CORPORATE MATTERS:

ORAL AGREEMENT CAN BE UNILATERALLY TERMINATED IF THERE IS NO DEFINITE TERM OR A PARTICULAR UNDERTAKING

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Under New York partnership law ("Partnership Law"), a partnership can be formed orally. Additionally, a partnership may be dissolved unilaterally if "no definite term or particular undertaking is specified" in the underlying agreement.[63]

In *Gelman v. Buehler* 2013 NY Slip OP 01991 (March 26, 2013, plaintiff (P) and defendant (D) were recent business school graduates who decided to form a partnership in 2007. D had proposed a plan to P aimed at acquiring $600,000 from investors for the purpose of establishing a "search fund" to research and identify and raise any additional funding needed to pay the purchase price of the targeted business. P and D were to manage the business with the goal of increasing its value until it could be sold at a profit (referred to as a "liquidity event") and the investors would share in the profits realized from the sale. P accepted D's proposal and the partnership was formed by oral agreement. P and D expected that the business plan would reach its objective in four to seven years. The partners apparently pursued prospective investors for several months. D withdrew from the venture after P refused his demand for majority ownership of the partnership.

P sued D for breach of contract, claiming that D could not unilaterally terminate his obligations under the agreement. D moved to dismiss the complaint on the ground that dissolution was permissible under New York partnership law because the oral agreement did not include a "definite term or particular undertaking." The Supreme Court of New York granted D's motion to dismiss, concluding that the complaint failed to allege that the partnership agreement provided for a definite term or a defined objective. However, the Appellate Division modified by reinstating the breach of contract cause of action, reasoning that the complaint adequately described a "definite term" by its reference to the liquidity event and sufficiently alleged a "specific undertaking of acquiring a business and expanding it until the investors would receive a return on their capital investments". Two Justices dissented, concluding that the partnership was dissolvable at will because the oral agreement contained neither a definite term nor a particular undertaking. D appealed.

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[63] New York Partnership Law §61(1)(b).

"Even if individuals starting out in a new enterprise do not want to incur the expense of a 'full blown' partnership agreement, there are some basic business understandings that could be documented by a competent attorney for relatively little expense. Most of these issues must be confronted at some point and there is no better time than at the outset of a project."

The Court of Appeals held for D, stating that P's complaint lacked a "fixed, express period of time during which the enterprise was expected to operate" and that since the complaint did not set forth a specific or even a "reasonably certain" termination date, the joint venture could be unilaterally terminated. The court further went on to hold that, "when the entire scheme is considered, the alleged sequence of anticipated partnership events detailed in the complaint are too amorphous to meet the statutory 'particular undertaking' standard for precluding unilateral dissolution of a partnership."

Often, when individuals go into business together, they do not document their initial business understanding. Usually this is not a conscious decision but simply a reflection of the fact that the parties are too busy working on a business plan or doing whatever it takes to get the business up and running to negotiate and draft a partnership or shareholders' agreement. Whatever the reason, many closely held businesses do not have adequate documentation covering the basic tenets of the enterprise. Some proceed without incident, many, as in the *Gelman v. Buehler* case, fail due to conflict over the most basic issues.

In the *Gelman* case, the defendant withdrew following a dispute over ownership of the partnership. Had the two individuals instructed counsel to draft even the most basic of partnership agreements, this issue would have been one of the first discussed and would have either been overcome or caused them to abandon the project.

We often have clients coming to see us having been in business together for some months or even years without ever having documented their business understanding. It is amazing when these people sit down to discuss a partnership agreement how different their views can be. These discussions can drag on and become quite acrimonious and distracting. *Gelman v. Buehler*'s journey through the courts is illustrative of how murky some of these issues can be.

Even if individuals starting out in a new enterprise do not want to incur the expense of a "full blown" partnership agreement, there are some basic business understandings that could be documented by a competent attorney for relatively little expense. Most of these issues must be confronted at some point and there is no better time than at the outset of a project. Questions asked by an attorney may also help cement ideas for the business plan.

The two individuals in the *Gelman* case should never have been in business together. A few hours with an attorney at the outset would have saved them a lot of time, money and anguish.