New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 267—NO. 117
TUESDAY, JUNE 21, 2022

Expert Analysis

Decision Suggests Shift From Rigid Consideration of Joint Venture Elements

By **Lara Flath**

And **Thania Charmani**

A recent decision by the Appellate Division, First Department, *Bradbury v. Israel*, 204 A.D.3d 563 (1st Dep't 2022), suggests potential increased flexibility with respect to pleading two key elements that have been "indispensable" to alleging the formation of a joint venture under New York law: a concrete, final agreement (rather than an agreement to agree) and sharing of profit and losses.

First, New York courts have consistently held that if a document setting forth the parties' alleged agreement only provides the framework for future negotiations, such document constitutes an unenforceable agreement to agree. See, e.g., *Scheider v. Jarmain*, 85 A.D.3d 581, 582 (1st Dep't 2011) (holding that a letter of intent that merely provided framework for continuing negotiations constituted an unenforceable agreement to agree). Similarly, communications do not constitute an offer where the language and context of the document make clear that a future bargain is contemplated. See *FCRC Modular v. Skanska Modular*, 159 A.D.3d 413, 414 (1st Dep't 2018) (holding that a document upon which alleged joint venture was allegedly created was "at most a nonbinding offer to enter into a joint venture and insufficient to form the basis of a breach of contract claim"); *New York Mil. Acad. v. NewOpen Grp.*, 142 A.D.3d 489 (2d Dep't 2016) ("[I]t is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable."); *Michaels Dev. Grp. v. Greene*, 267 A.D.2d 760, 760-61 (3d Dep't 1999) (holding that a purported written offer was not an offer where the writing contemplated a future bargain). The First Department's decision in *Aksman v. Xionwei Ju* is particularly noteworthy. 21 A.D.3d 260, 260 (1st Dep't 2005). The plaintiff alleged that the parties created a joint venture

LARA FLATH *is a complex litigation and trials partner in Skadden, Arps, Slate, Meagher & Flom's New York office. She represents a wide variety of clients in complex, high-stakes commercial, securities and antitrust litigation in federal and state courts throughout the country.* THANIA CHARMANI *is a complex litigation and trials associate at the firm. Carl Wu, a summer associate, assisted in the preparation of this article.*

through a letter of intent. See id. The defendant moved to dismiss on the grounds that the letter of intent was an unenforceable agreement to agree and, therefore, did not create a joint venture. See id. at 261. The trial court denied the motion to dismiss, but the First Department reversed, holding that the letter of intent was "clearly a preliminary, nonbinding proposal to agree" and expressed the parties' intent to be bound by a later agreement, which conclusively negated the breach of contract claim. See id. at 260-62.

By contrast, the First Department in *Bradbury* affirmed the denial of a motion to dismiss even though the purported agreement establishing the joint venture was an email describing the defendant's "thoughts and To Do List for monetizing the Real Estate Broker classes." Transcript of Supreme Court Oral Argument at A122-A123, *Bradbury v. Israel*, 204 A.D.3d 563 (1st Dep't 2022) (No. 2021-02688) (hereinafter Transcript of Oral Argument). The plaintiff also alleged that the joint venture was evidenced by the long time business relationship between the parties, including the initial email that attached a 16 point business plan, payments to the plaintiff, issuance of a Schedule K-1 issued annually for a partnership, and the actual development and presentation of real estate broker courses, which formed the basis for the purported venture. The defendant argued that the email and attachment merely constituted part of preliminary discussions regarding a potential venture between the parties such that there was no definitive offer which could be accepted by the plaintiff and no meeting of the minds. The Supreme Court, however, denied the motion to dismiss on the basis that there were questions of fact surrounding whether the parties had entered into a joint venture, given the creation of the LLC, the parties' long-standing business relationship, and the uncontested payments from defendant to plaintiff. See *Bradbury*, 204 A.D.3d at 564. The First Department agreed, and, notably, addressed and distinguished its previous holding in *Aksman* in light of the "parties' course of conduct in forming the LLC and working together over the course of several years." Id. To what degree *Bradbury* signals a potential shift under New York law from emphasis on the clear language of a written agreement to a more expansive view that considers and potentially focuses on the parties' conduct remains to be seen.

> In 'Bradbury', the First Department once again evidenced a potential willingness to look beyond the four corners of the document purportedly establishing the joint venture in considering whether plaintiff sufficiently alleged that the parties would share profit and losses under New York law.

Second, it is well-established under New York law that the sharing of profit and losses is an "indispensable element" to allege and prove a valid and enforceable agreement to form a joint venture. *Slabakis v. Schik*, 164 A.D.3d 454, 455 (1st Dep't 2018) (dismissing claim for breach of joint venture agreement where plaintiff failed to allege that he

would share in the liability for the losses of the joint venture, which is an "indispensable element" of a joint venture); *Schnur v. Marini*, 285 A.D.2d 639 (2d Dep't 2001) ("The failure of the purported joint venturers to agree upon the division of equity prevented a sufficiently definite agreement with respect to the sharing of profits and losses, which is an indispensable element of any joint venture agreement, oral or written."); *Calcagno v. Graziano*, 200 A.D.3d 1248 (3rd Dep't 2021) ("To prove the existence of a joint venture, the plaintiff must demonstrate that there was … a provision for the sharing of profits and losses."); *Buckmann v. State of New York*, 64 A.D.3d 1137 (4th Dep't 2009) ("Indispens[a]ble to the creation of a joint venture is a sharing in the profits and losses of the business.").

In *Bradbury*, the First Department once again evidenced a potential willingness to look beyond the four corners of the document purportedly establishing the joint venture in considering whether plaintiff sufficiently alleged that the parties would share profit and losses under New York law. The email proposal (again, the document that plaintiff alleged constituted the terms of joint venture agreement) stated that the defendant would cover losses if the venture did not have revenue. The defendant highlighted this language in his motion to dismiss, arguing that the plaintiff failed to allege any loss-sharing provision. See id. But the Supreme Court held that, as with the issue of whether the parties had entered into a joint venture, the email proposal raised a question of fact of whether the parties agreed to share losses equally, based on the plaintiff's allegation that the Schedule K-1 showed a 50-50 ownership interest in the LLC and included shares of profit and loss. Transcript of Oral Argument, at A39-A41. The First Department agreed despite clear language of the document purportedly establishing the joint venture that losses would not be shared by the parties. See *Bradbury*, 204 A.D.3d at 564. The court's reliance on separate documentation relating to the alleged partnership may indicate that courts applying New York law may be inclined to broaden their consideration of this "indispensable element" in determining whether allegations of joint venture formation are sufficient to survive a motion to dismiss as well.

The full impact of the First Department's decision, on both the issue of the loss sharing provision as well as the requirement that the purported agreement be final as opposed to an agreement to agree, remains to be seen, but perhaps signals a shift from a more rigid consideration of these two elements under New York law.