SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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LEONID LEBEDEV,

Plaintiff,

- v -

LEONARD BLAVATNIK, VIKTOR VEKSELBERG,

Defendant.

INDEX NO.	650369/2014
MOTION DATE	01/10/2019, 01/10/2019, 01/10/2019, 01/10/2019, 01/10/2019
MOTION SEQ. NO.	009 010 011 012 013

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1168, 1169, 1170, 1171, 1208, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 010) 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1167, 1172, 1173, 1174, 1175, 1176, 1177, 1178

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820,

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were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 012) 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 969

were read on this motion to/for STRIKE JURY DEMAND.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302

were read on this motion to/for SANCTIONS.

In this dispute between former business partners, plaintiff Leonid L. Lebedev ("Lebedev") moves for partial summary judgment, and defendants Leonard Blavatnik ("Blavatnik") and Viktor Vekselberg ("Vekselberg") (together "Defendants") separately move for summary judgment dismissal of Lebedev's complaint. Defendants also move for sanctions, and to strike Lebedev's jury demand.

Background

The facts of this case have been set forth in detail in previous decisions in this action, including the decision of the Appellate Division, First Department, *Lebedev v Blavatnik*, 144 A.D.3d 24 (1st Dep't 2016).

As is relevant here, Blavatnik and Vekselberg owned equal interests in Oil and Gas Industrial Partners ("OGIP"), which owned a partial interest in Tyumen Oil

Company ("TNK"). During the 1990s, Lebedev made contributions that assisted Defendants in obtaining their interest in TNK.

First, in 1997, Petrosol Holding, S.A. ("Petrosol"), a Lebedev related company, entered into a "Securities and Sale Purchase Agreement" with Blusdi Financieringsmaatschappij N.V. ("Blusdi"), a company related to Defendants ("1997 Agreement"). The 1997 Agreement provides that, in exchange for $133 million, Blusdi would transfer certain shares to Petrosol. It is undisputed that, although Petrosol made a $25 million payment, it never made additional payments, and Blusdi never transferred the shares that were to be used to hold Defendants' interest in TNK.

Then, in 1998, TSL International ("TSL"), another Lebedev related company, sold its 1.8% stake in TNK to Novy Petroleum Finance ("Novy"), a company related to Defendants ("1998 Agreement"). At his deposition, Lebedev testified that TSL never received payment for the TNK shares. Moreover, TSL also transferred and/or facilitated the transfer of 10.5% stock in a TNK subsidiary, NNG, to Novy. After these initial investments and arrangements, the parties started to dispute their respective obligations to one another.

According to Lebedev, in 2001, the parties resolved their dispute and agreed that Lebedev would receive a 15% equity stake in the "Oil Business" [1] for his various

[1] A 2001 investment agreement defines "Oil Business" as follows – "OGIP currently owns, among other assets, 50% of the shares of TNK Industrial Holdings Limited ("TNK IH"), which in turn owns, directly and through its subsidiaries, an oil business in Russia, Ukraine, and other countries ("Oil Business")."

contributions ("2001 Investment Agreement").[2] The 2001 Investment Agreement further provided that, "beginning October 1, 2001, [Lebedev] has the right to receive 15% (fifteen percent) of the net income received by OGIP." Although Lebedev and Vekselberg signed the 2001 Investment Agreement, Blavatnik never signed it. In any event, Lebedev argues that the 2001 Investment Agreement created a binding contract and/or joint venture between him, Vekselberg, and Blavatnik.

The 2001 Investment Agreement also provided for the issuance of a "Promissory Note" as payment for the income due to Lebedev.[3] Although the parties subsequently executed a "Promissory Note" through related companies, the parties sharply dispute whether or not that was pursuant to the 2001 Investment Agreement.[4] Ultimately, Lebedev received payments totaling more than $13 million via the Promissory Note, which Lebedev asserts equals exactly 15% of the net income he is entitled to receive under the 2001 Investment Agreement.

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[2] Paragraph 2 of the 2001 Investment Agreement provides that "[t]he Parties acknowledge that in 1997-98, [Lebedev] made equity contributions to various companies, made payments to third parties, and rendered services, valued by the Parties in aggregate at 15% of the total value of the Parties' contributions toward the purchase of the Oil Business. The Parties agree that, as a result of the above-referenced contributions and payments, [Lebedev's] contribution toward the purchase of the Oil Business, in the amount of 15% of the total stake of the Parties, has been completely paid in as of the present time."

[3] Paragraph 6 and 7 provide, in relevant part, that the parties "agree to issue and deliver to [Lebedev] a promissory note of OGIP . . . [and] [a]ll payments to [Lebedev] under the Promissory Note constitute a portion of the income . . . ."

[4] Lebedev states that the Promissory Note was finalized in October 2002 but dated as of December 1, 2001.

In 2003, a prospective TNK and BP merger ("TNK-BP") prompted an additional agreement between the parties, and again, through related companies, they entered into the "Acquisition Agreement" that same year. Section 2.3 of the Acquisition Agreement provides that "[t]he Seller and its Affiliates hereby waive and release any and all of their rights claims and other entitlements, emanating from the Underlying Interests and the Underlying Liabilities and/or related to the Underlying Transaction, in consideration for [$600 million.]" Lebedev admits that the Acquisition Agreement released his income rights from the 2001 Investment Agreement and the Promissory Note, but he disputes that the provision released his equity rights in the Oil Business.

Eventually, in 2013, TNK-BP was sold for more than $55 billion. Blavatnik and Vekselberg received approximately $13.8 billion from the sale, and Lebedev seeks approximately $2.1 billion as part of his alleged share of those proceeds. Lebedev commenced this action in 2014 for breach of contract, breach of joint venture, and breach of fiduciary duty with respect to the 2001 Investment Agreement. Each party now moves for summary judgment.

Discussion

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Grob v Kings Realty Assoc.*, 4 A.D.3d 394, 395 (2d Dep't 2004). The party opposing must then demonstrate the existence of a factual issue

requiring a trial of the action. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

Lebedev's Breach of Contract Cause of Action

Lebedev moves for partial summary judgment as to liability on his claim for breach of contract. "The existence of a binding contract is an essential element of a cause of action to recover damages for breach of contract[.]" *Moulton Paving, LLC v Town of Poughkeepsie*, 98 A.D.3d 1009 (2d Dep't 2012). "To establish the existence of an enforceable agreement, [Lebedev] must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound[.]" *Kowalchuk v Stroup*, 61 A.D.3d 118, 121 (1st Dep't 2009).

Lebedev argues that the 2001 Investment Agreement is a binding contract, whether as written or orally by its terms. Defendants oppose the enforceability of the 2001 Investment Agreement as a partially executed agreement. However, the absence of Blavatnik's signature is not fatal to the existence of a binding contract between the parties, if there is conduct that may constitute partial performance of the contract. *See Aristone Realty Capital, LLC v 9 E. 16th St. LLC*, 94 A.D.3d 519, 519 (1st Dep't 2012).

Defendants also oppose Lebedev's motion for partial summary judgment and separately move to dismiss the breach of contract claim on the ground that the 2001 Investment Agreement lacks consideration. Vekselberg argues that, pursuant to New York's General Obligations Law ("GOL") § 5-1105, the 2001 Investment Agreement is invalid because it is not supported by contemporaneous consideration, and

Lebedev's prior contributions are insufficient in the absence of a signed writing by Blavatnik (who never signed the 2001 Investment Agreement).

Is the 2001 Investment Agreement Supported
By Contemporaneous Consideration?

The 2001 Investment Agreement provides that Lebedev "made equity contributions . . . made payments . . . and rendered services . . . [and], as a result of the above-referenced contributions and payments . . . [he] has been completely paid in as of the present time." Lebedev does not dispute that these prior contributions were given before a return promise was made to him and therefore, the prior contributions do not constitute present consideration to support the 2001 Investment Agreement. Lebedev instead contends that other forms of present consideration support the 2001 Investment Agreement: (1) he agreed to forego income generated prior to October 1, 2001; (2) he agreed to forebear asserting his rights under the 1998 Agreement; and (3) he agreed to settle the parties ongoing disagreement regarding their respective obligations.

First, Lebedev argues that paragraph 11 of the 2001 Investment Agreement demonstrates that he agreed to forego any income that accrued prior to October 1, 2001, despite the Oil Business previously issuing profits to other investors. Lebedev's claim, however, is directly refuted in the 2001 Investment Agreement, however, which recites that Lebedev "has no claims on the portion of income and profit of the Oil Business received by the Oil Business before October 1, 2001[.]" Because Lebedev unambiguously states in Paragraph 11 that he has no claim to profit prior to October 1,

2001, any alleged profit cannot be considered present consideration, regardless of whether the Oil Business issued profits to other investors prior to October 1, 2001.

Next, Lebedev claims that, pursuant to the 1998 Agreement, TSL transferred TNK shares to Novy, a company owned by Defendants through other entities. According to Lebedev, Novy never paid for the TNK shares, and his forbearance of pursuing payment for the TNK shares constitutes sufficient present consideration to support the 2001 Investment Agreement.

Vekselberg does not dispute that payment was never made pursuant to the 1998 Agreement and that the parties had an ongoing disagreement regarding their respective obligations. Instead, Vekselberg rejects either basis as a form of present consideration, citing *Korff v Corbett*, 155 A.D.3d 405 (1st Dep't 2017) (hereinafter "*Korff*").

In *Korff*, the trial court held that the General Obligations Law did not bar plaintiff's enforcement of a one-page letter agreement, in which plaintiff recited Defendants' payment obligations, because the agreement was sufficiently supported by consideration in the form of forbearance and settlement.[5] The Appellate Division, First Department disagreed, finding that "there is nothing in the agreement that suggests that plaintiff was forbearing pursuing a claim, nor does anything in the record otherwise indicate that plaintiff had agreed not to assert his rights against defendants." *Korff*, 155 A.D.3d at 411.

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[5] Similar to Lebedev, the plaintiff in *Korff* had argued that "the agreement was based on present, not past, consideration . . . [and] claim[ed] that the agreement constitute[d] a compromise of his claim to a partnership interest . . . and his forbearance from enforcing his right to collect [] fees." *Korff*, 155 A.D.3d at 409.

Here, also, the 2001 Investment Agreement states nothing about Lebedev agreeing to forbear pursuing a claim arising from 1998 Agreement. *See Korff*, 155 A.D.3d 405, 411 (1st Dep't 2017) (noting that in the case law where forbearance supported a finding of present consideration, the "plaintiff's agreement to forbear pursuing a claim against the defendant was plain, having been recited in the writing at issue."). That the 2001 Investment Agreement generally provides that it "prevails over all other prior understanding and agreements among the Parties" is too vague to support a finding of present consideration in the absence of any specific reference to the relinquishment of claims under the 1998 Agreement.[6] Therefore, consistent with *Korff*, Lebedev's argument that present consideration exists in the form of forbearance of claims under the 1998 Agreement is unavailing.

Lebedev also argues that 2001 Investment Agreement reflects a settlement of the parties' ongoing disputes and therefore, is supported by present consideration. The First Department also rejected this argument in *Korff*, stating that there is "no indicia of a settlement agreement, such as an obligation by plaintiff to tender a release of his claims or otherwise incur a new detriment." *Korff*, 155 AD3d at 410. Here, entirely absent from the 2001 Investment Agreement is any language indicating a promise to release any claim. Therefore, even though "the agreement may have resolved what [Lebedev] was to

[6] I also note that Lebedev is not a party to the 1998 Agreement, rather, TSL is the party. Therefore, even if TSL agreed not to assert its rights against Novy, that forbearance cannot be attributed to Lebedev individually.

receive for the [contributions] he had [given] in the past[, it] does not, without some new, executory promise on his part, create present consideration[.]" *Korff*, 155 AD3d at 410.

At bottom, Defendants have shown that the 2001 Investment Agreement lacks contemporaneous consideration and, consistent with *Korff,* Lebedev has failed to raise an issue of fact on this issue.

Does The 2001 Investment Agreement Satisfy
The Requirements Of GOL § 5–1105?

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

The statute creates a limited exception for a "promise in writing and signed by the promisor[.]" Here, neither Blavatnik nor his agent signed the 2001 Investment Agreement; therefore, the consideration recited therein does not fall within GOL § 5-1105. *See Hardy v Rose*, 60 A.D.3d 904, 905 (2d Dep't 2009) (No binding contract where past consideration was recited in an unsigned writing); *Arnone v Deutsche Bank AG,* 2003 WL 21088514, at 4 (SDNY May 13, 2003)(determining, in part, that the writings involved failed to satisfy GOL § 5-1105 because the party to be bound did not sign it).[7] Lebedev, nevertheless, argues that GOL § 5-1105 is inapplicable because the

[7] Lebedev argues that Blavatnik's agents' signature on the Promissory Note and subsequent payment transfers are sufficient to bind Blavatnik under GOL § 5-1105. Contrary to Lebedev's position, the statute unequivocally requires that "the consideration

statute does not apply where the obligor partially performed under the contract or admitted to the existence of the contract.

Lebedev has not cited, and I am not aware of, any New York case that recognizes the doctrine of part performance as an exception to GOL § 5–1105. The statute itself does not provide for a part performance exception, and a plain reading of the statute – "[a] promise in writing and signed by the promisor" – contradicts Lebedev's interpretation. *Compare Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group PLC*, 93 N.Y.2d 229, 234 (1999) (stating that there is no "parallel judicially-created part performance exception to [GOL] § 5–701[.]"), *with* New York's GOL 5-703 (expressly providing that in cases of part performance, the court may exercise its equitable powers, despite the statute requiring real property agreements to be in writing), *and* N.Y. Pattern Jury Instr.--Civil 4:1 ("Waiver, part performance and estoppel constitute exceptions to GOL § 15-301(1)"). In the absence of a statutory provision providing for part performance as an exception to GOL § 5-1105, or any New York authority recognizing such an exception, Lebedev's argument is unfounded.

As to Lebedev's argument that Defendants admitted to the existence of a contract and therefore, GOL § 5-1105 is inapplicable, I disagree. Whether Defendants intended to be bound by the 2001 Investment Agreement is a sharply disputed issue. Deposition

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[be] expressed *in the writing*" that the promisor or his agent signed. GOL § 5-1105 (emphasis added). Further, in the absence of a fully executed contract, no written contract exists. *Kastil v Carro*, 145 A.D.2d 388, 388 (1st Dep't 1988) ("GOL § 5–1105 is not applicable, since the alleged agreement before [me] is not in writing.").

testimony and other extrinsic evidence demonstrates that Blavatnik and Vekselberg simply acknowledged the receipt of Lebedev's prior contributions. However, "[w]hether in a given case the claimed consideration is legally sufficient (as distinguished from factually adequate) has been treated as a question of law[.] " N.Y. Pattern Jury Instr.--Civil 4:1. Defendants' acknowledgement of Lebedev's prior contributions is not in a signed writing and therefore, as a matter of law, the acknowledgement recited in the 2001 Investment Agreement does not satisfy the requirements of GOL § 5-1105.

Moreover, the past consideration as recited in the 2001 Investment Agreement is too general and imprecise to fall within the confines of GOL § 5-1105. The 2001 Investment Agreement provides "that in 1997 – 1998, [Lebedev] made equity contributions to various companies, made payments to third parties, and rendered services[.]" Such vague and nonspecific references are insufficient under New York law in the absence of any detailed reference or specific identification of such value received. *See Mann*, 159 A.D.3d at 545.[8] Instead, "resort to [extrinsic] evidence . . . is necessary to

[8] Lebedev cites cases where New York courts have found imprecise language sufficient to meet the requirements of GOL § 5-1105. In *Movado Group, Inc. v. Presberg*, 259 A.D.2d 371 (1st Dep't 1999), for example, the Court found "ample consideration for the execution of a guaranty" where defendant made a "broad commitment" that he would "pay all of his company's debts to plaintiff on an 'absolute, unconditional and continuing' basis[.]" *Id.* at 371. However, courts have also recognized that "guarantees present a 'markedly different' factual scenario from the one at issue . . . because they generally identify or incorporate by reference a specific debt owed." *Greenberg v Greenberg*, 2015 WL 12965285, at 4 (E.D.N.Y. Feb. 11, 2015), *affd* 646 Fed. Appx. 31 (2d Cir. 2016). *Movado* is, therefore, distinguishable because Lebedev's claim does not involve a guarantee and, in any event, the consideration as recited does not identify or reference any specific debt owed. To the extent Lebedev's citation to other cases support his position, I find such case law inconsistent with the more recent application of the law in *Korff* and *Mann*.

give meaning to the consideration expressed[,]" *Umscheid v Simnacher*, 106 A.D.2d 380, 381 (2d Dep't 1984), but "in seeking the exception afforded by General Obligations Law § 5–1105, resort to such extrinsic evidence is impermissible," *Korff* 155 A.D.3d at 410.

In sum, even if Lebedev had raised an issue of fact as to whether Defendants' intended to be bound to a partially executed 2001 Investment Agreement, I nevertheless dismiss the breach of contract cause of action because Vekselberg has demonstrated, *prima facie*, that the 2001 Investment Agreement lacks consideration and because Lebedev has failed to raise an issue of fact on this issue.

Lebedev's Breach of Joint Venture Cause of Action

To establish a joint venture, the plaintiff must prove "acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses[.]" *Slabakis v Schik*, 164 A.D.3d 454, 455 (1st Dept 2018). Vekselberg moves for summary judgment dismissal of Lebedev's joint venture claim because Lebedev is unable to establish either that he agreed to share losses or that he had a right to control the alleged joint venture.

Under New York law, "[a]n indispensable [element] of . . . [a joint venture] is a mutual promise or undertaking of the parties to share in the profits of the business *and submit to the burden of making good the losses*[.]" *Slabakis*, 164 A.D.3d at 455 (citing *Matter of Steinbeck v. Gerosa*, 4 N.Y.2d 302 (1958) (emphasis in original). The 2001

Investment Agreement does not refer to sharing of losses, and, therefore, cannot be evidentiary support for Lebedev's agreement to share any losses of the alleged joint venture.

Citing *Don v. Singer*, 92 A.D.3d 576 (1st Dep't 2012), Lebedev argues that he need not show an agreement by the parties to share in losses, because the parties reasonably did not expect to incur losses. *Don* involved a property development project, in which plaintiffs alleged that they formed a joint venture with Defendants, who allegedly ousted plaintiffs and sold the development for profit. Plaintiffs sought their respective interest in that profit, and Defendants moved for summary judgment dismissal, arguing, *inter alia*, that plaintiffs' claim for breach of the joint venture agreement failed because there was no agreement to share losses.

The trial court denied the motion because "plaintiffs raise[d] issues of fact as to whether there was an implied agreement that the parties were to share all risks, including the risk of loss." *Don v Singer*, 2011 NY Slip Op. 31994(U) (Sup. Ct. NY County 2011). On appeal, the First Department, Appellate Division affirmed the trial court's determination that plaintiffs had raised an issue of fact as to an implicit loss sharing agreement. *Don*, 92 A.D.3d at 577. The Court also stated that "[t]here was no requirement that the joint venture agreement contain a provision that losses be shared since, under the circumstances, there was no reasonable expectation of losses[.]" *Id.*

Lebedev's general reliance on *Don* to dispense with his burden to show that he agreed to share joint venture share losses is misplaced. If a party were permitted to

dispense with proof of an agreement to share losses by simply claiming that the parties had no expectation of losses, the joint venture's loss-sharing requirement would be rendered meaningless. That is not the current state of the law in New York. *See Steinbeck v Gerosa*, 4 N.Y.2d 302, 317-18 (1958) ("[I]t is not 'enough that two parties have agreed together to act in concert to achieve some stated economic objective. Such agreement, by itself, creates no more than a contractual obligation, otherwise every stockholders' agreement would give rise to a joint venture.") (internal quotations and citation omitted); *Lerch v Ark Restoration & Design Ltd.*, 137 A.D.3d 637, 638 (1st Dep't 2016) (The parties "had no provision for the sharing of losses, and therefore was not one for a joint venture[.]").[9]

Moreover, *Don* is distinguishable because in that case, plaintiffs alleged specific facts showing an implied agreement that losses would be shared. For example, the trial court noted that plaintiffs alleged that they, along with defendants, personally guaranteed the repayment of mortgages and loans for the property development. *Don*, 2011 NY Slip

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[9] *See also Mawere v Landau*, 39 Misc. 3d 1229(A) (Sup. Ct. 2013), *affd as mod*, 130 A.D.3d 986 (2d Dep't 2015) ("While there are cases that state that the absence of an express agreement to share losses is not fatal to a joint venture, these cases are inconsistent with more recent Appellate Division, Second Department authority.") (citations omitted).

But see Cobblah v Katende, 275 A.D.2d 637, 639 (1st Dep't 2000) (determining that there was no reasonable expectation of losses for a venture involving a group of anesthesiologists servicing a hospital); *Dundes v Fuersich*, 6 Misc. 3d 882, 885 (Sup. Ct. 2004) (determining that although the parties did not discuss tort liability, it was not fatal to the claim when such liability is unlikely in a venture involving book publishing).

Op. 31994(U) at 15. Nothing Lebedev proffers raises a similar implication or issue of fact as to loss-sharing.

Specifically, Lebedev's position that his income payments were calculated after expenses is insufficient to imply an agreement to share losses when profits are usually paid net of expenses.[10] The 2001 Investment Agreement itself demonstrates that the objective intention of the parties was to only share in profits. Neither is Lebedev's contention that he stood to lose his initial investment sufficient to imply that losses would be shared, when I have already rejected his corollary position that the parties' alleged joint venture had no reasonable expectation of losses.[11]

Because the 2001 Investment Agreement had no provision for sharing of losses and because Lebedev fails to raise an issue of fact that the parties had an implied agreement that losses would be shared, I dismiss Lebedev's claim for breach of the joint venture. I also grant Vekselberg's motion to extent it seeks dismissal of the breach of fiduciary duty claim, which Lebedev concedes is based on the existence of a joint venture. In light of the foregoing, Blavatnik's separate motion for summary judgment is moot to the extent he seeks dismissal of the same claims based on the Acquisition Agreement.

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[10] *Black's Law Dictionary* defines profits as "total revenue minus total cost."

[11] This argument is also inconsistent with the 2001 Investment Agreement. Paragraph 12 provides that "[t]he Parties agree that, upon any potential reorganization of the Oil Business . . . they shall cause [Lebedev] to receive the income provided by this Agreement[.]" This provision contemplates that, if the Oil Business experienced financial distress and required a reorganization, then the parties would nevertheless preserve Lebedev's right to income and leave Vekselberg and Blavatnik with the burden of sharing the losses of their investment.

Defendants' Counterclaim for Indemnification

Blavatnik moves for summary judgment on his counterclaim for indemnification, and Lebedev separately moves to dismiss the same counterclaim. According to Blavatnik, Lebedev agreed to indemnify him pursuant to section 7.1 of the Acquisition Agreement. That provision provides that

> The Seller hereby undertakes to hold harmless and indemnify the Buyer and each of its Affiliates from and against any claim, threat, suit, action or other proceedings, as well as the related costs and expenses (including, but not limited to, any legal fees), related to or emanating from the Underlying Interests, the Underlying Liabilities or the Underlying Transaction, brought by the Seller against the Buyer or any of its Affiliates, with the exception of those related to the enforcement of this Agreement.

This provision unambiguously binds only the "Seller," which the Acquisition Agreement defines as "Coral Petroleum Ltd," ("Coral"), not Lebedev. Further, there is no reference to Seller's "Affiliates" as is commonly used throughout the Acquisition Agreement, including the same provision at issue as to the Buyer.

Defendants argue that because Coral is Lebedev's agent, the provision nevertheless binds Lebedev as the principal. To demonstrate that Lebedev is Coral's principal, Blavatnik submits a Trust Agreement, "dated November 14 October 2002," which nominates Coral as an agent for Trade Concept Limited ("TCL"), a Lebedev owned company. Blavatnik does not explain how the indemnity provision runs to Lebedev individually when the Trust Agreement creates a principal-agent relationship between TCL and Coral.

Section 7.1 of the Acquisition Agreement does not bind Lebedev individually to indemnify Blavatnik and Vekselberg, as individuals, particularly because indemnification provisions are narrowly construed, and the language employed here uses the singular "Seller[,]" *i.e.,* Coral, rather than the broader "Seller" and its "Affiliates[.]" Consequently, Lebedev's motion for summary judgment is granted the extent he seeks dismissal of Defendants' counterclaim for indemnification, and Blavatnik's motion for summary judgment on the same counterclaim is denied.

Defendants' Motion for Sanctions and to Strike the Jury Demand

For the reasons stated on the record at oral argument of these motions, I deny Defendants' motion for sanctions. Additionally, in light of my dismissal of Lebedev's amended complaint, Defendants' motion to strike Lebedev's jury demand is denied as moot.

In accordance with the foregoing, it is

ORDERED that the motion by defendant Viktor Vekselberg for summary judgment is granted and the complaint is dismissed against defendants Viktor Vekselberg and Leonard Blavatnik with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion by plaintiff Leonid Lebedev for partial summary judgment dismissing defendants' counterclaim for indemnification is granted, and the motion is otherwise denied; and it is further

ORDERED that the motion by defendant Leonard Blavatnik for summary judgment on defendants' fourth affirmative defense and counterclaim for indemnification is denied consistent with this decision;

ORDERED that the motion by defendants Leonard Blavatnik and Viktor Vekselberg to strike plaintiff Leonid Lebedev's jury demand is denied as moot; and it is further

ORDERED that the motion by defendants Leonard Blavatnik and Viktor Vekselberg for sanctions is denied; and it is further

ORDERED that the Clerk of the Court enter judgment dismissing the complaint in its entirety against the defendants; it is further

ORDERED that the Clerk of the Court enter judgment dismissing the counterclaim in its entirety against plaintiff.

This constitutes the order and decision of the Court.

7/9/19
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE