

DOCKET NO.: MMX-CV-23-6037152-S : SUPERIOR COURT
 :
 LEO D. CALDARELLA ET AL. : JUDICIAL DISTRICT OF
 : MIDDLESEX
 :
 V. :
 : AT MIDDLETOWN
 :
 ALLEN RIVES POTTS ET AL. : JUNE 12, 2024

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 Superior Court
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Judicial District of Middlesex
 State of Connecticut

MEMORANDUM OF DECISION RE MOTIONS FOR PREJUDGMENT REMEDY,
 TEMPORARY INJUNCTION, DISCLOSURE OF ASSETS AND RECEIVERSHIP (##107.07,
 109.00, 110.00, 111.00)

As set forth in their second amended complaint,¹ the plaintiffs, Leo D. Caldarella (Caldarella) and Calmar Marine North, LLC, allege that the defendant Allen Rives Potts (Potts) and Caldarella partnered to acquire certain marina properties for the specific purpose of creating a mixed-use development project (Marina Village), and that Potts breached this partnership by fraudulently excluding Caldarella from the membership interests in the limited liability company that was operative to the partnership, Ferry Landing, LLC (Ferry Landing). They further allege that Potts now wants to steal the development of Marina Village for himself or to abandon it by selling Ferry Landing or its assets and Ragged Rock Marina, the other marina property necessary to the Marina Village project, for a profit. In connection with the present action, the plaintiffs have filed several motions: a motion for prejudgment remedy in the amount of \$4,161,214, a motion for disclosure of assets, a motion for temporary injunction prohibiting the sale of Ferry Landing and Ragged Rock Marina, and a motion for receivership regarding Ragged Rock Marina to try to preserve any rights or interests that the plaintiffs may have based on the alleged

¹ The operative complaint at the time of the hearings on this matter was Docket Entry No. #165. The current operative complaint, the second revised complaint, was filed after hearings had concluded on February 20, 2024. See Docket Entry No. #193. The second revised complaint does not add or remove any counts from the second amended complaint that is being relied upon here.

partnership between Potts and Caldarella. The defendants oppose the granting of any of these remedies and contend that no partnership or agreement was ever executed in writing, and therefore, any remedy sought is improper.

The court heard these motions over twelve non-consecutive days from October 31, 2023, to February 7, 2024. The court heard the testimony of all the parties as well as a few witnesses. The court also received numerous documents into evidence. Post-hearing briefs were filed.

I BACKGROUND AND FINDINGS OF FACT

“It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony.” (Internal quotation marks omitted.) *Blasco v. Commercial Linens, LLC*, 133 Conn. App. 706, 709, 36 A.3d 737 (2012). The role of the trier of fact is to assess “the credibility of the witnesses . . . on the basis of its firsthand observation of [the witnesses’] conduct, demeanor and attitude.” (Internal quotation marks omitted.) *Cohen v. Roll-A-Cover, LLC*, 131 Conn. App. 443, 450, 27 A.3d 1, cert. denied, 303 Conn. 915, 33 A.3d 739 (2011).

The court had ample opportunity to observe the conduct, demeanor, and attitude of each witness, to evaluate the testimony, and to relate the testimony of each witness to the exhibits in the case. In considering the evidence and evaluating the testimony and exhibits, the court drew reasonable inferences from the facts established in this case. The court also took into consideration direct and circumstantial evidence that was admitted in the course of the hearing. The court’s findings of fact, including its decision to credit some witnesses and not others, are based upon all the foregoing factors.

The court finds the following:

1. Caldarella is a resident of Old Saybrook, Connecticut. Caldarella is a builder and developer whose building contracting company, MDC Construction and Development, LLC, has been involved in several development projects in Old Saybrook and throughout the state.
2. Potts is a resident of Florida and maintains a residence in Essex, Connecticut. Potts is prominent in the marina business and serves as president of Safe Harbor Marinas, which was acquired by Sun Communities, Inc. in 2020. Potts has a long career in the marina business, which began in Westbrook, Connecticut at Pilots Point Marina and Brewer Yacht Yards.
3. The defendant Thomas W. Potts (Walker) is Potts' son and a resident of Connecticut. Walker is the manager of the defendant 142 Ferry Road, LLC.
4. The defendant Valerie Anne Votto (Votto) is a resident of Connecticut and lives in Guilford. She has acted as Potts' attorney for numerous years.
5. The defendant 142 Ferry Road, LLC is a limited liability company organized under the laws of Delaware.
6. The defendant 54 Ferry Road #2 (CT), LLC is a limited liability company organized under the laws of Connecticut. The business address for 54 Ferry Road #2 (CT), LLC on file with the Secretary of State is the residential address of Potts in Florida.
7. The defendant RRM2 (CT), LLC is a limited liability company organized under the laws of Connecticut. The business address for RRM2 (CT), LLC on file with the Secretary of State as of the date of this complaint is the residential address of Potts in Florida.

8. The area at issue in this dispute is along the portion of Ferry Road in Old Saybrook that runs north-south alongside the western bank of the Connecticut River.
9. Between the Bridges Marina (BTB Marina) is located on Ferry Road and is divided into a North Yard parcel and a South Yard parcel, which were separated by a wetlands parcel (CMD Lot). The CMD Lot is owned by CMD Ventures, LLC (CMD).
10. Until 2019, the North Yard and South Yard parcels were owned by Between the Bridges, LLC (BTB LLC).
11. BTB LLC also owned a parcel on the western side of Ferry Road at 163 Ferry Road.
12. Caldarella has sought to develop the BTB Marina properties into a mixed-use residential development that would include condominiums, restaurants, shopping, public waterfront access, and a marina. The development concept is referred to as Marina Village. A prior proposal of Marina Village was submitted to Old Saybrook and had not been pursued.
13. In 2019, Caldarella and his business partner, Donald Brodeur, Jr. (Brodeur), paid money to acquire the South Yard parcel from BTB LLC along with an option to acquire the North Yard and 163 Ferry Road parcels.
14. Caldarella and Brodeur obtained title to the South Yard parcel in the name of Stack Marina, LLC (Stack Marina), and operated the property through South Yard Marina LLC (South Yard Marina). Caldarella controlled the entities, and Brodeur was a passive investor.
15. As further consideration for the South Yard parcel and option to purchase the other properties, Caldarella provided services as a non-member manager of BTB LLC.

16. Caldarella and Brodeur also purchased an option to buy the CMD Lot from CMD.
17. In 2020, Guilford Savings Bank (GSB) commenced a foreclosure action (GSB foreclosure) against BTB LLC on the mortgage GSB held on the North Yard and 163 Ferry Road parcels (foreclosure properties).
18. Ferry Landing held a junior mortgage on the foreclosure properties. At that time, Ferry Landing was controlled by its sole member, Dort Cameron (Cameron).
19. Caldarella and Brodeur negotiated with Cameron to acquire Ferry Landing's mortgage or Ferry Landing itself so that they could then secure title to the foreclosure properties via a redemption in the foreclosure proceedings.
20. In July of 2022, Caldarella and Brodeur, through South Yard Marina, paid \$50,000 to Cameron.
21. In July of 2022, Brodeur also individually provided a \$125,000 promissory note to Cameron.
22. The payment and promissory note were in exchange for Cameron's promise to not seek a foreclosure by sale, which would have threatened Caldarella and Brodeur's ability to secure title to the foreclosure properties because of other potential purchasers of the North Yard parcel.
23. Caldarella knew of at least one other buyer, Sachem Capital, who was interested in developing Marina Village and had purchased a construction company to prepare for the project.
24. Caldarella planned to find an investor who could help them complete the acquisition of Ferry Landing or its mortgage and redeem the foreclosure properties.

25. Caldarella and Brodeur met for the first time with Potts and his counsel, Votto, on or about October 18, 2022, because Potts was identified as a potential investor. They met to discuss a potential partnership in the acquisition of the foreclosure properties to develop Marina Village. At the meeting, Caldarella and Brodeur explained the development opportunity, the strategy for acquiring the foreclosure properties, and shared a brochure of the project.
26. At the meeting, Potts expressed his interest in working with Caldarella. No agreement was reached at the meeting.
27. Shortly after the meeting, however, Potts represented that the South Yard parcel had to be part of any deal.
28. In the month or so after this initial meeting, Caldarella and Brodeur continued to work out an agreement with Potts on moving forward with the development project. Once Caldarella decided not to sell the South Yard parcel to a different investor, he committed it to the project with Potts. Brodeur negotiated a value of the South Yard parcel with Potts of \$5 to \$5.5 million. Time was of the essence because of an upcoming court date on a motion for foreclosure by sale for the foreclosure properties.
29. On November 18, 2022, Caldarella and Potts met to discuss the inclusion of the South Yard parcel in the project. Potts communicated by email the following day to Caldarella and indicated his agreement to partner with Caldarella to obtain and build out the South Yard and North Yard parcels as discussed at their initial meeting and depicted by the brochure. See Pl. Ex. P-14.

30. At the same time, the attorney for Caldarella, David Shaiken (Shaiken), and the attorney representing Potts, Votto, were in communication to try to document the agreement between the parties.
31. With the November 21, 2022 redemption date for the North Yard parcel a couple days away, the attorneys had several email exchanges during the weekend regarding their agreement and the redemption of the North Yard parcel, which they would be acquiring through Cameron.
32. To accomplish the purchase, Votto circulated a blank assignment agreement provided by Cameron's counsel so that she and Shaiken could amend it to reflect what Caldarella and Potts had agreed. Shaiken provided some comments.
33. At the same time, Votto unilaterally sent a version of the document to Cameron's attorney, Tom Gugliotti (Gugliotti), in which she identified Potts alone as the purchaser and had Potts sign it (Potts Only Version). She did this after counsel for Stack Marina, Stephen Sheehan (Sheehan), objected to the assignment including Caldarella and not including Brodeur.
34. When Caldarella learned of the different versions, he told Potts, Shaiken, and Votto that he had to be defined as a buyer of the Ferry Landing membership interests. Votto was instructed by Potts, Shaiken, and Caldarella to change the document to reflect that Caldarella was a buyer of the membership interests and that there was no deal if she did not.
35. Votto revised the assignment to include Caldarella as a buyer to reflect that Caldarella and Potts were receiving the interests equally 50/50. Potts and Caldarella signed that version on the afternoon on Sunday, November 20, 2022 (Potts & Caldarella

Version). On Sunday evening, Gugliotti confirmed that he had been told that Caldarella had been added to the assignment as a buyer and requested a copy. Shaiken, instructed Votto to send Gugliotti the Potts & Caldarella Version without alteration.

36. Sheehan again raised concerns by email on Monday, November 21, 2022 to all the attorneys with having Caldarella named a fifty percent buyer. See Def. Ex. L.
37. Votto did not send the Potts & Caldarella Version to Gugliotti and Cameron. Instead, Cameron signed the Potts Only Version, changed the rejected payment date back to the 21st version and initialed it (Cameron Version).
38. Votto did not disclose any of this, but instead assured Shaiken and Sheehan, at 9:34 a.m. on Monday morning, that “[n]o one on my side is cutting anyone out.” She told Sheehan, that it did not matter who took the assignment that day because it was only a placeholder—it would be fixed later when she populated the Ferry Landing at a later date. See Sheehan Testimony, December 1, 2023 Transcript, p. 51:19-27.
39. Caldarella was not aware of the Cameron Version that excluded him as a buyer until sometime after the November 21, 2022 foreclosure hearing. See Def. Ex. NNN, Brodeur Email to Votto, December 16, 2022.
40. Caldarella continued to work and aid Ferry Landing in redeeming the North Yard parcel and securing clear title. Starting immediately after acquiring the Ferry Landing interest, Potts and Caldarella conferred and agreed on a strategy to acquire the Aguiar position in the foreclosure proceeding to block Sachem Capital. Shaiken negotiated and secured the Aguiar position for Ferry Landing, from which Ferry Landing

actually redeemed and acquired title to the North Yard parcel on November 30, 2022. See Pl. Ex. P35-P44.

41. Brodeur, Caldarella's partner in the South Yard parcel who had worked early on with Caldarella on Marina Village, also took steps following the redemption to merge the South Yard and North Yard marina operations together into Ferry Landing because he believed that Caldarella was a partner in Ferry Landing. See Brodeur Testimony, October 31, 2023 Transcript, p. 226:9-15. ("I absolutely believe that there was an agreement in place between Mr. Caldarella and Mr. Potts and that that agreement, it was in place as of the redemption date. I based all of my actions for the following month on that and that understanding, including my total cooperation to help operate the marina and to make sure that the South Yard was contributed into Ferry Landing.").
42. Even though the transfer of the fifty percent interest from Potts to Caldarella had not occurred in Ferry Landing, they both conducted ongoing business in a manner that treated Caldarella as a partner and included him in all discussions about moving forward. See Pl. Exs. P-50, P-52, P-54.
43. After the redemption, Potts and Caldarella discussed acquiring Ragged Rock Marina. Caldarella met with the owners on two occasions, communicated the asking price of \$6.5 million to Potts, and suggested that he not pay above \$5.5 million.
44. At a subsequent meeting with Potts present, the owners were told that Potts and Caldarella were acquiring it together. They agreed to a price with the owners of \$5.8 million. Potts and Caldarella also discussed their arrangement in relation to Ragged

Rock Marina. Potts again proposed that they be 50/50 partners in operating the marina alongside the North and South Yard parcels.

45. Potts and Caldarella executed a nondisclosure agreement, prepared a letter of intent identifying them both as the parties acquiring Ragged Rock Marina, which Potts signed, and signed an engagement letter, dated December 19, 2022, with Votto for her to represent them in the acquisition by preparing a purchase and sale agreement identifying Potts and Caldarella as the buyers. See Pl. Exs. P-46, P-50, P-56.
46. In the meantime, Brodeur was handling the accounting of the revenue and expenses of the North Yard parcel on behalf of Ferry Landing and deposited the revenues and paid the expenses from an account held by the South Yard Marina. Ferry Landing did not have its own bank account. See Brodeur Testimony, October 31, 2023, Transcript, p. 164:12-20.
47. Caldarella introduced Potts as his partner to John Milone—the lead engineer for Marina Village—who updated Potts on the work he had been doing on the engineering plans for Marina Village, its budget, and pursuing government approvals. Potts agreed to pay Milone the amounts owed to him for his work through that time and going forward with the approval process.
48. By early January 2023, Potts raised potential negative tax consequences regarding the development project as an obstacle to their intended 50/50 partnership through Votto. See Pl. Exs. P-68, P-69, P-70.
49. During this same time, Votto had been hired by both Potts and Caldarella to represent them in the acquisition of Ragged Rock Marina, yet Votto also started

communicating to Caldarella on behalf of Potts and through Shaiken. See Pl. Ex. P-69.

50. Shaiken, who had been obtained to represent Ferry Landing, on or about December 16, 2022, by Potts and Caldarella, engaged in an email exchange with Votto and explained that he represented Ferry Landing and not Caldarella individually. See Pl. Exs. P-52, P-69, P-70, P-72, P-75.

51. Given the issues raised with counsel, Caldarella reached out to Potts to determine what the status was of the project and their plans. See Pl. Ex. P-72. He also hired new counsel, Larry Marks (Marks), to represent him going forward. See Pl. Exs. P-77, P-79, P-80.

52. After Caldarella took steps to record his interest in Ferry Landing, Potts told Caldarella that he was not a member of Ferry Landing. No additional interactions occurred.

53. At some point after this, Caldarella learned that Walker acquired Ragged Rock Marina.

Additional facts found will be discussed as necessary to the court's analysis.

II PREJUDGMENT REMEDIES

The application for prejudgment remedy is brought by the plaintiffs against Potts, 142 Ferry Road, LLC, 54 Ferry Road #2 (CT), and RRM2 (CT), LLC. General Statutes § 52-278d (a) provides in relevant part that a hearing on a prejudgment remedy “shall be limited to a determination of (1) whether or not there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter

in favor of the plaintiff If the court, upon consideration of the facts before it and taking into account any defenses, counterclaims or set-offs . . . finds that the plaintiff has shown probable cause that such a judgment will be rendered in the matter in the plaintiff's favor in the amount of the prejudgment remedy sought and finds that a prejudgment remedy securing the judgment should be granted, the prejudgment remedy applied for shall be granted as requested or as modified by the court. . . .” See *Rafferty v. Noto Bros. Construction, LLC*, 68 Conn. App. 685, 688, 795 A.2d 1274 (2002).

“The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a [person] of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false.” *Morris v. Cee Dee, LLC*, 90 Conn. App. 403, 411, 877 A.2d 899, cert. granted, 275 Conn. 929, 883 A.2d 1245 (2005). “In its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error.” *TES Franchising, LLC v. Feldman*, 286 Conn. 132, 137, 943 A.2d 406 (2008). “[P]rejudgment remedy proceedings are not involved with the adjudication of the merits of the action brought by the plaintiff or with the progress or result of that adjudication. They are only concerned with whether and to what extent the plaintiff is entitled to have property of the defendant held in the custody of the law pending adjudication of the merits of that action.” *Morris v. Cee Dee, LLC*, supra, 411-12.

The present matter is a classic example of a business deal that went sideways. Both parties, Caldarella and Potts, are experienced businessmen. In fact, Potts has an international reputation and manages numerous marinas across the country. Caldarella is a local developer

with his own construction company and experience on development projects. He also was running the South Yard marina at the time of his involvement with Potts. As the business deal involved a number of alleged transactions and agreements, the agreement that the court finds pertinent and supported by the evidence is the preliminary partnership agreement that Caldarella and Potts are alleged to have entered into, wherein each party would have a 50 percent membership interest in Ferry Landing, and they would partner to develop Marina Village.

In reviewing all the testimony and documents submitted to the court over the twelve days of hearings, the court cannot find that the plaintiffs have met their burden to show that a prejudgment remedy may be awarded against any of the defendants in any amount. Although the plaintiffs have met their burden of proof regarding the merits of certain causes of action, based on the probable cause standard the court cannot enter a prejudgment remedy because the plaintiffs have failed to sufficiently show that they have been damaged.

A
RELEVANT COUNTS

1. Breach of Contract – Second Count (against Potts)

The plaintiffs argue that Potts and Caldarella agreed to partner to acquire the North Yard parcel and build Marina Village. Potts was to contribute to the partnership by paying for the North Yard parcel via the Ferry Landing redemption in the foreclosure proceeding, and Caldarella was to withhold on selling the South Yard parcel so that it may become integrated into the Marina Village project. Potts argues that no enforceable contract exists because the plaintiffs have failed to show that there was a meeting of the minds as to material terms, and that any actual damages were incurred as Caldarella did not contribute to the redemption of the North Yard parcel via the foreclosure proceeding or towards the purchase of Ragged Rock Marina.

“The elements of a breach of contract action are formation of an agreement, performance by one party, breach of the agreement by the other party and damages.” (Internal quotation marks omitted.) *Summerhill, LLC v. Meriden*, 162 Conn. App. 469, 474, 131 A.3d 1225 (2016).

“A binding agreement can arise, if the parties so intend, prior to the signing of a formal contract.” *Dacourt Group, Inc. v. Babcock Industries, Inc.*, 747 F. Supp. 157, 160 (D. Conn. 1990). “Regardless of the title, if the content [of a letter of intent] shows that the parties intended to be bound, and the other requisites of a contract have been satisfied, it may be a contract.” *Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 76 n.33, 873 A.2d 929 (2005). Although Connecticut appellate courts have not had occasion to establish the relevant considerations in determining whether a preliminary agreement is binding, the Supreme Court has cited *Teachers Ins. & Annuity Assn. of America v. Tribune Co.*, 670 F. Supp. 491, 496-503 (S.D.N.Y. 1987) as a “seminal case that sets forth relevant considerations in determining whether [a] preliminary agreement is binding.” *Glazer v. Dress Barn, Inc.*, supra, 87 n.37. “In seeking to determine whether such a preliminary commitment should be considered binding, a court’s task is . . . to determine the intentions of the parties at the time of their entry into the understanding, as well as their manifestations to one another by which the understanding was reached.” *Teachers Ins. & Annuity Assn. of America v. Tribune Co.*, supra, 499.

To assess the intent of the parties, the Supreme Court has cited to *Spencer Trask Software & Information Systems, LLC v. RPost International, Ltd.*, 383 F. Supp. 2d 428, 441 (S.D.N.Y. 2003) as a source for determining which factors are indicative of evidence of intent to be bound. See *Glazer v. Dress Barn, Inc.*, supra, 274 Conn. 87 n.37. The *Spencer Trask* Court promulgates the *Winston* test, which lists four relevant factors to consider: “(1) whether the parties have expressly reserved the right not to be bound without a written contract; (2) whether there has

been partial performance of the contract; (3) whether the parties have agreed to all terms of the alleged contract; and (4) whether the alleged agreement is the type that is usually committed to writing.” *Spencer Trask Software & Information Systems, LLC v. RPost International, Ltd.*, supra, 441 (referencing *Winston v. Mediapare Entertainment Corp.*, 777 F.2d 78, 80 [2d Cir. 1985]).

Under the *Winston* test, here the plaintiffs have met their probable cause burden of showing that Potts intended to be bound by a preliminary agreement. Potts did not expressly reserve the right not to be bound to a partnership without a written contract. After Caldarella decided to commit the South Yard parcel to the partnership with Potts, Potts expressly communicated his intent to enter into a partnership with Caldarella on numerous occasions. Caldarella demonstrated his intent to enter into the partnership by making no further effort to sell the South Yard parcel to a third party and committing it to the partnership. Both parties also signed a version of the assignment of Ferry Landing indicating that they would each be receiving a 50 percent interest in the entity to be purchased. Moreover, after performing part of the agreement by acquiring the North Yard parcel, Caldarella and Potts signed a letter of engagement with Votto indicating that Votto would represent both parties as joint purchasers of the Ragged Rock Marina. The parties acted in a manner that was consistent with a partnership. Even Brodeur testified that it was his firm belief that there existed a partnership between Caldarella and Potts. Although not all the terms of the agreement were specifically identified, the key terms were agreed to by the parties. See *Klewin Development, LLC v. A.R. Building Co., Inc.*, Superior Court, judicial district of New London, Docket No. CV-17-6031223-S (March 19, 2018, *Frechette, J.*) (finding that agreement in principle between plaintiff and defendants was binding because defendants expressed their intention to negotiate in good faith for purchase of

the plaintiff's interest in a parcel of land); see also *Hogan v. Lajosz*, 124 Conn. App. 602, 616, 6 A.3d 112 (2010), cert. denied, 299 Conn. 923, 11 A.3d 151 (2011) (finding that "[u]nder the modern law of contract, if the parties so intend, they may reach a binding agreement even if some of the terms of that agreement are still indefinite").

Finally, the type of agreement in question, a partnership, need not be written, and may even be created unintentionally. See General States § 34-301 (13) (defining partnership agreement as "agreement, whether written, oral or implied, among the partners concerning the partnership, including amendments to the partnership agreement.").

Here, the court finds that Caldarella and Potts both took actions in accordance with this agreement, later Potts told Caldarella that he was not a member of Ferry Landing, and that Walker had acquired Ragged Rock Marina. Thus, the court finds that the plaintiffs have met their probable cause burden to show that it is more likely than not that the agreement in principle between Caldarella and Potts was binding and was breached.²

² The defendants argue that the statute of frauds bars the plaintiffs' claims. General Statutes § 52-550 (a) provides in relevant part: "No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property . . ." Here, although Ferry Landing retains an interest in real property, the agreement in question between Caldarella and Potts concerns the preliminary partnership agreement to split the membership interest in Ferry Landing only. Connecticut courts have held that oral agreements similar to the preliminary partnership between Caldarella and Potts are not subject to the statute of frauds. See *Jacobs v. Thomas*, 26 Conn. App. 305, 310, 600 A.2d 1378 (1991) (finding that oral agreement concerning fund representing profits from partnership rather than interest in real estate falls outside statute of frauds), cert. denied, 221 Conn. 914, 603 A.2d 404 (1992); see also *Yavarone v. Moroni*, Superior Court, judicial district of Middlesex, Docket No. CV-04-0104753-S (May 10, 2005, *Aurigemma, J.*) (finding that oral partnership agreement pertaining to real property fell outside statute of frauds because agreement concerned sharing of expenses and profits associated with property rather than property's purchase or sale.). Moreover, Caldarella's and Potts' preliminary agreement contrasts with the agreement in *Urda v. Sahl*, Superior Court, judicial district of New Haven, Docket No. CV-02-0468800-S (April 17, 2003, *Arnold, J.*), wherein the court held that a partnership concerning employment in exchange for land, rather than ownership interest in a limited liability company, is subject to the statute of frauds. The court said, "[i]f this was an agreement to transfer an ownership interest in a limited liability company, which owned real estate, it would not be an agreement for the sale of an interest in real estate." *Id.* Here, the agreement at issue concerns the division of ownership interest in a limited liability company, rather than the division of interest in any land itself. Therefore, the plaintiffs' claims are not subject to the statute of frauds.

2. Breach of Fiduciary Duty: First Count (against Potts)

The plaintiffs argue that Potts and Caldarella formed a partnership to acquire the North Yard parcel and build Marina Village. As a partner, Potts owed Caldarella duties of loyalty and care, and was responsible for discharging these duties in good faith. The plaintiffs allege that Potts failed to discharge his duties in good faith. The defendant counters that the plaintiffs have failed to sufficiently demonstrate that a partnership exists, and, therefore, no fiduciary duty was owed by Potts to Caldarella.

“The elements which must be proved to support a conclusion of a breach of fiduciary duty are: [1] [t]hat a fiduciary relationship existed which gave rise to . . . a duty of loyalty . . . an obligation . . . to act in the best interests of the plaintiff, and . . . an obligation . . . to act in good faith in any matter relating to the plaintiff; [2] [t]hat the defendant advanced his or her own interests to the detriment of the plaintiff; [3] [t]hat the plaintiff sustained damages; [and] [4] [t]hat the damages were proximately caused by the fiduciary’s breach of his or her fiduciary duty.” (Internal quotation marks omitted.) *Chioffi v. Martin*, 181 Conn. App. 111, 138, 186 A.3d 15 (2018).

General Statutes § 34-314 (a) defines a partnership as “the association of two or more persons to carry on as co-owners of a business for profit . . . whether or not the persons intend to form a partnership.” The Supreme Court has recognized that “some actors are per se fiduciaries by nature of the functions they perform. These include agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians. . . . Beyond these per se categories, however, a flexible approach determines the existence of a fiduciary duty, which allows the law

to adapt to evolving situations wherein recognizing a fiduciary duty might be appropriate. . . .

This court has instructed that, [a] fiduciary duty or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him.” *Iacurci v. Sax*, 313 Conn. 786, 800, 99 A.3d 1145 (2014). The “hallmark of a per se fiduciary relationship is that a beneficiary entrusts a fiduciary with control and management of an asset, which necessarily involves risk and uncertainty.” (Internal quotation marks omitted.) *Id.*, 801, n.14.

“Even if the parties [to a preliminary agreement] did not have a binding agreement, the defendant, at minimum, had a duty to negotiate in good faith. The obligation to negotiate in good faith has been generally described as preventing one party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement . . . [T]he scope of any obligation to negotiate in good faith can only be determined from the framework the parties have established for themselves in their letter of intent.” (Internal quotation marks omitted.) *Klewin Development, LLC v. A.R. Building Co., Inc.*, supra, Superior Court, Docket No. CV-17-6031223-S.

In the present case, it is more likely than not that Caldarella and Potts established a fiduciary relationship by virtue of their routine collaborations towards developing the Marina Village. As previously discussed, a preliminary agreement between Caldarella and Potts likely existed to operate as partners of Ferry Landing. Potts likely breached the duty to negotiate in good faith when he signed and submitted the Potts Only Version of the agreement to Gugliotti. Moreover, the parties’ conduct towards one another suggests that a unique degree of trust and

confidence had been established between Caldarella and Potts. Thus, the court finds that the plaintiffs have met their probable cause burden to show that it is more likely than not that Potts breached his duty to negotiate in good faith to Caldarella.

3. *Breach of Duty of Loyalty – Seventh Count (against Potts and/or 142 Ferry Road, LLC)*

The plaintiffs argue that Potts and/or 142 Ferry Road, LLC, as members of Ferry Landing, breached their duties of loyalty to the plaintiffs by not signing the correct version of the assignment and not properly dividing the interests in Ferry Landing thereafter. The defendants argue that the plaintiffs have neither sufficiently demonstrated the existence of a partnership, nor followed the proper protocol to become a member of a limited liability company pursuant to General Statutes § 34-243e, and so they owe no fiduciary duties.

As discussed in the previous section, as it concerns Potts, the court finds that the plaintiffs have met their probable cause burden to show that it is more likely than not that Potts breached his duty of loyalty. Although the plaintiffs' second amended complaint alleges that 142 Ferry Road, LLC is managed by Potts, it does not allege how this entity breached its duty of loyalty and, moreover, this court finds that Walker, not Potts, managed this entity. As only Potts entered into an agreement with Caldarella to divide the membership interest in Ferry Landing, the court finds that the plaintiffs have not met their probable cause burden to show that it is more likely than not that 142 Ferry Road, LLC was engaged in a membership relationship with the plaintiffs resulting in a duty of loyalty.

4. *Fraud – Third Count (against Potts)*

The plaintiffs argue that Potts made misrepresentations to Caldarella both personally and through his agent, Votto, and failed to fully disclose information. The defendants disagree.

“Fraud involves deception practiced in order to induce another to act to her detriment, and which causes that detrimental action. . . . The four essential elements of fraud are (1) that a false representation of fact was made; (2) that the party making the representation knew it to be false; (3) that the representation was made to induce action by the other party; and (4) that the other party did so act to her detriment. . . . Because specific acts must be pleaded, the mere allegation that a fraud has been perpetrated is insufficient.” (Internal quotation marks omitted.) *Asnat Realty, LLC v. United Illuminating Co.*, 204 Conn. App. 313, 321, 253 A.3d 56 (2021). “Fraud by nondisclosure, which expands on the first three of [the] four elements [of fraud], involves the failure to make a full and fair disclosure of known facts connected with a matter about which a party has assumed to speak, under circumstances in which there was a duty to speak. . . . A lack of full and fair disclosure of such facts must be accompanied by an intent or expectation that the other party will make or will continue in a mistake, in order to induce that other party to act to her detriment.” (Internal quotation marks omitted.) *Id.*, 321-22. Furthermore, “[a]n attorney is the client’s agent and his knowledge is imputed to the client.” *National Groups, LLC v. Nardi*, 145 Conn App. 189, 201, 75 A.3d 68 (2013).

Here, the court finds that the plaintiffs have met their probable cause burden to show that it is more likely than not that Potts intended to exclude Caldarella from acquiring a membership interest in Ferry Landing but have him continue to manage the businesses and develop Marina Village, and that Potts and/or Votto purposefully withheld information concerning which version of the assignment agreement for Ferry Landing was signed for that reason. It is likely that Caldarella acted to his detriment by deciding not to sell the South Yard parcel to a third party and by continuing to work with Potts to develop Marina Village. Therefore, the court finds that the

plaintiffs have met their probable cause burden to show that it is more likely than not Potts committed fraud against Caldarella.

5. Conversion –Fourth Count (against Potts & 142 Ferry Road, LLC)

The plaintiffs allege that Caldarella entered into an agreement with Potts to each control 50 percent of the membership interests of Ferry Landing and 50 percent of the profits and control of Ragged Rock Marina, and that Potts and/or 142 Ferry Road, LLC control Ferry Landing and Ragged Rock Marina to the exclusion of Caldarella. The defendants argue that the plaintiffs never entered into such an agreement or possessed ownership over Ferry Landing or Ragged Rock Marina and, therefore, there can be no claim of conversion.

“Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner’s rights. . . . It is some unauthorized act which deprives another of his property permanently or for an indefinite time. . . . The essence of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to him, inconsistent with his right of dominion and to his harm. . . . To establish a valid claim of conversion, a plaintiff must establish legal ownership or right to possession in the particular thing . . . that the defendant is alleged to have converted.” (Citations omitted; internal quotation marks omitted.) *Marut v. IndyMac Bank, FSB*, 132 Conn. App. 763, 768-69, 34 A.3d 439 (2012).

“[T]he term owner is one of general application and includes one having an interest other than the full legal and beneficial title. . . . The word owner is one of flexible meaning, and it varies from an absolute proprietary interest to a mere possessory right. . . . It is not a technical term and, thus, is not confined to a person who has the absolute right in a chattel, but also applies

to a person who has possession and control thereof.” (Internal quotation marks omitted.) *Payne v. TK Auto Wholesalers*, 98 Conn. App. 533, 539, 911 A.2d 747 (2006).

Connecticut courts have not addressed the question of whether a binding preliminary agreement confers a right of ownership of a membership interest in a limited liability company. The Supreme Court, however, has recognized that “[i]n Connecticut, intangible property interest[s] have not traditionally been subject to the tort of conversion, except for those intangible property rights evidenced in a document. See, e.g., *Aetna Life & Casualty Co. v. Union Trust Co.*, 230 Conn. 779, 790 n.6, 646 A.2d 799 (1994) (conversion of trust account); *Devitt v. Manulik*, 176 Conn. 657, 662-63, 410 A.2d 465 (1979) (conversion applicable to account passbook).” *Hi-Ho Tower, Inc., v. Com-Tronics, Inc.*, 255 Conn. 20, 44, 761 A.2d 1268 (2000). A membership interest in a limited liability company qualifies as an intangible right of ownership. See *Steiner v. Ciapetta*, Superior Court, judicial district of Litchfield, Docket No. CV-11-6004944-S (April 21, 2015, *Danaher, J.*) (recognizing that debtor’s membership interest in limited liability company is intangible right of ownership).

Although owner is a flexible term, the court cannot find that that the plaintiffs have met their probable cause burden to show that it is more likely than not Caldarella has any legal ownership in Ferry Landing because the Potts Only Version was the agreement submitted in the assignment with Cameron, which means that the operative assignment is the Cameron Version, and Potts subsequently repudiated the partnership. Similarly, Caldarella tried but did not acquire any legal interest in or ownership of Ragged Rock Marina before he discovered that Walker acquired it. Consequently, this type of intangible property interest is not subject to conversion. Therefore, the court finds that the plaintiffs have not met their probable cause burden to show