SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DAVID E. RETTER,

Index No.: 652106/2010

Plaintiff,

DECISION & ORDER

-against-

NEIL ZYSKIND and PHYLLIS ZYSKIND,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

I. Introduction

In 2010, plaintiff David E. Retter commenced this action seeking a declaration of his rights in two adult homes near Buffalo.[1] He claims that defendant Neil Zyskind agreed to provide him with equity in both homes which, allegedly, would be run as joint ventures. Zyskind would operate the homes. Retter would be a passive investor. While both Retter and Zyskind are attorneys, the ventures were lightly documented, resulting in more than half a decade of litigation. The absence of definitive documentary evidence made this a case about the veracity and credibility of the parties' trial testimony.

The court finds neither party to be particularly credible. As explained below, the court finds that while Retter's testimony was more persuasive as to the parties' agreement regarding the first adult home, the blatantly illegal nature of that arrangement precludes the court from

[1] The parties have insisted on the homes being called "adult" homes instead of "nursing" homes. While the record does indicate that there is a practical difference between these types of homes (the latter's residents require more care; the former may have designated beds for residents who need extra care), it does not appear that these types of homes have relevant regulatory differences. As explained herein, applicable federal and state regulations matter significantly in this case. Nonetheless, the court uses the parties' preferred nomenclature because it has no dispositive legal significance.

granting him the equity he seeks. With respect to the second home, the evidence tips in Zyskind's favor regarding Retter's investment being merely a loan, albeit one that is in default and for which Retter is entitled to repayment of principal and interest.

These conclusions obviate the need for the court to reach the parties' myriad disputes about the way in which Zyskind ran the homes, as without any equity in the homes, Retter lacks standing to assert what are essentially derivative claims for breach of fiduciary duty.

II. Background & Procedural History

On November 24, 2010, Retter commenced this action by filing a complaint with causes of action for breach of the parties' alleged joint venture agreements, breach of the contracts that allegedly govern the ventures, breach of fiduciary duty, unjust enrichment, constructive trust, and an equitable accounting.[2] *See* Dkt. 1.[3] Zyskind's operative responsive pleading is his amended answer dated March 1, 2011. *See* Dkt. 10.[4] After the completion of discovery, Retter filed a Note of Issue on November 15, 2013. *See* Dkt. 32. In early 2014, the parties cross-moved for summary judgment. By order dated August 5, 2014, aside from dismissing Retter's unjust

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[2] The complaint was never amended until Retter conformed his pleadings to the proof after trial. It should be noted that all of the substantive claims in the complaint concern alleged wrongdoing on the part of Zyskind. However, Zyskind's wife, Phyllis, also was named as a defendant because, as explained herein, she was made a member of the LLCs that Zyskind formed to own the land and operate the homes. Phyllis is not alleged to have committed any actual wrongdoing. The court views her involvement as merely a nominal (but perhaps necessary) defendant since she could have been adversely affected by a judgment (e.g., one that alters the equity split in the homes). Regardless, as Retter does not walk away from this case with any equity in the homes, this case does not affect Phyllis, who will not be meaningfully discussed.

[3] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[4] For reasons that are unclear, it was not filed until June 28, 2012.

enrichment claim and Zyskind's statute of frauds defense, the court denied the parties' summary judgment motions due the existence of countless questions of material fact. *See* Dkt. 116 (the SJ Decision).

The SJ Decision sets forth the core allegations, and highlights the points of dispute that required a trial:

> On December 25, 2001, Retter met with [Zyskind] and his brother-in law (non-party Emanuel Pollack) to negotiate entering into a joint venture, whereby Retter and Pollack would invest in a nursing home that would be run by [Zyskind]. This nursing home is called Mary Agnes Manor (MAM) and is located in Buffalo. The parties orally agreed that Retter and Pollack would each receive 30% equity in MAM. [Pollack is not a party to this action, but he submitted affidavits in support of Retter and takes his side in this litigation.]
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> On December 26, 2001, Retter, Pollack, and [Zyskind] signed a memo, setting forth the terms "that were agreed upon" the previous day (the MAM Agreement). *See* Dkt. 92. The MAM Agreement sets forth the parties' equity (Retter getting 30%) and lays out how MAM is going to be run. Simply put, two LLCs were to be formed: (1) an operating company (Mary Agnes Manor LLC) to run the home; and (2) a real estate company (Mary Agnes Realty LLC) to own the property. [Zyskind] was to own 100% of the operating company and the equity in the real estate company was to be split in accordance with the MAM Agreement's equity distribution (i.e., Retter owning 30%). Retter maintains the parties orally agreed that the MAM business was to be treated as one venture, with profits distributed in accordance with the MAM Agreement's equity split, but that [Zyskind] was nominally named as the only member of the operating company for reasons that are not entirely clear. [Zyskind], on his own, drafted operating agreements for the MAM operating and real estate companies, and also secretly formed a third LLC called Mary Agnes Manor Management LLC – all of which only named [Zyskind] and his wife, Phyllis, as members, and none of which were signed by Retter or Pollack. All of these entities are New York LLCs.
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> Retter and Pollack each invested $216,000 in MAM. Retter claims these were equity investments and [Zyskind] claims they were loans. Pursuant to the MAM Agreement, Retter and Pollack are each entitled to a 12% return on their investment, which they did indeed receive from 2002 through 2008. [Pollack received more, but explains that this was attributable to other dealings with Zyskind]. [Zyskind] does not dispute this.] [Zyskind] stopped paying Retter in 2009, prompting this lawsuit.
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> A similar scenario played out with the second nursing home, called Heritage Manor (Heritage), which is located in Ransomville, New York. In 2004, Retter,

Pollack, and [Zyskind] met to discuss Retter and Pollack collectively purchasing 65% of the equity in Heritage. [Zyskind] sent Retter and Pollack a letter dated February 18, 2004 (the Heritage Agreement), stating:

> This letter is to confirm our agreement regarding **each of your loans to Heritage** in the amount of $168,750.00 for a total of $337,500.00. Promissory notes will be prepared and forwarded to you shortly. In addition to the 12% interest you will be receiving on your loan, I will be providing you with a 65% equity interest in the company owning the real estate or management company, to be agreed upon at a later date.

See Dkt. 95. As with MAM, [Zyskind] created an operating company (Heritage Ransomville Management LLC) and a real estate company (Heritage Ransomville Realty LLC), but did not name Retter and Pollack as members in their operating agreements. Retter claims that, between 2004 and 2008, he received certain payments from Heritage, but has never been repaid his $168,750, which he claims was a capital investment, not a loan.

On February 22, 2009, Retter, Pollack, and [Zyskind] met to discuss the possible sale of Heritage. The next day, on February 23, 2009, [Zyskind] sent Retter and Pollack an email:

> I am currently in negotiations to lease out Ransomville for $27,500. I am proposing to transfer the realty and pay the realty $15,000 per month rent. The realty would be owned 50% by the two of you and I would own the other 50%. Further, the lessee would pay $500,000 cash to be used to pay down the mortgage. Assuming our mortgage will be around $650,000, I anticipate our monthly int/principal to be around $6,000 per month. This leaves $9,000 to distribute.
>
> If this is unacceptable, I am proposing to buy both of u out for $350,000. If u wish I can get an appraisal and we can go from there.

See Dkt. 96.

The record is unclear about what happened with Heritage. On the one hand, the purported Heritage Agreement, allegedly sent by [Zyskind] to Retter and Pollack and never signed, indicates that Retter's $168,750 was a loan, and that a formal equity grant was to occur at some later point. However, no promissory notes were ever created or executed. Then too, no evidence of an equity grant appears to exist. Yet, the February 23, 2009 email indicates that [Zyskind] believed he had to buy out Retter and Pollack. There is no evidence in the record that conclusively resolves this question.

[Zyskind], however, points to the [LLCs'] operating agreements – again, which [Zyskind] drafted on his own and were never signed by Retter and Pollack – as proof that only [Zyskind] and his wife own equity. [Zyskind] further argues that the fact that Retter only received 1099s, and not K-1s, from the LLCs, is evidence that Retter was never a member. However, Retter explains that [Zyskind], over the objections of Retter and his accountant, refused to issue K-1s to Retter, and this was a longstanding matter of dispute among the parties. None of these issues are dispositive.

[Zyskind's] deposition testimony illustrates the confusion presented by this record:

> Q. Now after you paid off the note to Mr. Retter did you make any further payments to Mr. Retter in connection with Mary Agnes Manor?
>
> A. Yes.
>
> Q. So I want to see if I understand you. It was your understanding that legally Mr. Retter's alleged loan had been paid off from the HUD financing and you did not owe him another penny, correct?
>
> A. Correct.
>
> Q. But you nonetheless continued to pay him because you hoped that if you might pay him some money he might lend you more money?
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> A. Yes.
>
> Q. That was it, right?
>
> A. Yes.
>
> Q. Was this reflected in any writing?
>
> A. No.
>
> Q. Did you tell Mr. Retter that?
>
> A. No.
>
> Q. This was just something that you decided?
>
> A. Yes.

> *See* Dkt. 91 at 11, quoting [Zyskind's] 11/29/12 Dep. Tr. at 106-07 (*see* Dkt. 100 at 30).

SJ Decision at 2-5 (emphasis added; some footnotes omitted; others replicated in bracketed text).

On April 12, 2016, the Appellate Division affirmed the SJ Decision. *See Retter v Zyskind*, 138 AD3d 496 (1st Dept 2016).

A bench trial was conducted between December 20 and December 23, 2016. *See* Dkt. 189 (12/20/16 Tr.); Dkt. 190 (12/21/16 Tr.); Dkt. 191 (12/22/16 Tr.); Dkt. 192 (12/23/16 Tr.). Six witnesses testified: (1) Retter [*see* 12/20/16 Tr. at 21-149]; (2) non-party Judah Fogel, Retter's accountant (he testified *only* as a fact witness) [*see* 12/20/16 Tr. at 150-176; 12/21/16 Tr. at 178-210]; (3) Pollack [*see* 12/21/16 Tr. at 211-298]; (4) Mel Feder, a financial and accounting consultant called by Retter as a damages expert [*see* 12/21/16 Tr. at 298-364; 12/22/16 Tr. at 366-431];[5] (5) Zyskind [*see* 12/22/16 Tr. at 444-557; 12/23/16 Tr. at 559-606]; and (6) Herbert Mayer, Zyskind's accountant (he testified *only* as a fact witness) [*see* 12/23/16 Tr. at 607-667].[6] The parties filed post-trial briefs on March 3, 2017. *See* Dkt. 193 (Zyskind's brief); Dkt. 194 (Retter's brief).[7]

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[5] After Retter rested, Zyskind moved to dismiss on multiple grounds. The court denied the motion, except with respect to *in pari delicto*. *See* 12/22/16 Tr. at 441-43. The merits of Zyskind's *in pari delicto* defense are addressed below.

[6] After Zyskind rested, Retter moved to conform his pleadings to the proof. The court granted that motion, over Zyskind's opposition, pending a letter explaining the scope of amendment. *See* 12/23/16 Tr. at 667-68. Retter's explanation was provided by letter dated January 20, 2017. *See* Dkt. 186. He seeks to add claims for specific performance, i.e., an order directing Zyskind to take all necessary actions to make Retter an LLC member in the joint venture entities and for repayment of the Heritage loan. While both claims for relief are deemed to have been pleaded, the court denies Retter judgment on the former and grants him judgment on the latter.

[7] The parties also filed unsolicited letters, in violation of the court's rules, regarding their dispute over whether Zyskind's brief contains an improper rebuttal analysis of Retter's expert (Zyskind

This case turns significantly on the witnesses' credibility,[8] based to a great degree on the witnesses' demeanor, their forthrightness, the plausibility of their testimony in light of the other evidence, the law, and the commercial reasonableness of their testimony. The court will neither weigh the substance nor credibility of Mr. Feder's testimony because his analysis is not relevant given the court's decision that Retter has no equity in the homes. This also obviates the need for the court to opine on the implications, noted earlier, of Zyskind not submitting an expert report or calling an expert witness to testify. The court also places minimal weight on the testimony of Fogel and Mayer, who shed little light on the dispositive issues. The court's findings of fact, set forth below, are principally based on the testimony of the parties themselves, which, when evaluated alongside the evidence in the record, reveal the truth of the parties' agreements.

III. Findings of Fact

A. MAM

Retter has proved by a preponderance of the evidence that, at the outset of the parties' relationship in 2001, the parties intended[9] that he have equity in MAM. The MAM Agreement,

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did not call an expert or submit a report). The court disregards these letters because the issue is moot by virtue of the court's decision (i.e., the derivative damages need not be computed because Retter has no equity, nor is an expert needed to compute pre-judgment interest).

[8] "It is well established that findings of fact rendered by a court after a bench trial 'should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under **any fair interpretation of the evidence**, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses.'" *Glenbriar Co. v Lipsman*, 11 AD3d 352, 356 (1st Dept 2004) (emphasis added), *aff'd*, 5 NY3d 388 (2005), quoting *Thoreson v Penthouse Int'l, Ltd.*, 80 NY2d 490, 495 (1992).

[9] "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). Parol evidence should only be considered to interpret a written agreement where, as here, the contract is ambiguous. *See Naughton v W. Side Advisors, LLC*, 137 AD3d 562, 563 (1st Dept

while not the definitive operating agreement contemplated therein, nonetheless reflects the intent to give Retter equity in MAM. The MAM Agreement does not purport to be a loan agreement, and none of the parties' testimony inclines this court to believe that the parties only intended for Retter to merely be a lender to MAM.

That being said, in 2003, Retter was paid back his entire $216,000 investment pursuant to the HUD refinancing. Zyskind was not. The reason is undisputed. HUD has a strict prohibition against anyone with equity in an adult home receiving cash from the HUD refinancing proceeds. Zyskind testified that his equity in MAM precluded him from taking any cash from the refinancing. Retter does not dispute this testimony, which the court accepts as the reason for Zyskind not receiving any of the refinancing proceeds.

Retter, in contrast, was fully cashed out.[10] Both Retter and Zyskind represented in sworn affidavits to HUD that all of MAM's outstanding debt was being paid off with the refinancing proceeds, including Retter's "loan" to MAM. There are two ways for the court to interpret this representation to HUD.

First, the court could take the representation at face value, and simply assume the parties were not lying to HUD, meaning that Retter only made a loan to MAM, and was being paid back

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2016).

[10] The court will not resolve the parties' competing explanations about why Zyskind continued to pay Retter 12% interest on MAM after the HUD refinancing. Both explanations are plausible. Retter may have thought he was continuing to receive his 12% return by virtue of his equity in MAM, while Zyskind claims that he was trying to keep Retter happy to induce him to invest in further ventures (which he succeeded in doing with Heritage). By virtue of the court's decision that the parties' agreement to give Retter equity in MAM is unenforceable, the real reason for Retter's post-refinancing payments is not material. Indeed, while there are many factual disputes in the record, the court limits its fact finding to issues that are material to this decision.

the amount owed on that loan. The logic is that Retter could not possibly have had equity in MAM because, if he did, he would not have been permitted to receive any of the refinancing proceeds and certainly would not have averred that the payment was for a loan.[11] Indeed, this view of things would fit nicely with the law. That is because Retter's equity in MAM was required to be disclosed to the Department of Health (DOH). *See* Social Services Law § 461-b(3) (requiring disclosure of anyone who "beneficially owns any interest in", *inter alia*, the land or the building). That did not occur. Therefore, even if Retter only was a member of the real estate company (Mary Agnes Realty LLC), it would be a violation of § 461-b(3) if the LLC that operated MAM (Mary Agnes Manor LLC) paid rent to the real estate company, not in a fixed amount, but in an amount corresponding to a pass-through of the operating company's profits.[12] To do so would result in the members of the real estate company having a beneficial interest in the profits of the adult home. Having such an interest (which Retter claims under the MAM Agreement), without disclosing it to DOH, is illegal. Obviously, having an interest in the entire MAM venture (which Retter claims to have) without disclosing it to DOH also is illegal.

If the court takes the parties' representation to HUD at face value, it would conclude that not only does Retter have no equity in MAM, but that he has no claim to MAM at all because his loan was paid off. Such a conclusion would be satisfying only to the extent that Retter, a

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[11] While Zyskind testified that Retter would not have been thrilled about getting his money back and losing the right to a 12% return, there is no evidence that Retter actually objected to getting his money back while also (allegedly) knowing that he had equity in MAM. As discussed, he agreed to sign the very documents that permitted him to do so.

[12] In contrast, if the rent was fixed (i.e., not purely dependant on profits) – which it was not – perhaps Retter might have been legally capable of having an equity stake in the real estate company. But Retter is very clear that he seeks equity in the whole venture and not a piece of the real estate companies.

licensed attorney, would not be accused of breaking the law. But it would completely defeat his claim to MAM.

That is why Retter urges the court to ascertain the parties' intent based on their actions from the outset. The court agrees that this is the proper approach. And when one looks at the evidence of the parties' initial dealings, their intent becomes quite clear. Not only does the MAM Agreement evidence an intent to provide Retter with equity in MAM, but Retter's testimony that this was the parties' intent was far more compelling than Zyskind's testimony to the contrary. The court finds that Zyskind, somewhat cynically, seeks to use the parties' representations to HUD as a convenient post hoc gloss on the parties' intent ab initio. The evidence, however, does not support this finding. If the parties really intended for Retter's role to be limited to a lender, a simple promissory note would have done the trick. That they felt the need to reflect, in writing, their intent that Retter get equity convinces the court that such was their intent. Moreover, an agreement that merely was meant to memorialize a loan likely would not have expressly addressed allocation of management responsibilities and set the manager's compensation.

Yet, for Retter to claim an equity interest in MAM, he must concede the alternative explanation for the parties' representation to HUD – that they knowingly lied to HUD, and also knowingly violated New York law by allowing Retter (and Pollack) to have acquired equity in MAM without disclosing that fact to DOH. The court accepts this view of the evidence. The court, further, does not credit Retter's claim of ignorance and his efforts to shift the blame to Zyskind. Retter is not only extremely intelligent, educated, and wealthy, but he is a partner at the law firm of Kelly Drye & Warren LLP (Kelly Drye), where, among other things, he

represents indenture trustees in debt offerings. The court is not so naïve to believe that Retter is not to blame for his failure to disclose his ownership in MAM to DOH. Nor does the court find his representations to HUD to be innocuous. Plausible explanations for Retter's behavior are that he knowingly lied to the government and that he was grossly negligent in failing to make required regulatory disclosures. In this action, Retter, retroactively, wants more than a decade's worth of the benefits of equity in two adult homes. He asks this court to exercise its equitable powers by declaring him to be a member of the ventures, and in doing so, to ignore the illegality.

As explained further below, where, as here, enforcing the parties' agreement would result in countenancing a serous illegality would violate public policy, and the court will not do so. Regardless of whether the parties are *in pari delicto*, the court will not enforce such an illegal contract. The court finds that Retter broke the law by allowing himself to obtain HUD refinancing proceeds while also believing himself to have equity in MAM, which was illegal for failure to disclose such equity to DOH.

The reason adult homes are subject to rigorous regulatory oversight is that elder abuse, as well as cost, are serious public policy concerns. *See* Social Services Law § 460 ("Residential care programs for adults and children of the highest quality, efficiently produced and properly utilized at a reasonable cost, are a matter of vital concern to the people of this state."); *see also Bloomfield v Cannavo*, 39 Misc3d 1216(A), at *2-4 (Sup Ct, NY County 2013) (Friedman, J.) (addressing DOH regulatory framework for oversight of adult homes), *aff'd*, 123 AD3d 603 (1st Dept 2014). Unfortunately, many unscrupulous businessmen fail to properly care for the elderly by cutting corners to increase profit margins. State regulators, therefore, insist on transparency as to the ownership and control of adult homes to ensure that bad actors are kept out of the

industry. The parties have relatives, such as Taub and his father, that are bad actors.[13] Pollack, one of the supposed equity holders in MAM, allowed himself to be associated with his relatives' wrongdoing. Notably, while Zyskind's relatives also ran into trouble, DOH had no problem with him running MAM and Heritage. In fact, Zyskind's unrebutted testimony makes clear that he and his family worked extremely hard to make the homes a financial success.[14]

In sum, based on the above factual findings and under the authority cited below, the court finds that the parties intended for Retter to have equity in MAM, but that such agreement is illegal and, as a consequence, unenforceable.

B. Heritage

The Heritage Agreement unambiguously characterizes Retter's investment as a loan. It also indicates that Retter will be getting equity, but at terms "to be agreed upon, at a later time."

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[13] Taub pleaded guilty and got a suspended sentence in connection with his involvement with another adult home in Queens. His father went to prison. In 2004, Pollack, the third alleged partner here, signed a stipulation with the New York Attorney General not to serve as a director, operator, or licensee of a DOH regulated adult home (the investigation appears to have begun around 1999, before the parties' MAM investment in 2001). This is why Taub ultimately was not involved with MAM and likely why Pollack did not want his involvement in MAM or Heritage disclosed to DOH. To be clear, the court does not mean to suggest that the level of Pollack's involvement was a violation of his stipulation with the Attorney General. The court simply notes why Pollack might have wanted to invest as a silent partner. While Pollack did not join this case (which he claims was due to his familial relation to Zyskind), he did testify on Retter's behalf and signed the MAM Agreement that purported to give him equity in MAM. That being said, given Pollack's decision not to join this case, nothing herein should be construed to affect Pollack's rights in MAM and Heritage.

[14] Were the court to reach the propriety of Zyskind paying his family members, it would have found that the unrebutted evidence indicates that the vast majority of the payments were justified based on legitimate work. That being said, the court declines to delve into the merits of Retter's waste claims because, without equity in the homes, Retter lacks standing to assert such claims. Nonetheless, the real work performed by Zyskind's family members is worth noting due to the Retter's unsubstantiated allegation that their work was not justified and that their compensation was not deserved.

It is undisputed that no such terms were ever agreed upon. Under the authority addressed below, the court finds that the parties merely had an agreement to agree with respect to Retter's potential equity in Heritage. Retter took no steps after 2004 to negotiate further terms, nor did either party even attempt to draft a definitive agreement.[15] It is not even clear if Retter's equity was supposed to be supported by further investment.[16] Unlike with MAM, the court finds Zyskind's testimony to be more persuasive. Zyskind's testimony that the parties never reached a meeting of the minds on Retter receiving equity in Heritage, coupled with the Heritage Agreement indicating that the parties had only agreed on the terms of a loan, lead this court to conclude that the parties never agreed on Retter getting equity in Heritage.[17]

Since the court finds that Retter loaned money to Zyskind for Heritage, as set forth further below, Retter is entitled to repayment of principle and interest. This is the only award issued in Retter's favor.

IV. Conclusions of Law

A. MAM

"The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers." *Kirschner v KPMG LLP*, 15 NY3d 446, 464 (2010).

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[15] While Retter complained about getting 1099s, instead of K-1s, he did so for years without taking any legal action to enforce his rights. This case was filed nearly 9 years after Retter's initial investment in MAM.

[16] $337,500 for a majority stake seems low, especially given the guaranteed 12% return. That Retter and Pollack refused to be bought out for $350,000 suggests they thought 65% of Heritage is worth much more.

[17] In any event, even if Retter's 2004 investment in Heritage was supposed to entitle him to equity, the parties' failure to disclose Retter's equity to DOH is the very sort of illegality for which the court precludes Retter from being awarded equity in MAM.

"[D]enying judicial relief to an admitted wrongdoer deters illegality" and "avoids entangling courts in disputes between wrongdoers." *Id.* "[T]he law will not extend its aid to either of the parties or listen to their complaints against each other, **but will leave them where their own acts have placed them**". *Id.* (citation omitted; emphasis added). "Indeed, the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be 'weakened by exceptions.'" *Id.*

As discussed above, the court finds that both Retter and Zyskind violated the Social Services Law by failing to disclose to DOH their agreement to give Retter equity in MAM. They also lied to HUD by representing that Retter was merely a lender to MAM, thereby permitting him to illegally receive repayment of his "loan". Retter's contention that Zyskind controlled MAM and made the decision about what to disclose to DOH and HUD is not compelling. Nothing prevented Retter from contacting DOH regarding his equity stake in MAM. Certainly, no one held a gun to Retter's head to induce him to sign and submit a false affidavit to HUD.

Consequently, the court rejects Retter's argument that the parties are not equally culpable. *See Rosenbach v Diversified Grp., Inc.*, 85 AD3d 569, 570 (1st Dept 2011) ("The doctrine of in pari delicto bars a party that has been injured as a result of its own intentional wrongdoing from recovering for those injuries from another party *whose equal or lesser fault* contributed to the loss.") (emphasis added); *see also New Greenwich Lit. Trustee, LLC v Citco Fund Servs. (Europe) B.V.*, 145 AD3d 16, 25 (1st Dept 2016) (same), citing *Chemical Bank v Stahl*, 237 AD2d 231, 232 (1st Dept 1997). The court finds that Retter, a highly sophisticated partner at a white shoe law firm, is as culpable as Zyskind. The court also rejects Retter's argument that his representations to HUD were innocuous. *See* Dkt. 194 at 44. A partner at

Kelly Drye cannot persuasively make the case that he did not understand the legal implications of a regulatory filing.

At best, Retter's representations to HUD were grossly negligent, which the court finds to be tantamount to Zyskind's culpability. *See Colnaghi, U.S.A., Ltd. v Jewelers Protection Servs., Ltd.*, 81 NY2d 821, 823-24 (1993) ("'[G]ross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing."). The parties' lack of candor to HUD about Retter's stake in MAM smacks of ill intent. The court, at the very least, finds that both parties were grossly negligent. The court, additionally, finds that Retter and Ziskind are equally culpable, making them in in pari delicto. As a result, the court will not permit Retter to reap the fruits of his illegal behavior by granting him equity in MAM. *See B.D. Estate Planning Corp. v Trachtenberg*, 134 AD3d 650, 651 (1st Dept 2015) ("the court should not intervene to enable the wrongdoer to obtain additional fruits of its crime.").

Nonetheless, even if the parties were not equally culpable, the court would still not grant Retter equity in MAM. New York courts will not enforce illegal contracts when doing so grossly offends public policy. *See McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 470, 471 (1960) ("Consistent with public morality and settled public policy, we hold that a party will be denied recovery even on a contract valid on its face, if it appears that he has resorted to gravely immoral and illegal conduct in accomplishing its performance.") This is not a case where ruling against Retter will result in an unjustified windfall for Zyskind [*see id.*], nor does the court find that Zyskind is cynically proffering an illegality defense. *See Chirra v Bommareddy*, 22 AD3d 223, 224 (1st Dept 2005). In fact, Retter not only recouped his entire

investment in MAM, but he also received a 12% return on that investment for many years. Retter admits that he provided no other consideration for equity in MAM. In contrast, Zyskind not only loaned money, but also guaranteed MAM's debt and put in hard work to make MAM profitable. Leaving Zyskind with control of the company is not inequitable.

Nor may Retter's conduct be characterized as a "small illegality in the performance of an otherwise lawful contract." *See id.* The Appellate Division has repeatedly held that statutory violations that offend public policy suffice to deny recovery on a contract. *See Castellotti v Free*, 138 AD3d 198, 206 (1st Dept 2016) ("courts invoke[] public policy principles to deny recovery where illegality was manifest."), citing *Abright v Shapiro*, 214 AD2d 496 (1st Dept 1995) (illegal scheme to violate rent stabilization laws and zoning regulations); *United Calendar Mfg. Corp. v Huang*, 94 AD2d 176, 180 (2d Dept 1983) (doctor's fee-splitting agreement violative of Education Law). *Huang* implies that profit sharing regulations meant to guard against public health concerns are sufficiently serious so as to warrant refusing to enforce a contract that violates such regulations. The same is true of the subject adult home regulations. Such illegality, along with the parties misleading a federal agency, warrants a refusal by this court to enforce the parties' agreement to grant Retter equity in MAM. All of Retter's claims regarding MAM are dismissed.[18]

[18] As noted earlier, without equity in MAM, Retter lacks standing to complain about how it was operated. For instance, any corporate waste would not have harmed Retter since he had no equity that would be devalued by such waste. The court, therefore, will not opine on any of the parties' arguments regarding Retter's derivative claims (including the parties' damages expert disputes).

B. Heritage

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Express Indus. & Terminal Corp. v N.Y. State Dep't of Transp.*, 93 NY2d 584, 589 (1999), citing *Joseph Martin, Jr., Delicatessen, Inc. 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." *166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 (1991), quoting *Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 (1989). "The law is clear that although the parties may intend to enter into a contract, if essential terms are omitted from their agreement, or if some of the terms included are too indefinite, no legally enforceable contract will result." *Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 61 (1st Dept 2015). Hence, "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Schumacher*, 52 NY2d at 109.

While the Heritage Agreement sets forth all the material terms of a loan agreement, as discussed earlier, it omits countless material terms regarding Retter's alleged equity. Unlike the MAM Agreement, the Heritage Agreement is entirely silent about the specifics of the parties' rights in Heritage or how it would be run. And while Retter claims that the parties had some sort of oral or unspoken (but somehow understood) agreement, the court does not credit Retter's testimony to that effect. While the parties' efforts to document their relationship were minimal, the court finds that had the parties reached a definitive agreement on Retter getting equity in Heritage, they would have papered their agreement in at least the minimal fashion that they did with MAM. Their failure to do so, coupled with the Heritage Agreement, on its face, couching

itself as a loan and an agreement to agree, leads this court to conclude that the parties never reached an agreement on Retter getting equity in Heritage.

In any event, even if the court were to conclude that Retter and Zyskind reached a definitive agreement, the court would not grant Retter equity in Heritage because, as with MAM, he broke the law by keeping his interest in Heritage a secret from DOH. As with MAM, the court rejects Retter's attempts to blame everything on Zyskind. While it is true that Zyskind was exclusively in charge of operating the homes, nothing precluded Retter from insisting that his equity be disclosed to DOH,[19] or taking matters into his own hands (e.g., contacting DOH or moving for injunctive relief sooner than 5 years after he purported to acquire his equity). The court does not believe a Kelly Drye partner lacks the means to ensure that his investment in a highly regulated industry is legally up to snuff.

That being said, there is nothing illegal about Retter lending money to Heritage.[20] In fact, Zyskind concedes that his best possible outcome in this case is being held liable to Retter for repayment of the Heritage loan with interest. Judgment in Retter's favor on the Heritage loan, thus, is granted, and his other remaining claims are dismissed with prejudice. Accordingly, it is

ORDERED that, with the exception of Retter's claim against Zyskind for repayment of the Heritage loan, all of Retter's remaining causes of action are dismissed with prejudice; and it is further

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[19] Complaining about not receiving K-1s is not the same as insisting on proper regulatory disclosure.

[20] The court assumes the loan was a personal obligation on behalf of Zyskind, and not an obligation on behalf of any of the Heritage entities. Retter clearly does not think otherwise, as he only sued Zyskind for repayment. The court, therefore, construes the Heritage loan claim as a breach of a contract between Retter and Zyskind.

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff David E. Retter, and against defendant Neil Zyskind, in the amount of $168,175, plus 12% interest from March 1, 2009 to the date of this decision, and statutory interest of 9% thereafter until the date judgment is entered.

Dated: May 2, 2017

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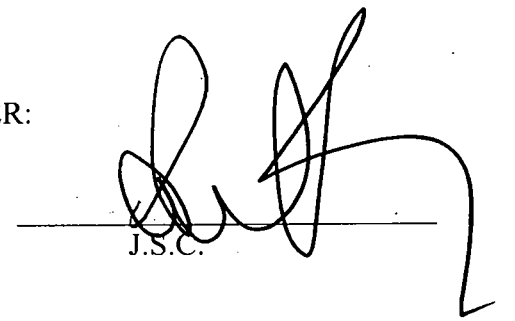

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.