SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Paul G. Bryant v. George W. ("Tripp") Way, III, Gina Way, George Way, Kathryn Way, and Emory Hill Real Estate Services, Inc.
C.A. No. 11C-01-164 RRC

Submitted: January 20, 2012
Decided: April 17, 2012

Upon Consideration of Cross Motions for Summary Judgment.

Plaintiff Paul G. Bryant's
Motion for Summary Judgment.
GRANTED IN PART AND DENIED IN PART.

Defendants George W. ("Tripp") Way, III, Gina Way, and Kathryn Way's
Motion for Summary Judgment.
GRANTED IN PART AND DENIED IN PART.

Upon Consideration of Defendants' Motion to Sever Counts IV through VI.
DENIED AS MOOT.

Dear Counsel:

I. INTRODUCTION

Before the Court are Cross Motions for Summary Judgment arising from a real estate partnership's deterioration. The cross claims address: (1) each broker's right to particular commissions, as well as (2) whether Defendants provided funds to Plaintiff as a loan or an investment. First, the Court finds that by their agreement, the parties' agreed to share the particular commissions through June 30, 2010. Secondly, the Court determines that Defendants have not shown the funds in question were intended as a loan. Both Cross Motions are **GRANTED IN PART** and **DENIED IN PART**, consistent with this Opinion.[1] Defendants' Motion to Sever is **DENIED AS MOOT**.

II. FACTUAL HISTORY

The parties have stipulated that no material facts are in dispute. The parties differ regarding the proper inferences to be drawn from the agreed-upon facts. The parties entered into a joint stipulation of facts in November 2011. The body of the stipulation is set forth in toto below. The stipulation additionally included Exhibits A-BB, each of which the Court has not included within this Opinion, but which may be accessed in the Prothonotary.[2]

Set forth below is the joint stipulation of facts of plaintiff Paul G. Bryant and defendants George Way W. ("Tripp") Way, III, Gina Way, George Way and Kathryn Way. The parties submit this joint stipulation of facts in connection with their anticipated cross motions for summary judgment, without prejudice to their rights under Rule 56 of the Rules of this Court.

Individuals and entities referred to herein are as follows:

Bryant:	Plaintiff Paul G. Bryant
Way:	Defendant George W. ("Tripp") Way, III

[1]Initially, the Court notes that the parties' business disputes occurred without the timely advice of legal counsel and are replete with personal and professional dispute. Through this lawsuit, the Court is essentially asked to rescue business savvy parties from circumstances marred by sloppy document draftsmanship and extreme casualness. The Court is tasked with untangling unresolved contract inconsistencies and urged to restore parties financially from their informal business transactions. The involvement of counsel with the initial transactions may well have prevented the entire quarrel. Conversely, the Court notes that since their inclusion, counsel for both parties have performed admirably and with utmost professionalism as they deal with a difficult factual record.

[2] *Bryant v. Way*, N11C-01-164 Transaction No. 40796128. (Nov. 9, 2011).

Emory Hill:	Emory Hill Real Estate Services, Inc.
Facciolo:	Carmen Facciolo, Jr., Principal of Emory Hill
Clifton:	Tia L. Clifton, Office Manager at Emory Hill
Hill:	Robert Hill, Principal of Emory Hill
Iron Hill:	Iron Hill Properties, LLC
Lang:	Jeffrey Lang, Managing Member of Iron Hill

All parties agree that the documents attached hereto as exhibits are true and correct copies of physical documents and true and correct prints of electronic documents, without addition or redaction; that the signatures on physical documents attached hereto are the genuine signatures of the individuals they purport to be; that emails attached hereto as exhibits were sent and received by the individual, as indicated, on the date and at approximately the time indicated; and that all individuals had full legal capacity and competency. The parties further stipulate and agree that either party may cite from any part of any deposition transcript not cited herein so long as such citation does not create a genuine dispute of material fact.

EMORY HILL CLAIMS

1. Bryant and Way work as real estate brokers for Emory Hill.

2. In or about January 2006, Bryant and Way entered into a partnership agreement whereby they would split commissions they earned at Emory Hill between them 50/50. Bryant at 102:5.

3. The terms of Bryant and Way's partnership agreement were not documented.

4. In March 2010, Bryant and Way agreed to dissolve their partnership. Way at 12:16; Bryant at 102:21.

5. On or about March 14, 2010 Bryant and Way began discussing how the partnership would be dissolved. Way at 13:2.

6. Attached hereto as Exhibit A is an email thread between Bryant and Way that occurred on March 16, 2010.

7. In Exhibit A, where Bryant wrote "I would like both of us to sign off on this document," Bryant was referring to a document that did not then exist, but rather a document that Bryant was calling for and that he anticipated. Bryant at 104:24.

8. Attached hereto as Exhibit B is an email thread between Bryant and Way that occurred on March 17, 2010.

9. Attached hereto as Exhibit C is an email thread between Bryant and Way that occurred on March 24 and March 25, 2010.

10. Way does not recall any emails exchanged between himself and Bryant after March 25, 2010 on the issue of the termination of their partnership. Way 52:4.

11. Bryant wanted a document to be prepared by Emory Hill to reflect the agreement with Way because he "felt more comfortable having someone from the company" draft an agreement to ensure that "there wouldn't be any discrepancies." Bryant at 118:20-119:1.

12. Facciolo, one of Emory Hill's principals, testified that the dissolution of Bryant and Way's partnership was a personnel matter of high importance to Emory Hill. Facciolo authorized Clifton, Emory Hill's office manager and head of human resources to draft a document to finalize Bryant and Way's agreement. Facciolo at 28:6, 25:15.

13. Attached as Exhibit D is an email from Bryant to Clifton dated March 26, 2010.

14. Attached as Exhibit E is an email from Clifton to Way dated March 30, 2010.

15. Attached as Exhibit F is an email from Way to Clifton dated March 31, 2010, with email attachments.

16. Way does not recall why he excluded the Marks on O'Neill listing on the chart that he originally created. Way at 65:22.

17. Clifton prepared the document referenced in paragraph 12 in memorandum format because she thought it should look that way and included signature blocks with the heading "Agreed to and accepted by" at Bryant's request. Clifton at 15:12; 17:23.

18. Facciolo testified that it would not be typical for signature blocks to be included in memoranda, but that Way and Bryant were "trying to finalize an agreement between themselves." Facciolo at 30:13.

19. Attached as Exhibit G is an email from Clifton to Bryant and Way, with a cc to Facciolo and Hill, dated April 1, 2010, with email attachment.

20. Attached as Exhibit H is an email from Way to Clifton dated April 1, 2010, with attachment. Bryant was not cc'd by Clifton on Exhibit H.

21. The attachment to Exhibit H reflects changes to the Memorandum made by Way, so that Way's additions are underlined and deletions appear in the "bubbles."

22. Way does not know the significance of the March 25, 2010 effective date for the termination that he, Way, requested be placed in the Memorandum. Way at 53:8, 11-12, 54:14, 55:16.

23. Way does not know why he deleted the provisions about reimbursing Bryant from the Memorandum. Way at 59:13, 24.

24. Way testified that the reason that he inserted the language in the bullet points on the bottom of page 2 of the attachment to Exhibit H that states, "Below are deals to be split equally and their respective dates. STATE TRANSACTIONS THAT ARE SIGNED BY 6/30/10" was because, in his opinion, that was the deal that was "negotiated and agreed to." Way at 59:4.

25. Attached as Exhibit I is an email thread between Clifton and Bryant dated April 2, 2010 and April 5, 2010. Facciolo and Hill were cc'd on certain of the emails in Exhibit I, as reflected therein.

26. Through the email thread attached as Exhibit I, Clifton kept Bryant in the loop on changes to the memorandum as reflected in such email. Bryant at 125:20.

27. Attached as Exhibit J is an email thread between Clifton and Tripp dated April 5, 2010.

28. Attached as Exhibit K is an email from Clifton to Bryant and Way, cc'd to Facciolo and Hill, dated April 5, 2010, with email attachment.

29. The June 30, 2010 cut-off date was inserted by Way in Exhibit H hereto, was incorporated into version 3 of the Memorandum, and was carried over into version 4 of the Memorandum.

30. Way does not recall how he chose a June 30, 2010 cutoff date. Way at 46:15.

31. Attached as Exhibit L is an email chain including an email from Facciolo to Way and Bryant, dated April 12, 2010.

32. Facciolo testified that he believed, as of April 12, 2010, "an agreement was not finalized" between Way and Bryant. Facciolo at 49:12. Facciolo testified that as of April 13, 2010, it was his understanding the only issue remaining to be resolved was with respect to the MOOC Commission.

33. Bryant agreed that as of April 12, Facciolo did not believe that an agreement between Bryant and Way had been finalized. Bryant at 128:24.

34. Attached as Exhibit M is an email from Way to Clifton dated April 13, 2010, with email attachment.

35. Attached as Exhibit N is an email thread among Clifton, Facciolo and Bryant, dated April 13, 2010, with email attachment representing Version 5 of the Memorandum.

36. Attached as Exhibit O is an email thread among Bryant, Clifton and Facciolo, dated April 21, 2010.

37. Clifton believed that as of April 21, Bryant and Way still had not finalized an agreement because the terms of the agreement were fluid and constantly changing. Clifton at 49:14.

38. Bryant stated that as of April 21, he understood that the Memorandum would not be final until it was fully executed. Bryant at 136:11.

39. Bryant believed that the matter had been delayed for weeks and that it was time to get the document finalized. *Id*. at 137:3-5.

40. Attached as Exhibit P is an email from Way to Clifton, dated April 23, 2010, with email attachments.

41. Attached as Exhibit Q is a memorandum dated April 23, 2010 (the "Memorandum").

42. Prior to signing the Memorandum, Bryant added by hand the words "of Delaware" between "State" and "Transactions" on page 2 of the Memorandum.

43. Bryant made that handwritten notation on the signed Memorandum for "clarification purposes" to ensure that the bullet point in question referred to the State of Delaware tenant in particular in the University Plaza property. Bryant at 147:17.

44. Facciolo and Clifton both believed that the Memorandum represented the final agreement between Bryant and Way because it has signatures of both parties and initials from Bryant. Facciolo at 50:3; Clifton at 53:4.

45. Clifton believed that Way and Bryant were both involved equally in the process of preparing and finalizing the Memorandum, and that Way never tried to sneak any language into it. Clifton at 51:22; 52:17.

46. Clifton stated that Bryant never indicated to Clifton that he didn't believe that the Memorandum was necessary. *Id*. at 56:2.

47. Commission payments by Emory Hill arising from the State of Delaware at University Office Plaza transactions totaled $87,703.75. Of that amount, Emory Hill paid $50,126.90 to Way and interplead $37,576.85 with the Prothonotary of this Court.

48. In July 2010, during a marketing meeting Bryant noticed that Emory Hill had paid Way commissions related to the State of Delaware transactions in University Plaza. Bryant at 149:16-20.

49. In July 2010, after Bryant noticed that Emory Hill had paid Way (but not Bryant) commissions related to the State of Delaware Transactions at University Plaza, Bryant approached Way and the Emory Hill principals and told them that he did not think that such payment was consistent with Bryant and Way's agreement. Way disagreed. *Id*. at 150:9.

50. Facciolo first became aware of the issue involving the cut-off date in the summer of 2010. Facciolo at 20:12.

51. Bryant went to Facciolo's office and said he thought a State of Delaware deal was going to be signed and to see if Way was going to give to Bryant any of the commission. *Id*. at 20:17.

52. When Bryant first approached Facciolo about the commissions related to the State of Delaware lease in University Plaza, Bryant did not indicate to Facciolo that he believed that there was an error in the Memorandum regarding the June 30, 2010 cutoff date. *Id*. at 21:3.

53. A few weeks later, Bryant approached Facciolo again and told him that he was entitled to 50% of the commission related to the State of Delaware lease in University Plaza. *Id*. at 24:5.

54. Bryant consistently maintained that he was entitled to 50% of the commissions for the State of Delaware lease at University Plaza. Facciolo at 22:22. Facciolo told Bryant that he should refer to the terms of the Memorandum. Bryant told Facciolo that he, Bryant had made a mistake regarding the 2010 cut-off date and that he did not catch the mistake. Facciolo at 23:5-19.

55. On or about October 5, 2010, Bryant, Facciolo, Hill and Way had a meeting in Emory Hill's office to attempt to resolve the issue, but no agreement was reached. Facciolo at 23:1.

56. Emory Hill sought the advice of its counsel, and on or about November 29, 2010 advised Bryant that Emory Hill deemed itself bound to distribute the remaining $37,576.85 of the distributable share of the Chopin Commission to Way in accordance with the terms of the Memorandum. Facciolo at 63:8.

IRON HILL CLAIMS

57. Iron Hill is a Delaware limited liability company formed to own a parcel of real property known as Twin Lakes.

58. Lang is the managing member of Iron Hill. Lang at 17:6

59. The Twin Lakes property is located in Newark, Delaware and was originally conceived sometime in 2005 to be an 80-plus unit age-restricted housing development. *Id*. at 16:10.

60. The Twin Lakes project has been revised and is now divided into two separate parcels, one that is age-restricted and one that is not. *Id*. 16:17.

61. Although construction has begun and some buildings have been built, Iron Hill has never been able to offer any return to its members on their investment. *Id*. at 16:20-24; 12:16.

62. Iron Hill has never paid any dividends or distributions to its members. *Id*. at 23:8.

63. Iron Hill's internal affairs are governed by the Operating Agreement that is attached hereto as Exhibit R.

64. Iron Hill has five members, and at all times since its inception has only had five members. Lang at 43:7-10. The five members of Iron Hill, as identified in the Operating Agreement, are: Lang; Robert G. Edwards, as Trustee for the Revocable Trust of Robert G. Edwards U/A dated September 26, 2006; David G. Bull; David J. Grayson; and Bryant.

65. Iron Hill's members' percentage ownership interests are as follows: Robert Edwards 25%; Lang 25%; David Grayson 16.67% David Bull 16.67%; and Bryant 16.67%. *See* Exhibit S, Iron Hill's responses to subpoena.

66. Way does not recall when or how he first became aware of the Twin Lakes project or how he went about investigating the Twin Lakes Project. Way at 75:9, 13, 16-19; 77:5.

67. Way does not recall when he first discussed Twin Lakes with Bryant. Way at 80:1.

68. Way does not recall how much money Bryant requested in connection with the Twin Lakes project. Way at 87:7-8.

69. On July 12, 2007, George Way and Kathryn Way delivered a check to Bryant in the amount of $26,502.50. That same date, Way and Gina delivered a check to Bryant in the amount of $26,500.00.

70. Attached as Exhibit T is an email chain containing an email from Lang to members, including Bryant.

71. On November 2, 2007, Bryant e-mailed Way and asked if he and George Way and Kathryn Way could provide him checks for $12,500 each to deposit into "our account." *Id*.

72. On November 2, 2007, George Way and Kathryn Way delivered a second check to Bryant in the amount of $12,500.00. Also that day, Way and Gina delivered a check to Bryant in the amount of $12,500.00.

73. None of the funds given to Bryant by George Way, Kathryn Way, Gina, and Way were gifts.

74. There is no documentation specifying how these funds were to be treated.

75. No party has produced any documentation related to the financial performance, either prospective or current, of Iron Hill that was or was not provided by or to any party to this matter.

76. No party has produced any marketing material, brochures, tax documentation, or otherwise that was or was not provided by or to any party to this case.

77. No documentation has been produced, by Iron Hill or Bryant, suggesting that Bryant sought the consent of Iron Hill's members or manager to transfer a portion of his interest to another person.

78. As of August 17, 2011, Lang was not aware of any transfer of any of Iron Hill's member's interests to anyone. Lang at 45:21.

79. As of August 17, 2011, no one had asked for a waiver of Section 9.1 of Iron Hill's Operating Agreement. Lang at 45:14.

80. As of August 17, 2011, no written consent for transferring a member's interest was requested or executed by Iron Hill's members. *Id*. at 46:21. Lang also stated that, as managing member, he was not aware of any beneficial owners of an interest in Iron Hill, other than possibly the bank. Lang at 48:6-8.

81. Lang was not aware of any member transferring an interest in Iron Hill either before October 1, 2007, a cut-off date identified in Iron Hill's Operating Agreement, or after October 1, 2007. Lang at 49:11-18.

82. Lang stated that "[p]ursuant to [Iron Hill's Operating Agreement] not only would I have to be aware of [a transfer of a member's interest] but all the members would have to be aware of it." *Id*. at 49:21-23.

83. Lang further stated that until August 17, 2011, he was not aware of any transfer of Iron Hill interests to Way, Gina Way, George Way or Kathryn Way and that any such transfer was not authorized and not voted on by the members. Lang at 54:14-17.

84. Lang stated that, as manager of Iron Hill, he would not recognize any purported beneficial ownership interest in Iron Hill that was not transferred in accordance with its Operating Agreement. Lang at 63:22.

85. Bryant never asked Lang if the Ways were permitted to purchase an equity interest in Iron Hill. Bryant at 76:1.

86. Bryant said that as far as he knew, since Iron Hill's inception, there has not been a waiver of the transfer restrictions set out in Section 9.1 of Iron Hill's Operating Agreement. Bryant at 84:6.

87. Bryant stated that he understood the terms of Iron Hill's Operating Agreement when he signed it. Bryant at 85:17-18.

88. On or about August 3, 2007, Way contacted Benjamin J. Berger, a Delaware attorney with whom he had been involved in various commercial real estate transactions, to ask him for a form operating agreement for a limited liability company. Way testified he does not recall doing this. Way at 68:16-17, 72:24.

89. Attached as Exhibit U is an email thread dated August 3, 2007, from Amy Weiser, Mr. Berger's legal assistant, to Way, attaching a form of operating agreement for a limited liability company.

90. During the time that Way and Bryant were partners in Emory Hill, they talked about numerous real estate investment opportunities. Bryant at 94:22.

91. At some point Way and Bryant discussed potentially purchasing a residential property in the Little Italy neighborhood of Wilmington, Delaware. Bryant at 95:19; Way at 69:13.

92. Way did not request the form of limited liability company agreement in response to the possibility of a joint investment in the Little Italy property and does not recall what if any event prompted him to request a form of limited liability company agreement. Way at 70:19; 71:2, 6; 74:1.

93. Way and Bryant never purchased a property in the Little Italy neighborhood of Wilmington, Delaware.

94. Between 2007 and March of 2010, Bryant had no written communications with the Way Defendants regarding the funds related to Iron Hill.

95. Attached as Exhibit V is an email dated March 3, 2010 from Bryant to Way attaching a letter from Lang to the Planning Director of the City of Newark. Way does not recall forwarding Exhibit V to Way's parents. Way at 95:18.

96. Bryant testified that knew how to get information directly to George Way and Kathryn Way, but that he sent all information related to Iron Hill to Way. Bryant at 32:24.

97. Attached as Exhibit W is an email from Bryant to Way dated March 3, 2010.

98. Attached as Exhibit X is a March 16, 2010 email thread between Way and Bryant.

99. Way has no specific or general recollection of asking Bryant for repayment of funds relating to Iron Hill prior to March 16, 2010. Way at 97:21, 24.

100. Neither George Way nor Kathryn Way asked or authorized Way to draft the March 16, 2010 e-mails on their behalf. Kathryn Way at 18:5; George Way at 21:13.

101. Attached as Exhibit Y is an email dated April 15, 2010 between Way and Bryant.

102. Attached as Exhibit Z is an email dated April 16, 2010 between Kathryn Way and Bryant.

103. In response, Bryant asked George Way and Kathryn Way to meet him at the Twin lakes site. Kathryn Way at 24:8.

104. Kathy asked Bryant for directions how to get to Twin Lakes. *Id*. at 30:14.

105. On April 25, 2010, George Way and Kathryn Way met with Bryant at the Twin Lakes site. Bryant at 29:8.

106. During that meeting Bryant provided some documentation to George Way and Kathryn Way. Kathryn Way at 24:19.

107. The only documentation produced by any party that was exchanged between Bryant and George and Kathryn Way during the April 25 meeting is a Development Agreement between Cornell 19711 LLC and Iron Hill, a copy of which is attached hereto as Exhibit AA.

108. During the April 25 meeting, the concept of beneficial ownership was not discussed. Bryant at 34:6.

109. The April 25 meeting ended after George Way, Kathryn Way and Bryant disagreed as to whether the funds provided to Bryant constituted an investment in Iron Hill or a personal loan to Bryant.

110. Attached as Exhibit BB is an email from Kathryn Way to Way dated June 28, 2010.

111. Kathryn Way testified that the 8% referenced in her June 28 e-mail refers to interest on her purported loan to Bryant. Kathryn Way at 21:10. However, Kathryn Way never reached an agreement with Bryant regarding any specific interest rate. Id. at 21:10.

112. Kathryn Way and George Way have never claimed a loss or otherwise accounted for the $39,000 she and George Way delivered to Bryant on her income tax returns. *Id*. at 23:8-12; *see also* George Way at 25.

113. Gina Way and Way file their taxes jointly as a married couple and none of their income tax returns since 2007 make any reference to the Twin Lakes project. Gina Way at 21:20-22:2.

III. PROCEDURAL HISTORY

Plaintiff filed suit in January 2011. Counts I through III of the Complaint address the Emory Hill commissions, while Counts IV through VI involve the Iron Hill claims. Emory Hill was originally sued under the Complaint but was dismissed without prejudice when Emory Hill agreed to interplead unpaid commissions with this Court.

The remaining Counts II and III seek damages for breach of contract and unjust enrichment arising from the Email Agreement, while Count IV seeks a declaratory judgment against the remaining Defendants that the 2007 payments to Bryant were not loans, but were co-investments in Iron Hill. Counts V and VI seek damages from the Defendants for their failure to provide additional capital contributions to Iron Hill.

In March 2011, Defendants answered the Complaint and asserted counterclaims for damages arising out of the Iron Hill transactions. Plaintiff answered the counterclaims. Defendants moved to dismiss Counts II and III under Rule 12(b)(6) and to sever Counts IV through VI under Rule 21. The Court heard argument on the motions to dismiss and to sever in April 2011 and in May 2011 denied the motion to dismiss.[3] The motion to sever was deferred with the parties' agreement and remained pending until now.

[3] *Bryant v. Way*, 2011 WL 2163606 (Del. Super. May 25, 2011). The Court's finding on Defendants' motion to dismiss is not inconsistent with the present Opinion. Plaintiff reminds the Court of its statement in the course of denying dismissal that "the email agreement contains all the necessary elements for a valid contract." *Id*. at *4. That conclusion does not support Plaintiff's piggybacked contention that the email agreement's validity is presently predetermined. A motion to dismiss requires the Court to consider the "Plaintiff's allegations and all reasonable inferences

In November 2011, the parties submitted their joint stipulation of facts and unsuccessfully attempted to mediate the dispute. The present Cross Motions were submitted in December 2011 and the parties completed briefing in January 2012.

IV. THE PARTIES' CONTENTIONS

A. Plaintiff's Contentions

1. Emory Hill Claims

In essence and distilled from Plaintiff's numerous claims, Plaintiff contends that the email correspondence constituted an enforceable binding contract and that the subsequent memorandum was an unenforceable attempt to modify the email provisions. Specifically, Plaintiff argues that the email correspondence fulfilled all the elements for a valid contract and unambiguously set June 30, 2011 as the termination date for commissions from the State of Delaware Transactions. Plaintiff contends that the memorandum was not a condition precedent to contract formation because the subsequent modifications did not negate the prior email agreement's validity.

Alternatively, Plaintiff contends that if the Court finds the memorandum constituted a valid contract, the memorandum must be rescinded because of unilateral mistake. Plaintiff asserts that rescission at law is appropriate for mistake because it would return the parties to the status quo existing before the contract's formation. Plaintiff also contends that the memorandum is subject to reformation as a mutual mistake because the June 30, 2010 date was a scrivener's error.

2. Iron Hill Claims

Plaintiff asserts that Defendants have been unable to establish evidence sufficient for a fact finder to find a loan agreement. Plaintiff asserts that the evidence demonstrates instead that the funds were delivered to Plaintiff for joint

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from the complaint in the light most favorable to Plaintiff." *Id. at *5.* No such similar benefit of the doubt that "all well-pled allegations are true" is currently present and therefore, the Court need not necessarily reach an identical conclusion. *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978). The factual record was subsequently developed and evidences both the agreement's continued evolution beyond the email provisions, as well as the email correspondence's incompleteness.

investment. Plaintiff contends that even if the joint investment violated Iron Hill's operating agreement, it does not follow that the parties instead intended a loan agreement.

B. Defendants' Contentions

1. Emory Hill Claims

In essence, and distilled from the numerous claims, Defendants contend that Plaintiff's Emory Hill claims fail because the email correspondence did not form a binding contract by failing to provide all essential terms and satisfy a condition precedent to formation. Defendants assert that the parties' subsequent conduct including revising terms, agreeing to create a memorandum, and then drafting a signed writing, were preconditions to a binding agreement. Additionally, Defendants assert that the email correspondence constitutes parol evidence because the memorandum was intended as the complete and binding contract.

2. Iron Hill Claims

Defendants contend Plaintiff did not intend the funds to be equity investments and that the Defendants at all times considered the funds to be personal loans to Plaintiff. Defendant argues that because the purported sale of a beneficial ownership interest in Iron Hill was in contravention to Iron Hill's operating agreement, a joint investment is unenforceable.

V. STANDARD OF REVIEW

On cross motions for summary judgment, summary judgment is appropriate when there is no genuine issue of material fact that requires a trial and a party is entitled to judgment as a matter of law.[4] Under Superior Court Civil Rule 56(h), "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions" and "will grant summary judgment to one of the moving parties."[5]

The parties have agreed there are no material facts in dispute. Inferences drawn by the Court from the underlying facts must be viewed in the light most

[4] *Wygant v. Geico Gen*., 27 A.3d 553 (Del. 2011) (TABLE).
[5] *Scottsdale Ins. Co. v. Lankford,* 2007 WL 4150212 at *3 (Del. Super. Nov. 21, 2007).

favorable to the non-moving party.[6] A non-movant must show more than "metaphysical doubt as to the material facts."[7] Rather, the non-moving party must demonstrate sufficient evidence for a jury to return that verdict in its favor.[8] If the entire record could not lead a reasonable jury to find for the non-moving party, summary judgment must be granted.[9]

VI. DISCUSSION

THE EMORY HILL CLAIMS

A. The email correspondence did not form a binding contract because the parties intended to reduce the email correspondence to a final enforceable memorandum.

A valid contract requires the parties' intent to be bound accordingly, and therefore, the contract must include sufficiently definite terms, and be supported by consideration.[10] The touchstone is whether a reasonable negotiator asserting the contract's existence would have concluded that the parties reached agreement on every essential term and that negotiations were concluded.[11]

Evaluating whether a contract exists requires taking into account "all of the surrounding circumstances," including the "formality and completeness of the document . . . that is asserted as culminating and concluding the negotiations."[12] "Agreements made along the way to a completed negotiation, even when reduced to writing, must necessarily be treated as provisional and tentative. Negotiation of complex, multi-faceted commercial transactions could hardly proceed in any other way."[13]

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[6] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).
[7] *Id*. a 586.
[8] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986).
[9] *Matsushita*, 475 U.S. at 587.
[10] *Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)(citation omitted).
[11] *Patel v. Patel*, 2009 WL 427977 *1(Del. Super. Feb. 20, 2009) citing, *Leeds v. First Allied Connecticut Corp*, 521 A.2d 1095, 1097 (Del. Ch. 1986).
[12] *Leeds*, 521 A.2d at 1101-02.
[13] *Id,* citing *International Telemeter Corporation v. Teleprompter Corporation,* 592 F.2d 49 (2d Cir.1979) (Friendly, J., concurring).

"The terms contract and agreement are not synonymous."[14] An agreement is "a factual conclusion that two minds have come mutually to accept terms of a proposed contract."[15] Alternatively, "contract . . . means a legal conclusion that the parties have reached an agreement with respect to ***all material terms*** and have expressed an intention to bind themselves to perform the promised acts."[16] "Where one of the contracting parties states that he will not be bound until an event such as the signing of a memorandum that might not otherwise be required occurs, he will not be bound before that condition is satisfied."[17] "It is everywhere agreed that if the parties contemplate a reduction to writing of their oral agreement before it can be considered complete, there is no contract until the writing is signed."[18]

The Court must determine the parties' intent despite the admitted various inconsistencies between the email correspondence and memorandum.[19] The only disputed provision is the State of Delaware commission sharing termination date. While the email correspondence unequivocally demonstrates that the parties agreed ***at one time*** to share commissions through June 30, 2011, the memorandum's inconsistency undermines Plaintiff's contention that June 30, 2011 remained under agreement.[20] Plaintiff mentions that during email correspondence, Way agreed to print and sign the email thread to demonstrate his assent. However, when Way

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[14] *Seigman v. Columbia Pictures Entertainment, Inc*., 576 A.2d 625, 631 (Del. Ch. 1989).
[15] *Id.* (internal quotations omitted).
[16] *Id.* (internal quotations omitted)(emphasis added).
[17] *Transamerican Steamship v. Murphy*, 1989 WL 12181 (Del. Ch. Feb. 14. 1989).
[18] 1 Williston on Contracts §28 (4th ed.).
[19] The parties clearly began to draft a contract to dissolve their partnership through email. Effectively, if the parties never drafted a memorandum, only the email provisions would prevail. If the parties reduced the email provisions verbatim, without altering the terms, the email provisions would still prevail. Moreover, even if the termination date for the State of Delaware commissions was the ***only*** modification in drafting, the Court might find the inconsistency was a mere scrivener's error and modify the memorandum. However, none of those scenarios appear from the undisputed facts.
[20] The record's only explicit negotiation regarding the termination date occurred during email correspondence and nothing provided explicitly details later agreement to a different date. However, absence from the record does not negate the possibility that a new agreement was reached outside the record, even if improbable. Plaintiff argues that because Plaintiff was so adamant that the date not be changed in email, he would have never agreed to a later modification. That he was previously adamant does not foreclose a possible change of heart as the agreement and negotiations evolved. Further, it is expected that one with such an adamant stance would notice any modification to that provision if it contravened their stance.

offered to sign, the parties had already contemplated reducing their agreement to a memorandum and ultimately the email thread was never signed.[21]

The parties' conduct demonstrates that the email provisions did not encapsulate either their complete or final agreement. Prior to finalizing the memorandum, the parties generated several distinct versions. During revisions, several changes were made including modifications to include a previously neglected provision. Plaintiff himself modified the memorandum and offered revisions immediately prior to signing the document.[22] It would have been unreasonable for either party to regard the email correspondence as constituting their final agreement when both continued to modify provisions and anticipate a future memorandum. In comparing the email correspondence's finality against the memorandum, the email correspondence's overarching informality is overcome by the memorandum's relative formality and comprehensiveness. The parties' conduct demonstrates that both parties viewed the memorandum as culminating their negotiations. Plaintiff's assertion that he viewed the formal memorandum as unnecessary is not compelling when contrasted with Plaintiff's repeated suggestions that the parties' generate a formal signed memorandum.

While the email correspondence provided framework for an agreement and partial agreements were made "along the way"[23], those agreements were merely provisional and tentative. At best, the email correspondence generated consensus regarding ***most*** of the eventual contract. The email correspondence lacked finality because it was informal, incomplete, and required revision. In contrast, the memorandum provided the parties' consensus regarding all material terms, even those neglected in the email correspondence. The parties continued to work toward a finalized contract beyond when Plaintiff contends the contract was finalized. If the parties intended the email correspondence as the complete final agreement, it

[21] Through emails on March 16, 2010, two days after the parties began to discuss dissolving the partnership, Plaintiff mentioned that the parties should sign off on a future document memorializing the anticipated agreement. Additionally, Facciolo asserted it was necessary for the parties to include signature blocks on the memorandum because the parties intended to finalize an agreement. Facciolo's statement demonstrates his understanding that a final agreement had not been generated from the email correspondence.

[22] Plaintiff contends he only memorialized the email provisions rather than re-negotiate the email correspondence. Whether Plaintiff intended to modify the terms, the fact remains that the agreement was modified, that Plaintiff was aware the memorandum did not recite the email correspondence verbatim, and yet Plaintiff signed the memorandum.

[23] *Leeds*, 521 A.2d at 1101-02.

would be inconceivable to continue revising terms and modifying provisions.[24] Therefore, the Court finds that the memorandum, rather than the email correspondence, represents the final binding agreement between the parties.[25]

B. Plaintiff's unilateral and mutual mistake defenses fail because Plaintiff cannot prove either unconscionability or that ordinary care was exercised, and cannot assert a scrivener's error by clear and convincing evidence.

Plaintiff alternatively claims that if the Court determines the memorandum controls, it should be rescinded because of unilateral mistake.[26] This Court recognizes the doctrine of rescission and may rescind a contract and enter an order restoring a party to their original condition by awarding money or other deprived property.[27] However, this Court lacks jurisdiction to order equitable rescission, which in addition to the legal remedies, typically requires that the court cause an instrument . . . to be set aside and annulled."[28]

To prove unilateral mistake, a plaintiff must demonstrate a specific prior understanding which is materially different from the written agreement by clear and

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[24] Plaintiff contends that the modifications to the email provisions are superfluous and do not merit a distinct interpretation. However, even if the Court should assume *arguendo* that the modifications only preserved the email provisions, the agreement's form changed, the agreement's words changed, and the parties signed the memorandum. All of these demonstrate finality not present during the email correspondence.

[25] Plaintiff argues that Defendant has been unable to prove that Plaintiff ever agreed to change the termination date, however, while that may be true, the burden is on Plaintiff to establish that the agreement did not change. Plaintiff cannot prove that the termination date agreement remained constant and with the contract modifications in the interim, the Court cannot reach Plaintiff's bold assertion.

[26] It is unclear, whether the rescission Plaintiff seeks is within this Court's jurisdiction. If the Court ordered that contract's rescission, the partnership dissolution memorandum would be a nullity. Theoretically, that action may impact partnership property rights extending beyond this Court's jurisdiction. However, because the Court recognizes the memorandum as the controlling contract and rejects unilateral mistake, the Court need not reach the jurisdictional issues.

[27] *See USH Ventures v. Global Telesystems Group, Inc*., 796 A.2d 7, 18 (Del. Super. 2000)("the doctrine of rescission (both a cause of action and a defense) has also been recognized at law in Delaware."); *See also Monsanto Co. v. Aetna Cas. and Surety Co.,* 1989 WL 997183, *1 (Del. Super. Sept. 29, 1989) (holding that "while claims for rescission, reformation and avoidance will usually fall within the jurisdiction of the Chancery Court, the claims for such remedies brought in a case before a Court of law will not automatically strip that Court's jurisdictional power").

[28] *Medek v. Medek,* 2008 WL 4261017 *7 (Del.Ch. Sept 10, 2008) (holding the Court of Chancery has ancillary jurisdiction over a breach of contract claim under the cleanup doctrine because it was closely intertwined with the fraudulent transfer claim requesting equitable relief).

convincing evidence.[29] Plaintiff must also demonstrate that plaintiff was mistaken and that the opposing party knew of the mistake and remained silent.[30] Rescission of an agreement based upon unilateral mistake is available if (1) enforcement of an agreement is unconscionable; (2) the mistake relates to the substance of the consideration; (3) the mistake occurred regardless of the exercise of ordinary care; and (4) it is possible to place the other party in the status quo.[31]

Unilateral mistake is inapplicable because Plaintiff cannot fulfill either the first or third elements required for rescission. The Court agrees both that the commission termination date is a material term and that the parties agreed by email that the termination date would be June 30, 2011. However, rescission is not available because even with a different termination date, the memorandum is not unconscionable, nor has Plaintiff demonstrated that he exercised ordinary care. For the memorandum to be unconscionable, Plaintiff must have not had a meaningful choice and the contract terms must have unreasonably favored Defendant.[32] Generally, a claimant asserting unconscionability asserts they were overcome by another parties' superior bargaining power. However, inequity in bargaining power alone without unreasonableness does not equate to unconscionability.[33] The test for unconscionability is "whether the provision amounts to the taking of an unfair advantage by one party over the other."[34]

Here, both parties are real estate brokers and former partners. There is no disparity in bargaining power. There is nothing unreasonable about the memorandum. While the date discrepancy has resulted in a dispute over a substantial sum, the financial implications alone do not make the agreement unreasonable.

Finally, and notably, Plaintiff has not demonstrated with any certainty that he exercised ordinary care when he signed the memorandum. For rescission to be appropriate, "the aggrieved party's mistake [must] not be the result of inadvertence which could have been avoided had ordinary care been exercised."[35] Plaintiff was aware that the memorandum did not reflect the email correspondence verbatim and

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[29] *Cerberus Intl. Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151-52 (Del. 2002).
[30] *Id*. at 1151.
[31] *In re Enstar Corp*., 604 A.2d 404, 411 (Del. 1992) (quoting Williston on Contracts § 1573 (3d ed. 1970)).
[32] *Tulowitzki v. Atlantic Richfield Co*., 396 A.2d 956, 960 (1978).
[33] *Id.*
[34] *J.A. Jones Construction Co. v. City of Dover*., 372 A.2d 540, 552 (1977).
[35] *Burge v. Fid. Bond & Mortg. Co*., 648 A.2d 414, 420 (Del. 1994).

was on notice of its modifications. Particularly, because the termination date had been contested through email, Plaintiff should have been especially vigilant to ensure the memorandum included the accurate date. While in other circumstances a party's failure to notice a changed date might be a minor oversight, Plaintiff's oversight of the termination date is major considering Plaintiff's emphatic stance regarding the date. That Plaintiff did not notice the termination date despite its importance during negotiations bespeaks Plaintiff's lack of ordinary care. Plaintiff's lack of ordinary care is fatal to his unilateral mistake defense.[36]

Separately, and mentioned by Plaintiff merely in passing, Plaintiff asserts that a mutual mistake makes the memorandum invalid because a scrivener's error caused a substitution of the June 30, 2010 termination date.[37] A scrivener's error is a mutual mistake where a modified term is included simply by a drafter's mistake. Where a scrivener's error is alleged, the parties generally seek reformation to reflect the parties' true intent and thereby correct the erroneous instrument, rather than rescission.[38] Reformation does not create a new contract, but instead effectuates the parties' original intent.[39]

A complaint seeking reformation because of mutual mistake, such as a scrivener's error, is only valid if "it alleges: (i) the terms of an oral agreement between the parties; (ii) the execution of a written agreement that was intended, but failed to incorporate the terms; (iii) the parties' mutual but mistaken belief that the writing reflected their true agreement; and (iv) the precise mistake.[40]

Plaintiff cannot demonstrate the June 30, 2010 date was included merely by scrivener's error. While it is entirely possible that a scrivener might mistakenly include an incorrect date, the evidence is not clear that such an error occurred. Fundamentally, a mutual mistake requires that the contract fail to reflect the intent of ***both*** parties.[41] Defendant stated he sought to include the June 30, 2010 date

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[36] Plaintiff asserted that Defendant inserted the language unilaterally and hints it was included in bad faith. Without sufficient proof that Defendant was acting in bad faith, the Court cannot reach any conclusion in that regard.

[37] Like with unilateral mistake, it is similarly unclear whether the Court has jurisdiction to effectuate a reformation without impugning additional rights such that equity jurisdiction is required. However, the Court similarly need not reach this issue.

[38] *In re Will of McCall,* 398 A.2d 1210, 1215 (Del. Ch.1978).

[39] *In re Will of McCall,* 398 A.2d at 1215.

[40] *Envo, Inc. v. Walters*, 2009 WL 5173807 (Del. Ch. Dec. 30, 2009)

[41] See *Cerberus Int'l, Ltd*., 794 A.2d 1141, 1151 (Del. 2002) ("the plaintiff must show that ***both parties*** were mistaken as to a material portion of the written agreement')(emphasis added).

because that was the deal "negotiated and agreed to."[42] Since the parties stipulated to the facts in this case and nothing evidences otherwise, the Court must construe Defendant Tripp's statement as meaning that the June 30, 2010 termination date reflected the parties' intended bargain.[43]

Finally, Plaintiff's assertion that the scrivener modified the termination date strains credulity. The alleged error fundamentally alters the entire agreement and directly impacts an adamantly negotiated provision. This is not the type of error one would expect real estate brokers to overlook. If Plaintiff insisted that commissions on State of Delaware transactions be split through June 30, 2011, Plaintiff must be held to some due diligence standard to ensure the agreement reflected his intended bargain. A unilateral or mutual mistake must be proven by clear and convincing evidence.[44] The Plaintiff has failed to meet that burden as to both and therefore, the memorandum agreement is controlling and not subject to defenses.

Therefore, for all the reasons stated in this Opinion, Defendant's Motion for Summary Judgment regarding the Emory Hill claims included within the Complaint as Counts I through III is **GRANTED** and Plaintiff's cross Motion for Summary Judgment is **DENIED**. The memorandum agreement controls the parties' rights. Commissions interplead with this Court are payable to Defendant in accordance with the memorandum.

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[42] Joint Stip. of Facts at ¶24.

[43] Neither the parties' joint stipulation of facts nor the limited deposition transcripts included in briefing provide any context to Defendant's statement that he believed the June 30, 2010 date represented the term "negotiated and agreed to." *Id*. It is possible that Defendant's precise statement was that the June 30, 2010 date was agreed to in the email correspondence. That would infer a different meaning since the email correspondence would contradict that understanding. However, because no context is provided for Defendant's statement, the Court cannot reach that conclusion. Conversely, it is possible that during memorandum preparation the parties' modified the termination date. Regardless, because the standard requires clear and convincing evidence for a mutual mistake, the lack of clarity of Defendant's comment is immaterial.

[44] *Cerberus Int'l, Ltd*., 794 A.2d 1141, 1151 (Del. 2002) citing Restatement (Second) of Contracts § 155 cmt. c (1979) (requiring "the trier of the facts to be satisfied by 'clear and convincing evidence' before reformation is granted").

THE IRON HILL CLAIMS

A. Defendants have failed to prove the parties intended a loan agreement rather than a joint investment.

When a contract purpose is to facilitate lending money, the contract's essential terms include the loan's duration, interest rate, payment method, and any security.[45] A contract's existence "is to be determined from the nature of the dealings of the parties."[46] As previously explained, "the Court shall deem [cross motions for summary judgment] to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions" and "will grant summary judgment to one of the moving parties."[47]

The unique procedural posture of this case dictates that the Court's discretion regarding the parties' Iron Hill arrangement is limited. The Court has been asked by the parties to determine whether the transaction was a loan or an investment. The parties have stipulated that the Iron Hill arrangement was not a gift. The parties have argued that this Court should find that the Iron Hill payments were either a loan or an investment; no party has suggested that the Court, in the particular framework of this case, could theoretically find that the evidence is insufficient to find the existence of either an investment or a loan.

Cross motions for summary judgment are treated as a stipulation for a decision, and the Court must grant one of the cross motions and deny the other. The parties have stipulated that no material facts are in dispute. Therefore, the Court must balance the parties' competing claims as stated, to find one arrangement over the other. In so proceeding, the parties have waived any possibility for the Court to find the evidence requires a finding that neither a loan nor an investment exists.

Defendants proffer scant proof that the funds delivered to Plaintiff represented personal loans. Defendants cannot identify the terms, amount, interest rate, security, duration, or any documentation suggesting a loan. The only evidence adduced suggesting a loan is from email conversations in June 2010. Similarly, Plaintiff

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[45] *First Federal Savings Bank v. CPM Energy Sys. Corp*., 1993 WL 13986 (Del. Super. Apr. 22, 1993).
[46] *Id.* (quoting *Industrial America, Inc. v. Minnesota Mining and Manufacturing Co.*, 306 A.2d 751 (Del. 1973).
[47] *Scottsdale Ins. Co.,* 2007 WL 4150212 at *3 (Del. Super. Nov. 21, 2007).

proffers somewhat more evidence suggesting the parties' had a joint investment. However, the evidence supporting a joint investment is the more convincing.

Defendant contacted an attorney and obtained a form operating agreement within weeks after providing the first Iron Hill funds. Plaintiff's forwarding of Iron Hill financial information is consistent with an investment. Until the relationship between Plaintiff and Defendants deteriorated, at all times communications more consistently reflected an investment agreement rather than a loan. The first communication suggesting the funds were anything other than a joint investment occurred after the quarrel began.

That the investment is contrary to the Iron Hill Operating Agreement is not dispositive. The parties' entire business partnership occurred with lack of care for proper procedure or legality. The facts are replete with the parties' informality and carelessness regarding financially complicated transactions. While the joint investment is arguably contrary to the Iron Hill operating procedures, this is consistent with the parties' blasé course of dealing. Defendants cannot hold Plaintiff at fault for not following the procedural requirements for an investment when their own argument has little factual support.

That Plaintiff stated he was solely personally liable for losses generated from Iron Hill does not compel a conclusion that the funds were intended as a loan. The parties' excessive informality in handling their transactions prevents the Court from presently completely understanding their intentions or why the terms of their agreement are as such. Defendants' suggestion that the statutory interest rate is applicable since no rate was provided appears a last ditch effort to include a single term when no other terms exist.

The parties disregarded formality and failed to consider possible consequences. It is unclear if the parties realized the import of their purported agreement until the relationship soured. While hardly convincing, the funds delivered to Plaintiff seem more likely provided for the purposes of facilitating a joint investment.

The conclusion upholding an investment and therefore granting summary judgment for Plaintiff on the Iron Hill claims is caused in part by the unique posture of this case. Furthermore, in reaching that conclusion that posture also requires that

the Court grant summary judgment in favor of Plaintiff's claim that Defendants are responsible for not fulfilling the further capital contributions.[48]

Accordingly, the Court determines that funds delivered to the Plaintiff by all Defendants were intended as a joint investment rather than a loan. The joint investment remains valid and enforceable. For all the reasons stated in this Opinion, Plaintiff's Motion for Summary Judgment is **GRANTED** as to Counts IV, V, and VI. Defendant's cross Motion for Summary Judgment is **DENIED** as to Counts I, II, III of Defendant's Counter Claim.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

cc: Prothonotary

[48] This Court realizes that this Opinion does not and cannot answer any unresolved questions regarding the terms and scope of the Iron Hill investment arrangement.