

MEMORANDUM ENDORSEMENT

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 7/21/05

Marc Heiman v. F.J. Sciame Construction Co., Inc.  
05 Civ. 3621 (LLS)

Defendant's motion, to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, is denied. Viewing the complaint in the light most favorable to plaintiff, and taking its factual assertions as true, the terms of the claimed agreement (to share fifty-fifty in the profits of the Heiman Division) are sufficiently definite to be enforced, and are sufficiently set forth in writings to satisfy the Statute of Frauds, N.Y. Gen. Oblig. L. § 5-701(a) ("some note or memorandum thereof be in writing") even if it applies, which is doubtful. See Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362, 670 N.Y.S.2d 973 (Ct. App. 1998). Defendant's spreadsheet calculations of plaintiff's profit shares start with "Fees on all projects" and proceed with deductions (including staff expenses, administrative costs ("burden"), bonuses and other adjustments) to arrive at a subtotal, which is then "Split 50%" to produce a figure which (after deduction of the Division Head's automobile expense and Equity Retained) results in an amount "Available for Distribution." The plaintiff fully performed, and the defendant at least partly performed, this agreement for years, during which defendant distributed over two million dollars of accumulated profits to plaintiff.

Although there remain disputes over the amount payable to plaintiff, who resigned from defendant's employ in December 2004, these require resolution of predominantly factual issues, not dismissal of the complaint.

So ordered.

DATED: New York, New York  
July 21, 2005

*Louis L. Stanton*  
\_\_\_\_\_  
LOUIS L. STANTON  
U. S. D. J.