispute that the three remaining causes of action (breach of contract, promissory estoppel, and unjust enrichment) in the 2016 Action "involve personal promises made by the Managing Defendants that they would pay Weisenfeld's father (and later his assignees) an amount equal to 20% of the income received by Iskay's general partner" is baseless. In fact, the Defendants repeatedly disputed these allegations. In addition, Plaintiffs do not explain how asserting claims against the General Partner and the principals of the General Partner challenging how assets were distributed after the sale of partnership assets is not a challenge to the management of the affairs of the partnership.

C. Defendants Stay Request

Defendants' request for a stay or adjournment of the 2018 Action until the summary judgment motion in the 2016 Action is decided is denied as moot since that motion has been decided in this Decision and Order.

CONCLUSION

Defendants' motion for summary judgment in the 2016 Action shall be granted and the complaint dismissed. The contract claim fails for lack of definiteness. The term "GP inc" is not defined and there is no extrinsic proof that establishes its meaning or any objective standard by which the court could determine what the parties actually agreed to (if they did agree). In any event, the alleged contract is unenforceable because attorney Stark failed to obtain consent and failed to advise his clients to seek independent counsel. The promissory estoppel claim fails as a matter of law because there is no clear and unambiguous promise. The unjust enrichment claim is barred because it duplicates the insufficient contract claim.

With regard to the 2018 Derivative Action, Defendants' motion to dismiss the second through fifth causes of action for breach of fiduciary duty, misappropriation, conversion, and unjust enrichment shall be dismissed along with the punitive damages demand. Those causes of action duplicate the claim for breach of § 4.8 of the Limited Partnership Agreement regarding indemnification for legal fees, and there is no basis for punitive damages.

Plaintiffs' motion for partial summary judgment must be denied. Plaintiffs failed to make a prima facie showing of the entitlement to partial summary judgment, as there are material issues of fact that must be resolved and they improperly failed to set forth their arguments until the reply. As suggested above, there may be substantial grounds for dismissal of the entire complaint because all defendants appear to be entitled to have their defense costs borne by the partnership. Defendants have not sought such relief and it will not be granted on these motions.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of Defendants (motion sequence number 003) in the case with Index Number 651436/2016 (2016 Action) is GRANTED in its entirety and the complaint is DISMISSED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment against Plaintiff, Tina S. Weisenfeld and in favor of Defendants Sameh S. Iskander, Michael F. Bishay, Intervest Development Corp., 610 Realty, LLC; together with costs upon presentation of a proper bill of costs; and it is further

ORDERED that the motion to dismiss the second through fifth causes of action (motion sequence number 002) in the case bearing Index Number 652184/2018 (2018 Derivative Action) is GRANTED and said causes of action are hereby DISMISSED; and it is further

ORDERED that the motion for partial summary judgment of Plaintiffs (motion sequence number 003) is DENIED; and it is further

ORDERED that the cross motion of Defendant for a stay or adjournment is DENIED as MOOT; and it is further

ORDERED that counsel for the parties shall appear at a status conference as to the remaining claim in the 2018 Action on Tuesday, June 18, 2019 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: **April 16, 2019**

ENTER,

O. PETER SHERWOOD J.S.C.