

JFP W. LLC v JTM Family Holdings, LLC

2023 NY Slip Op 30096(U)

January 10, 2023

Supreme Court, New York County

Docket Number: Index No. 650998/2020

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC

PART 36

Justice

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INDEX NO. 650998/2020

JFP WEST LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

JTM FAMILY HOLDINGS, LLC and JUDAH TAUB, VISTA
COVE PARTNERS LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff moves for partial summary judgment on its fourth cause of action seeking monetary damages for an alleged breach of an agreement by defendant Judah Taub (“Taub”). Defendants oppose,¹ and plaintiff replies.

As relevant to this motion, plaintiff alleges in its complaint dated February 13, 2020 (NYSCEF Doc. No. 1, *complaint*) as follows. In or about January 2017, plaintiff and defendant JTM Family Holdings, LLC (JTM), “entered into an operating agreement setting forth their membership interests and rights with respect to [defendant] Vista Cove [Partners, LLC], a company owning interests in several skilled nursing facilities (‘Operating Agreement’)” (*id.* at 3, ¶ 14). “Also in or about January 2017, Vista Cove, JTM, Taub and JFP entered into a Side Letter Agreement (‘Side Agreement’), which modified the Operating Agreement and set forth an annual preferred return to JFP in exchange for its \$200,000.00 capital contribution (‘Capital Contribution’)” (*id.* ¶ 19).

Plaintiff alleges that “[t]o induce JFP’s contribution, Taub agreed to personally backstop the Capital Contribution in the event it was not promptly repaid” (*id.* at 4, ¶ 23), and then quotes the language of Paragraph 1(c) of the Side Agreement. Plaintiff alleges, upon information and belief, that defendants: “failed to make any distributions under the Operating Agreement to JFP, despite earning profits that should have been distributed monthly” (*id.* ¶ 25). “Defendants honored their payment obligations under the Side Agreement for only 11 months, making payments to JFP of \$45, 833.37 (‘Preferred Return Payments’ before stopping without explanation, and then failing to respond for any requests for information” (*id.* ¶ 26).

Plaintiff alleges that “on July 10, 2019, JFP made a formal demand that defendants

¹ While the fourth cause of action is directed only as to Taub, the opposing papers are submitted by all the defendants. Accordingly, this decision similarly utilizes this identification.

(1) pay JFP their outstanding debt,” provide copies of and access to books and records, and provide a detailed accounting (*id.* at 5, ¶ 30). Plaintiff alleges that “Taub ridiculed this demand. Then he ignored it” (*id.* ¶ 31). “On February 3, 2020, more than three years after the date of the Side Agreement, JFP further demanded that Traub honor his obligations and pay JFP the difference between Preferred Payments and the Capital Contribution, i.e., \$154,166.63” (*id.* ¶ 32). Taub did not do so.

In the fourth cause of action, plaintiff alleges that “Taub was obligated to, after the third anniversary of the Side Agreement and immediately upon demand, pay JFP the difference between the Preferred Return Payments and the Capital Contribution, or \$154,166.63” (*id.* at 7, ¶ 48). JFP alleges that on February 3, 2020, it demanded payment of \$154,166.63 (*id.* ¶ 49), that “Taub breached the Side Agreement by refusing to pay” (*id.* ¶ 50), and that, as a result of that breach, it “suffered damages in the amount of \$154,166.63” (*id.* ¶ 51). JFP seeks judgment in the amount of \$154,166.63, plus interest.

Defendants deny the allegations of the complaint. As to the fourth cause of action, they deny the allegations set forth in Paragraphs 48, 49, 50 and 51, “except admit that Plaintiff invested with Defendants” and admit “that certain documents were executed, and refer this Court to the documents for the contents thereof, once the documents are produced” (NYSCEF Doc. No. 6 at 3, ¶ 14). They also assert three affirmative defenses, including failure to state a cause of action and statute of frauds. Defendants also assert as their third affirmative defense (*id.* at 4, ¶ 21) that plaintiff:

“held itself out as a sophisticated investor and knowingly made high risk investments that are not performing, and were not guaranteed by the Defendants. Indeed, the Defendants themselves are no longer receiving any management fees or other income from the facilities in question, and therefore are not in a position to remit any return to the Plaintiff on its loans and investments.”

The following facts are not in dispute. “In or about January 2017, JFP and JTM Family Holding, LLC (‘JTM’) executed an operating agreement setting forth their membership interests and rights to Defendant Vista Cove Partners, LLC (‘Vista Cove’), a company owning interests in several skilled nursing facilities (‘Operating Agreement’)” (NYSCEF Doc. No. (Doc) 10, Plaintiff’s Rule 202.8-g Statement of Undisputed Material Facts, at 1, ¶ 1; NYSCEF Doc. No. 27, Defendant’s Rule 202.8-g Statement of Disputed Material Facts, at 1, ¶ 1). “JTM and JFP are 92.7845 % and 7.2155% owners, respectively, of Vista Cove” (*id.* ¶ 2). “Judah Taub, the principal of JTM, is the managing member of Vista Cove” (*id.* ¶ 3). “The Operating Agreement required that Vista Cove make monthly distributions to its owners in accordance with each owner’s percentage interest” (NYSCEF Doc. No. 10 at 2, ¶ 4; Doc. No. 27 at 1, ¶ 4). “The Operating Agreement also required Vista Cove to prepare a detailed balance sheet and profit and loss statement to be distributed to the members quarterly; and to provide monthly financial updates” (NYSCEF Doc. No. 10 at 2, ¶ 5; Doc. No. 27 at 2, ¶ 5.). “Throughout 2018 and 2019, JFP repeatedly reached out to Defendants for information regarding the financials of Vista Cove, and for the payments owed under the Side Agreement” (NYSCEF Doc. No. 10, at 3, ¶ 13; Doc. No. 27, at 4, ¶ 13).

As it applies to this motion for partial summary judgment, the parties do not genuinely dispute that the Operating Agreement (NYSCEF Doc. No. 12) and the Side Agreement (NYSCEF Doc. No. 13) contain the following provisions, although they do dispute the legal significance of the provisions and the enforceability of the Side Agreement. This discussion of the agreements pertains to the contentions and issues raised in this motion for partial summary judgment, but does not address other provisions of the agreements except as relevant.

The Operating Agreement is dated “as of January ____, 2017” (NYSCEF Doc. No. 12 at 1). It consists of six numbered pages. Vista Cove is defined as the Company; JTM, JFP and “collectively with Taub” are defined as the “Members” (*id.*). As to the sufficiency of the consideration, the preamble provides that “NOW THEREFORE, in consideration of the mutual agreements set forth herein, the sufficiency of which is hereby acknowledged by the parties to be entirely sufficient to bind the parties contractually, the parties hereto agree as follows” (*id.*).

The provisions of the Operating Agreement conclude with paragraph 24 appearing at approximately mid-page of page 5, followed by the following words appearing in brackets: “[signature page follows]” (*id.* at 5). On page 6, the signature page begins with the words “WHEREFORE, the Parties have executed this Agreement on the dates stated below their signatures on the attached signature page for each individual Party.” The court notes that the signature lines appear below the “Wherefore” clause on the copies of the Operating Agreements attached as exhibits to both moving and opposing papers (NYSCEF Doc. Nos. 12 and 24), and an additional attached signature page is not attached to either exhibit. Taub’s name is supplied and he signed on behalf of JTM in the signature line; his title is not indicated by the “Title” line. The Operating Agreement does not contain JFP’s signature in the signature line.

Article VI, titled miscellaneous provisions (*id.* at 4), provides as follows:

“18. Amendment. Except as otherwise provided in this Agreement, any amendment to this Agreement may be proposed by a Member. Unless waived by the Members, the proposing Members shall submit to the Members any such proposed amendment together with an opinion of counsel as to the legality of such amendment and the recommendation of the Members as to its adoption. A proposed amendment shall become effective at such time as it has been approved in writing by all of the Members. This Agreement may not be amended nor may any rights hereunder be waived except by an instrument in writing signed by the party sought to be charged with such amendment or waiver, except as otherwise provided in this Agreement.”

The Side Agreement consists of three unnumbered pages. It, too, is dated effective as of “January __, 2017” (NYSCEF Doc. No. 13, first page). It “is made between” Vista Cove [identified as the Company], JTM, “Judah Taub, an individual” and JFP (*id.*). The “Whereas” clauses include the following: “WHEREAS, the parties desire to modify the terms of the Operating Agreement as set forth in this Agreement” (*id.*). The consideration clause provides, in all capital letters, “Now therefore in consideration of the promises contained herein and other

good and sufficient consideration the receipt and sufficiency [of which] is hereby acknowledged the parties agree as follows” (*id.*).

The Side Agreement identifies plaintiff’s investment in the principal amount of \$200,000.00 as the “Capital Contribution” (*id.* para 1[a]). Paragraph number 1(c) provides as follows:

“To the extent that on the 3 year anniversary of this Agreement (the ‘Capital Return Date’) the Company [Vista Cove] has not (for any reason whatsoever) made payments to JFP totaling at least the amount of JFP’s Capital Contribution, Taub, upon demand of JFP, shall immediately pay to JFP the difference between JFP’s Capital Contribution and the amount of distributions paid to JFP between the date hereof and the Capital Return Date” (*id.*).

Paragraph 6, which appears mid-page on the second page, provides that “In the event of any conflict between this Agreement and the Operating Agreement of the Company, this Agreement shall control” (*id.*, second page). The words “Signature page follows” appear approximately mid-page below paragraph 6. The third page begins “IN WITNESS WHEREOF”, the undersigned, intending to be legally bound hereby, do duly execute this Side Letter Agreement effective as of the day and year written above” (*id.*, third page).

The Side Agreement contains signature lines for the four parties to the agreement. Three of those lines contain the typed name and handwritten signature of Judah Taub; once on his own behalf; once on behalf of Vista Cove with his title as Managing Member; and once on behalf of JTM with his title as Managing Member. A signature does not appear on the signature line for JFP West LLC, which is followed by the typed words “By: Harry Jeremias” and, below that, “Title: Manager” (*id.*).

Plaintiff argues that there are no genuine issues of disputed material fact and it is entitled to partial summary judgment as a matter of law on its fourth cause of action against Taub for breach of contract, specifically, the Side Agreement. In essence, plaintiff asserts that Taub breached the Side Agreement by failing to pay the duly demanded amount of \$154,166.63 (the amount of \$200,000.00 less 11 payments totaling \$45,833.37) (NYSCEF Doc. No. 11, *Affirmation of Harry Jeremias*).

In opposition, Taub refers to the Operating Agreement and the Side Agreement for their terms and provisions and attaches copies. He asserts that JFP is a sophisticated investor which “understood both the risks to its capital and the fact that the facilities sometimes fail through no fault of the investors, as happened here” (NYSCEF Doc. No. 23, *Affirmation of Judah “Jay” Taub in Opposition* [opp aff], at 2, ¶ 8). He further asserts that “Certainly, all distributions of profits from the operation of Vista Cove Corona and Vista Cove Long Beach were passed on to Plaintiff as received until the facilities terminated their operations and stopped making distributions to JTM” (*id.* ¶ 9).

He contends that plaintiff “now asserts that in a side letter (‘Side Letter Agreement’), [he] personally guaranteed repayment of its investment, which it is entitled to enforce at this time,” and that he “dispute[s] that any such payment is due” (*id.* at 3, ¶11). He asserts: “Indeed, there is simply no reason why [he] would guaranty [sic] an investment where [he] do[es] not stand to receive any benefit from that guaranty” (*id.* ¶ 12).

Taub argues that the “alleged Side Letter Agreement is entirely unenforceable for a number of reasons” (*id.* ¶ 12), asserting that (1) “it purports to be a modification of the Operating Agreement, but does not comply with the express provisions of the Operating Agreement for amendment or modification” and (2) he “received no consideration for the alleged promise of payment” (*id.*).

He “note[s]” (*id.* ¶ 13) that: (1) the Side Agreement lacks JFP’s signature; (2) there is no promissory note; (3) “the terms of payment are not explicitly stated” (*id.*); and (4) “the signature page stands alone, and it is neither numbered nor contains any reference to the Side Letter Agreement” (*id.*).

Taub asserts that “[a]fter the investment in VCP [Vista Cove Partners] failed, [he] contacted Plaintiff and explained that the facilities were no longer operating, and no further payments would be forthcoming” (*id.* ¶ 14). Additionally, he asserts that “[s]ince [he] did not personally guaranty Plaintiff’s investment, [he has] not reimbursed Plaintiff for its loss” (*id.* ¶ 15). He did advise plaintiff, however, that he has “some other investments [he is] working on” and “offered to provide Plaintiff with an opportunity to recoup its loss should any of these investments bear fruit,” but to date he has not “concluded any new deals” (*id.*) at 3-4, ¶ 15).

In reply, plaintiff contends that “Taub does not deny signing the Side Agreement, does not deny that it is his signature that appears on the signature page, does not deny that he agreed to its terms, and does not deny making 11 monthly payments of \$4,166.67 to Harry Jeremias [JFP’s managing member] under the Side Agreement” (NYSCEF Doc. No. 29, *Memorandum of Law in Further Support of Plaintiff’s Motion for Partial Summary Judgment* at 2-3). Additionally, Taub concedes JFP made a \$200,000.00 capital contribution and that JFP has not been repaid the Contribution.

JFP argues that many of defendants’ arguments concerning the Side Agreement relate to cosmetic matters that do not affect the Side Agreement’s enforceability. In addition, JFP argues that although Taub takes issue with certain aspects of the Side Agreement, for example, a lack of JFP’s signature, he does not dispute or challenge the Operating Agreement which similarly contains the alleged issue with a lack of JFP’s signature. “Taub cannot agree to the enforceability of one instrument and dispute the enforceability of another based upon characteristics present in both agreements” (*id.* at 4).

Plaintiff argues that the Side Agreement is an enforceable contract, and defendants’ arguments to the contrary are not supported. The Side Agreement contains the necessary essential terms; there was consideration; JFP’s signature is not required, as Taub, not JFP, is the party to be bound and Taub does not dispute his signature. Additionally, the enforceability of the contract is not affected by Taub’s asserted deficiencies in the Side Agreement, such as lack of

pagination or a separate signature page. Further, as Taub does not dispute that the Side Agreement was entered into the same day and with the Operating Agreement, the Side Agreement's enforceability is not affected by the Operating Agreement's modification and amendment provision. In any event, such provision was waivable and was waived.

The “proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

“Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The role of the court in determining the “drastic remedy” of summary judgment is “issue - finding,” not “issue - determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks and citation omitted]). “However, bald, conclusory assertions or speculation and a shadowy semblance of an issue are insufficient to defeat summary judgment, as are merely conclusory claims” (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal quotation marks and citations omitted]).

“The doctrine of definiteness ‘assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement’” (*Cowen & Co. v Fiserv, Inc.*, 141 AD3d 18, 21 [1st Dept 2016], quoting *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]). “[B]efore the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained” (*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]).

“If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract” (*Cobble Hill Nursing Home*, 74 NY2d at 482 [internal citations omitted]). “Thus, definiteness as to material matters is of the very essence in contract law. Impenetrable vagueness and uncertainty will not do” (*Joseph Martin, Jr., Delicatessen*, 52 NY2d at 109 [internal citations omitted]). In determining the existence of a binding contract, the court looks not to the parties' subjective intent but to “the objective manifestations of the intent of the parties as gathered by their express words” (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977] [internal citations omitted]). “In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain” (*id.*, at 399-400 [internal citations omitted]).

The application of the principle of definiteness is sometimes elusive, as “the concept of definiteness cannot be reduced to a precise, universal measurement” (*Cobble Hill Nursing Home*, 74 NY2d at 482 [internal citation omitted]). “The standard is necessarily flexible, varying for example with the subject of the agreement, its complexity, the purpose for which the contract was made, the circumstances under which it was made, and the relation of the parties” (*id.* at 482-483 [internal citations omitted]). Where “the record demonstrates that sophisticated parties intended to be bound by an agreement, the doctrine of definiteness should not be used to defeat the bargain of the parties” (*Cowen & Co., LLC*, 141 AD3d at 22 [internal citations omitted]).

“While there must be a manifestation of mutual assent to essential terms, parties also should be held to their promises and courts should not be pedantic or meticulous in interpreting contract expressions” (*Cobble Hill Nursing Home*, 74 NY2d at 483 [internal quotation marks and citations omitted]). “Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear” (*id.* [internal citation omitted]).

Here, plaintiff met its *prima facie* burden and demonstrated that there are no genuine issues of material fact in dispute and that it is entitled to partial summary judgment as a matter of law.

Defendants fail to defeat this showing. While they refer to the agreements for their terms and conditions, they do not identify or support how those terms and conditions or other admissible evidence demonstrate the existence of a genuine material issue of fact or defeat plaintiff’s showing of entitlement to judgment as a matter of law.

Contrary to defendants’ contentions, the Side Agreement is enforceable. It is reasonably certain in its material terms, and its express terms objectively manifest the parties’ intent to be bound by it. Under these circumstances, any alleged lack of certainty or precision does not render the Side Agreement unenforceable. Contrary to defendants’ argument, the Side Agreement, signed by JTM, Taub, and Vista Cove, does not violate the modification and amendment provision of the Operating Agreement and does not render the Side Agreement unenforceable.

Similarly unavailing are Taub’s various assertions that the formatting, form or asserted omissions of the Side Agreement create issues of fact or law. For example, Taub does not cite persuasive authority for his proposition that a separate signature page renders an agreement unenforceable. Indeed, the Operating Agreement similarly presents a separate signature page. Thus, Taub does not set forth persuasive authority that for a contract to be enforceable it must contain pagination. Tellingly, Taub does not assert that provisions or pages are missing from the Side Agreement, or that there are discrepancies between the copy of the Side Agreement he attaches as an exhibit, and the copy plaintiff attaches. The existence of consideration for the Side Agreement is acknowledged and memorialized in the Side Agreement itself. Similarly, defendants noting that a promissory note does not accompany the Settlement Agreement amounts, under these circumstances, to a mere shadowy semblance of an issue that is insufficient to defeat plaintiff’s showing. To the extent, if at all, defendants raised an issue, plaintiff defeated

it in its reply. For the foregoing reasons, plaintiff’s motion for partial summary judgment on its fourth cause of action against Taub is granted. Accordingly, it is

ORDERED that plaintiff’s motion pursuant to CPLR 3212 for partial summary judgment on its fourth cause of action against defendant Judah Traub is granted; and it is further

ORDERED that plaintiff, within twenty (20) days after this decision and order is uploaded to NYSCEF, shall serve a copy of this decision and order with notice of entry upon defendants and upon the Office of the County Clerk; and it is further

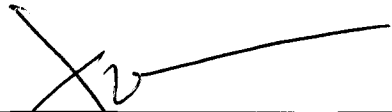
ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff JFP West LLC on its fourth cause of action and against defendant Judah Taub only in the amount of \$154,166.63, together with interest; and it is further

ORDERED that the remaining causes of action as against the remaining defendants, including defendant Judah Taub, are severed and continued; and it is further

ORDERED that service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

January 10, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
				REFERENCE