

<b>Ostad v Nehmadi</b>
2019 NY Slip Op 32250(U)
July 27, 2019
Supreme Court, New York County
Docket Number: 650460/2010
Judge: Marcy Friedman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60\_\_\_\_\_  
DAVID H. OSTAD,

Plaintiff,

- v -

BEHZAD NEHMADI, a/k/a BEN NEHMADI and BENITA  
HOLDINGS LLC,Defendants.  
\_\_\_\_\_

INDEX NO. 650460/2010

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 006

## DECISION AND ORDER

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 267, 268, 269, 270, 271, 272, 275, 282, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298 were read on this motion to AMEND TRIAL DECISION.

This action arises out of a cash transaction between plaintiff David Ostad and defendant Behzad Nehmadi. The action was tried before this court without a jury on March 4, 5, 6, and 22, 2019. In a decision after trial on the record on March 22, 2019 (trial decision), this court held that Mr. Ostad was entitled to judgment on his unjust enrichment cause of action in the amount of \$400,000. (Mar. 22, 2019 Tr. [NYSCEF Doc. No. 272], at 554 [3/22/19 Tr.].) Mr. Ostad now moves for an order, pursuant to CPLR 4404 (b), amending the court's trial decision to the extent of providing for pre-judgment interest on the award of \$400,000 as of March 2008, at the statutory rate of 9% per annum. Defendants Nehmadi and Benita Holdings, LLC cross-move for an order "amending" the trial decision to dismiss Mr. Ostad's cause of action for unjust enrichment and to vacate the award of \$400,000, on the ground that the unjust enrichment claim is time barred.

CPLR 4404 (b) provides:

"After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial

of a cause of action or separable issue.”

In the trial decision, the court denied Mr. Ostad’s cause of action for a constructive trust.

(3/22/19 Tr., at 553.) The court determined that Mr. Ostad and Mr. Nehmadi had a close personal relationship, which the court found to be one of trust; that Mr. Nehmadi needed cash to close a difficult business deal;<sup>1</sup> and that Mr. Ostad provided the cash. (*Id.*, at 550-552.)

Although the court concluded that Mr. Ostad did not prove that the cash was given to Mr. Nehmadi in exchange for a ten percent interest in the 45th Street property (the property) (*id.*, at 552), the court found that the cash was not a “gift” to Mr. Nehmadi. (*Id.*, at 553.)

Contrary to Mr. Nehmadi’s contention on this motion, the court did not find that the cash transaction was a loan. Rather, the court found that Mr. Ostad’s provision of the cash to Mr. Nehmadi was consistent with the informal manner in which Mr. Ostad and Mr. Nehmadi conducted financial transactions until March 2008, when the relationship between them sharply deteriorated after Mr. Nehmadi’s involvement in foreclosing on a loan for a separate property in Florida that Mr. Ostad had purchased. (*Id.*, at 553-554.)

Based on the credible evidence at the trial, the court now makes the additional finding, which was not expressly articulated in the trial decision, that consistent with the informal manner in which Mr. Ostad and Mr. Nehmadi conducted financial transactions prior to the breakdown of their relationship, Mr. Ostad provided, and Mr. Nehmadi accepted, the cash, with the reciprocal expectation that some financial benefit would be provided by Mr. Nehmadi to Mr. Ostad in the future. Put another way, Mr. Ostad’s provision of the cash to Mr. Nehmadi was a financial favor on which the claim for unjust enrichment may be predicated. (*See Whittemore v Yeo*, 112 AD3d 475, 475-476 [1st Dept 2013] [where plaintiff made a guaranty as a favor to defendant, his

---

<sup>1</sup> As found in the trial decision, Mr. Nehmadi credibly testified that the closing of the property was time of the essence; the seller wanted an upfront deposit to be released from escrow, which was very unusual; and the seller was behind in his mortgage payments and was going to prison. (3/22/19 Tr., at 550.)

former friend, the court held that plaintiff's unjust enrichment claim was viable, as the guaranty "was not shown to be grounded in any contractual agreement as between them"].)

The court accordingly rejects Mr. Nehmadi's contention on this motion that the court's determination in the trial decision improperly treated the cash transaction as "an informal and undocumented loan. . . ." (Defendants' Memo. In Opp. and In Supp. of Cross-Motion, at 8.) The court further rejects Mr. Nehmadi's contention that if the transaction were a loan, the statute of limitations for a loan payable on demand would apply and would bar the unjust enrichment cause of action. (*Id.*, at 8-9.)

Although the trial decision granted Mr. Ostad judgment on the unjust enrichment cause of action and determined that Mr. Ostad did not establish the constructive trust cause of action, the unjust enrichment finding was based on Mr. Ostad's proof of all of the elements of the constructive trust claim, except the promise element—i.e., that a promise was made to exchange the cash for a ten percent interest in the property. As discussed further below, the court finds that the same statute of limitations therefore applies to both the constructive trust and unjust enrichment claims.

It is well settled that a constructive trust claim "is governed by the six-year statute of limitations provided by CPLR 213 (1), which commences to run upon occurrence of the wrongful act giving rise to a duty of restitution. . . ." (*Knobel v Shaw*, 90 AD3d 493, 496 [1st Dept 2013] [internal quotation marks and citation omitted] [*Knobel*]).<sup>2</sup> In cases in which both constructive trust and unjust enrichment causes of action have been asserted based on the same facts, the courts have repeatedly held that the six-year statute of limitations applies to both causes of action. (See e.g., *Gerschel v Christensen*, 143 AD3d 555, 556 [1st Dept 2016] ["Plaintiffs'

---

<sup>2</sup> CPLR 213 (1) provides that a six-year statute of limitations applies to "an action for which no limitation is specifically prescribed by law."

claims for . . . unjust enrichment [ ] and constructive trust accrued at the time of their injury”]; Coombs v Jervier, 74 AD3d 724, 724 [2d Dept 2010] [“Causes of action alleging unjust enrichment and to impose a constructive trust [are] governed by a six-year statute of limitations and begin[ ] to accrue upon the occurrence of the wrongful act giving rise to a duty of restitution . . .”] [internal quotation marks and citations omitted; brackets in original]; Rickerman v Rickerman, 34 AD2d 1069, 1070 [3d Dept 1970]; see also Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 213.01, n 7 [“A cause of action alleging unjust enrichment is . . . governed by the six-year statute of limitations of CPLR 213 (1) and begins to run upon the occurrence of the alleged wrongful act giving rise to the duty of restitution”]; Maya NY, LLC v Hagler, 106 AD3d 583, 585 [1st Dept 2013] [citing Knobel in support of its holding that the six-year statute of limitations applies where “the unjust enrichment and breach of contract claims are based upon the same facts and pleaded in the alternative”].)

On this authority, the court holds that the constructive trust statute of limitations applies to the unjust enrichment cause of action. As discussed in this court’s decision of the motion for summary judgment, and on the authorities cited in that decision, the statute of limitations “commences to run upon occurrence of the wrongful act giving rise to a duty of restitution.” (Ostad v Nehmadi, 2017 WL 4315071, \* 3 [Sept. 28, 2017], aff’d 167 AD3d 490 [1st Dept 2018], quoting Knobel, 90 AD3d at 496.) As held in the summary judgment decision, the constructive trust cause of action accrued in March 2008 when Mr. Nehmadi repudiated Mr. Ostad’s demand for his asserted stake in the property. (2017 WL 4315071, \* 3.) The court adheres to its holding in the trial decision, based on the credible evidence, that the cause of action for unjust enrichment accrued at the same time. (3/22/19 Tr., at 554.) This cause of action is timely as it was asserted when the action was commenced in 2010, well within the six-year statute of limitations. Mr. Nehmadi’s motion will therefore be denied.

Mr. Ostad's motion<sup>3</sup> for pre-judgment interest on the award of \$400,000, pursuant to CPLR 5001 (a), will also be denied. In the trial decision, the court declined to exercise its discretion to award pre-judgment interest. (3/22/19 Tr., at 554-555.)

It is well settled that "[t]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." (Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 [2012] [brackets in original; internal quotation marks omitted].) It is undisputed that under CPLR 5001, the court has discretion to award pre-judgment interest on an equitable claim.<sup>4</sup>

Mr. Ostad claims that the court's failure to award interest was an abuse of discretion. In particular, he argues that interest from March 2008 is mandated because Mr. Nehmadi wrongfully withheld the cash that Mr. Ostad provided to him, and that the denial of interest would result in a windfall to Mr. Nehmadi. (See Aff. of Evan Klestzick [Mr. Ostad's attorney], ¶¶ 7-22.) Mr. Ostad also appears to argue that interest should be awarded based on Mr. Nehmadi's wrongful denial that "he even received the money" from Mr. Ostad. (Id., ¶ 22.)

As Mr. Ostad correctly argues, "[t]he purpose of interest is to require a person who owes money to pay compensation for the advantage received from the use of that money over a period of time." (Manufacturer's & Traders Trust Co. v Reliance Ins. Co., 8 NY3d 583, 589 [2007].) "Interest is not a penalty." (Id. [internal quotation marks, citation, and brackets in original

<sup>3</sup> To the extent that Mr. Ostad seeks to amend the trial decision to impose a constructive trust (Martin Reply Aff., ¶¶ 4-31), this claim is improperly made for the first time on the reply. (Small v City of New York, 160 AD3d 471, 473 [1st Dept 2018]; Dannash v Bifulco, 184 AD2d 415, 416-417 [1st Dept 1992] ["The function of reply papers is . . . not to permit the movant to introduce new arguments in support of, or new grounds for the motion"].) In any event, the claim is without merit.

<sup>4</sup> CPLR 5001 (a) provides:

"Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."

omitted].) Under the unusual circumstances of this case, however, the court remains unpersuaded that interest should be awarded. These circumstances include that plaintiff himself waited until 2008, five years after he gave the cash to Mr. Nehmadi, to demand an interest in the property, and then waited again until 2010 to commence this action (see 3/22/19 Tr., at 554-555); the transaction was undocumented; and the determination as to whether the cash transaction occurred turned entirely on the resolution of a bona fide credibility dispute. Mr. Ostad cites no authority awarding interest on similar facts. Moreover, to the extent that Mr. Ostad claims that Mr. Nehmadi should be required to pay interest because he denied his receipt of the money, the interest would in effect be a penalty given the bona fide dispute.

It is accordingly hereby ORDERED that the motion of plaintiff David Ostad to amend the decision after trial on the record on March 22, 2019 (trial decision) to award pre-judgment interest and for other relief is denied; and it is further

ORDERED that the cross-motion of defendants Behzad Nehmadi and Benita Holdings, LLC to "amend" the trial decision to dismiss Mr. Ostad's claim for unjust enrichment and to vacate the award of \$400,000 is denied.

This constitutes the decision and order of the court.

7/27/19

DATE

CHECK ONE:

☒

CASE DISPOSED

☐

GRANTED

☒

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

MARCY S. FRIEDMAN, J.S.C.