

Matter of Roberts

2008 NY Slip Op 32703(U)

September 30, 2008

Surrogate's Court, Nassau County

Docket Number: 312558

Judge: John B. Riordan

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SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of

ALICE ROBERTS, AS ADMINISTRATRIX OF
THE ESTATE OF

STEPHEN M. ROBERTS,

File No. 312558

Deceased,

Dec. No. 509

Petitioner,

-against-

NATHAN BORG,

Respondent.

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This is a proceeding by the petitioner, Alice Roberts, as the administrator of the estate of the decedent, Stephen M. Roberts, to recover the proceeds of a life insurance policy allegedly owed to the estate. Alice is Roberts' surviving spouse. A nonjury trial was held on May 20, 2008. In lieu of closing statements, with the court's permission, the parties filed post-trial briefs. The matter has now been submitted for decision.

FACTS

The decedent and the respondent, Nathan Borg, were the majority shareholders in a closely-held domestic corporation, Charlene Fabrics Group, Ltd. (Charlene), until October 28, 1997 when they executed two agreements at a closing. Charlene is in the business of selling textiles in the garment trade (tr. 57).¹ One agreement, entitled, "Agreement of Reorganization"

¹The trial transcript is cited to as (tr. #).

(Reorganization Agreement) (pet. ex. 2)², provided, among other things, that (1) Charlene would transfer to Premier Fabrics, Inc. (Premier),³ a New York corporation Charlene had recently caused to be organized, certain of Charlene's assets, comprised of \$200,000.00 in cash, \$200,000.00 in inventory, and a \$42,000.00 loan receivable due to Charlene from Borg, said assets having a total book value of \$442,000.00, in exchange for the original issue of 100 shares of common stock of Premier, being all of the issued and outstanding shares, and having no par value; (2) Charlene would distribute to Borg all of the Premier stock in exchange for all of the stock (10 shares) in Charlene that Borg owned, and Borg would be the sole shareholder of Premier and have no further interest in Charlene. The Reorganization Agreement bears four signatures as follows: Charlene Fabrics Group Ltd. by Stephen Roberts; Stephen Roberts; Nathan Borg; and Karim Abed. Abed was the minority shareholder in Charlene.

The other agreement is entitled simply, "Agreement" (Agreement) (pet. ex. 3). The Agreement also contains four signatures: Charlene Fabrics Group, Ltd. by Stephen Roberts, President; Stephen Roberts, Shareholder and Director; Nathan Borg, Shareholder and Director; and Karim Abed, Shareholder and Director. Among other things, the Agreement called for Roberts to transfer to Borg or Borg's designee a \$1,000,000.00 term life insurance policy on Borg's life in which Roberts was the named beneficiary, whereupon the named beneficiary would be changed from Roberts to a beneficiary of Borg's choosing and Borg would be responsible for all future premium payments on the policy. It is undisputed that Roberts made the transfer and that Borg removed Roberts as the beneficiary under the policy. Likewise, the agreement contains

²The petitioner's trial exhibits are cited to as (pet. ex. #).

³Charlene and Premier are not parties to this proceeding.

a reciprocal provision calling for Borg to transfer to Roberts or Roberts' designee a \$1,000,000.00 term life insurance policy on Roberts' life in which Borg was the named beneficiary, whereupon the named beneficiary would be changed from Borg to a beneficiary of Roberts' choosing and Roberts would be responsible for all future premium payments on the policy. It is undisputed that Borg did not make the transfer; rather, he assumed payment of the premiums, which previously had been paid by Charlene. Roberts procured another life insurance policy in an equivalent amount, which eventually lapsed. After Roberts' death on March 1, 2000, Borg collected \$1,006, 628.12, the proceeds of the policy that was the subject of the Agreement.

The Agreement also contained provisions that Charlene would continue to pay for medical insurance for Borg and his family for six months and would continue to make the lease payments on the car used by Borg, also for a six-month period, and that all personal guarantees signed by Borg guaranteeing any of Charlene's obligations would be terminated as of the date of the closing.

THE PLEADINGS

The petition (ct. ex. A)⁴ alleges four causes of action: (1) breach of contract; (2) unjust enrichment; (3) monies had and received; and (4) conversion. The causes of action all arise from Borg's failure to transfer to Roberts the term life insurance policy on Roberts' life. As to each cause of action, the petition seeks a decree directing that Alice, as the administrator of the decedent's estate, recover from Borg the amount of \$1,000,000.00, with interest and the costs and disbursements of the proceeding.

⁴The court's trial exhibits are cited to as (ct. ex. #).

Borg's amended answer (ct. ex. A) contains four affirmative defenses: (1) that the petition fails to state a cause of action upon which relief can be granted; (2) that as a result of Roberts' breach of the agreements, the petitioner is precluded from suing on the agreements; (3) that since Roberts and Charlene breached the agreements, which are binding on Roberts' successors, heirs and personal representatives, by, among other things, failing to transfer the amount of \$442,000.00 to Borg and by failing to transfer to Borg or his designee the \$1,000,000.00 term life insurance policy on Borg's life,⁵ the petitioner is precluded from suing on the agreements because she comes to the court with unclean hands; and (4) the petition is barred pursuant to the doctrine of waiver. The amended answer also contains a counterclaim seeking an order declaring that: (1) Roberts, in his individual capacity and in his capacity as an officer, director and shareholder of Charlene, materially breached the agreements; (2) the petitioner, as the personal representative of Roberts' estate, does not have standing to maintain this proceeding due to the aforesaid breach of the agreements; (3) upon Roberts' material breach of the agreements, the agreements were terminated and there remained only Borg's rights and remedies regarding the damages that he alleges were directly and proximately caused by Roberts' breach of the agreements; (4) the petitioner, as administrator of the decedent's estate, is bound by the terms of the agreements; (5) Borg is entitled to not less than \$1,000,000.00 in compensatory damages as a result of Roberts' breach of the agreements; (6) the petitioner, as the administrator of the decedent's estate, is responsible to pay Borg all costs, disbursements and reasonable counsel fees incurred in defending this proceeding.

⁵Borg has since admitted that Roberts transferred to Borg the life insurance policy on Borg's life and that Borg removed Roberts as the beneficiary (ct. ex. C).

The petitioner's reply (ct. ex. A) contains one affirmative defense to Borg's counterclaim, to wit, that the counterclaim fails to state a claim upon which relief can be granted.

Prior to trial, Borg admitted that he did not transfer the insurance policy on Roberts' life to Roberts (ct. ex. C). Borg claims that he did not deliver the insurance policy because Roberts and Charlene materially breached the agreements by not transferring all of the \$200,000 in inventory from Charlene to Premier, by not paying for six months of medical insurance for Borg and his family, by not making six months' worth of lease payments on the car used by Borg and by not timely terminating the personal guarantees signed by Borg guaranteeing any of Charlene's obligations with respect to two of its factors, Finova Capital Corporation (Finova) and James Buslik & Associates, Inc. (Buslik). Borg also claims that Roberts waived Borg's performance with respect to transferring the subject life insurance policy and renounced his right to designate a beneficiary.

THE NONJURY TRIAL

The petitioner did not present any witnesses at trial. Instead, she relied on the exhibits that were entered into evidence. Borg testified on his own behalf and called one other witness to the stand, Kenneth Jacoby. The petitioner did not cross-examine Borg or Jacoby; nor did she put on a rebuttal case. At the conclusion of the trial, the petitioner moved to dismiss Borg's affirmative defense of waiver; the court reserved decision on the motion.

At the beginning of the trial, the parties stipulated to having the exhibits admitted into evidence. They were marked as Petitioner's Trial Exhibits 1 through 36 and Respondent's Trial Exhibits 37 through 50. The court also entered four exhibits into evidence as Court Exhibits A through D.

DISCUSSION

The facts establish that both agreements are to be read together as one interdependent contract. This is in accord with the rule that written instruments are to be read together where their history and subject matter show them to be unified (*Nancy Neale Enters. v Eventful Enters.*, 60 AD2d 453, 453 [2d Dept 1999]). The agreements were both executed in connection with the reorganization of Charlene and were executed on the same day, at the same closing and by the same parties.

Breach of Contract

Borg has admitted that he did not transfer the life insurance policy on Roberts' life to Roberts and that he collected the proceeds of the policy after Roberts' death. However, Borg argues that he was excused from doing so because of material breaches of the agreements by Charlene and Roberts. Borg asserts that Charlene and Roberts failed to: (1) deliver a portion of the inventory; (2) timely terminate Borg's personal guarantees with respect to Finova and Buslik; (3) pay Borg's car lease for six months; and (4) pay Borg's health insurance for six months.

“[O]rdinarily one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice . . .” (*New York Cent. Mut. Fire Ins. Co. v Ward*, 38 AD3d 898, 900 [2d Dept 2007] [citation omitted]; *see also R.C.P.S. Assocs. v Karam Devs.*, 258 AD2d 510 [2d Dept 1999]). In order to determine whether a breach is material, consideration must be given to the circumstances surrounding the contract (Restatement of Contracts [Second] §241). Here, the purpose of the agreements was the reorganization of Charlene and the formation of Premier as an independent corporation. Indeed, the Reorganization Agreement explicitly states that it is being made based upon the agreement by the shareholders [Borg,

Roberts and Abed] to divide Charlene “so that Borg may operate his share of the business as he sees fit, independent of Roberts and Abed (pet. ex. 2).” In a letter (pet. ex. 13) dated December 1, 1997 from Jay M. Newman, who is Borg’s attorney, to Borg, Mr. Newman states, “In summary, the split-up was accomplished by Charlene’s formation [of] a wholly-owned subsidiary, Premier, which is capitalized with inventory and other assets listed in the [Reorganization Agreement]. . . The split-up was completed by the exchange of your stock in Charlene for Charlene’s stock in Premier.” Thus, there is no dispute that the primary purpose of the agreements was effectuated; Charlene was reorganized, Premier was formed, ownership of all of Premier’s stock vested in Borg with Borg as its president and director.

“There is no simple test for determining whether substantial performance has been rendered and several factors must be considered, including the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance” (*Hadden v Consolidated Edison Co. of N.Y.*, 34 NY2d 88, 96 [1974] [citation omitted]).

Borg argues that the agreements were materially breached by Charlene’s alleged failure to deliver \$85,579.64 of its inventory. In support of his position, Borg relies exclusively on a letter (resp. ex. 50)⁶ dated November 28, 1997 from Borg’s attorney to Jeffrey B. Krongold, who is identified in the Closing Statement (pet. Ex. 14) from the closing on the reorganization as the attorney for Borg and Abed. The letter references the “still undelivered inventory pursuant to the

⁶Borg’s trial exhibits are cited to as (resp. ex. #).

Agreement of Reorganization dated as of October 28, 1997 . . .” Attached to the letter is a handwritten list of the inventory alleged to be “[d]ue from Charlene to Premier.”

The Reorganization Agreement, at section 2 (b), states that Charlene “shall transfer all of the assets and properties identified in Exhibit “A” hereto, to Premier in exchange for 100 shares of its common stock, having no par value.” There is no dispute that Premier received the \$200,000.00 and that the loan receivable from Borg was transferred. The subject of the dispute is whether the full amount of the inventory was transferred.

Section 4 (d), under the heading of “Representations and Warranties of Corporation [Charlene],” sets forth the obligations with respect to the assignment of inventory from Charlene to Premier. Essentially, inventory totaling \$200,000.00 as described in the 12 pages that follow Exhibit “A” to the Reorganization Agreement was to be transferred. Section 4 (d) of the Reorganization Agreement also states that “[t]he parties agree to acknowledge delivery and receipt of the inventory pursuant to the terms hereof by initialling [sic] two copies of Exhibit “A” and delivering one such copy to each of the parties [sic] attorneys.”

Admitted into evidence as petitioner’s trial exhibit 4 is a document entitled, “Assignment.” It is dated October 29, 1997 and is signed by Roberts as president of Charlene. Attached to the Assignment is a copy of Exhibit A to the Reorganization Agreement, including the 12 pages that delineate the inventory that was to be transferred. Each of the 12 pages is initialed by Roberts and Borg. A copy of the initialed document is also found in the Closing Statement (pet. ex. 14) prepared by Borg’s attorney, Mr. Newman, evidencing that a copy was delivered to Borg’s attorney. Based on the evidence presented, the court finds that Borg has failed to prove that any of the promised inventory was not delivered.

Borg also asserts that he is excused from delivering the life insurance policy proceeds based on Charlene's failure to comply with Paragraph 6 of the Agreement. Paragraph 6 states in relevant part:

“All personal guarantees signed by Borg guaranteeing any obligations of the Corporation, including those given to any factors, shall be terminated as of the date of the closing. The Corporation will cooperate with Borg in seeking to have the factor, Finova, cancel the second mortgage that it currently holds on Borg's home. The Corporation shall hold Borg harmless from any claims and causes of action with respect to any such guarantees, unless such liability is a result of the wrongful actions of Borg. In addition, the Corporation agrees to wholly and completely indemnify and save Borg harmless from and on account of any and all loss, cost, expense and liability which may arise or be occasioned or be in any manner asserted against Borg by reason of his status as a former shareholder, officer and director of the Corporation, including, but not limited to, any liability under the lease of the Corporation's premises; relative to any factoring agreement . . .”

Borg claims that he remained liable to Finova and Buslik after the date of the closing. As an initial matter, Borg did not plead this in his amended answer, and he did not move at the conclusion of the trial to conform the pleading to the proof.

In support of the claim, Borg relies on two letters to him from Doreen Driscoll, the vice president of Finova, the first dated November 14, 1997 (pet. ex. 11) and the second letter (pet. ex. 18) dated April 14, 1998. Among other things, the November 14, 1997 letter states, “On behalf of Finova Capital Corporation, we hereby acknowledge termination of your Guaranty as of October 14, 1997 (the “Termination Date”). Please be reminded that you remain liable to the terms of the Guaranty, for all obligations [\$6,465,000.00] of the Company incurred up to the Termination Date.” The April 14, 1998 letter states, “We acknowledge termination of your personal guarantee

and release you of [sic] liability as of April 9th[,] 1998.” Borg also relies on a letter (pet. ex. 16) dated April 2, 1998 to him from the president of Buslik. The letter states in its entirety, “As per our recent conversation, you are no longer a shareholder in Charlene Fabrics Group Ltd. and it is understood and agreed that your guarantee under the “good guy clause” shall be deleted from the lease effective immediately.”

At the trial, Borg testified that during the six-month period commencing October 28, 1997, he was not able to refinance real property he owned in Roslyn, New York, because Finova was holding a lien on the property and that he was not able to convey the property during that same time period to his wife, whom he was divorcing, for the same reason (tr. 62-63). Borg did not present any documents to substantiate this and also did not present any evidence that Charlene failed to cooperate with Borg in seeking to have Finova cancel the second mortgage that it held on Borg’s home.

The explicit language of the Agreement states that the “personal guarantees signed by Borg guaranteeing any obligations of the Corporation, including those given to any factors, shall be terminated as of the date of the closing.” The November 14, 1997 letter from Finova states that Finova deemed Borg’s guarantee terminated as of October 14, 1997, approximately two weeks prior to the closing. The letter from Buslik does not specify the date when it deemed Borg’s personal guarantee to be terminated; rather, the letter states only the date, April 2, 1998, when the guarantee would be deleted from a certain lease.

Additionally, paragraph 6 of the Agreement does not provide a timetable as to when Borg would be released from his obligations and liabilities under his guarantees to the factors. As Borg concedes, he was ultimately released by both Finova and Buslik as shown by the April 2, 1998

letter from Buslik and the April 14, 1998 letter from Finova. In any event, Borg has not demonstrated that any the actions of Finova or Buslik are attributable to Roberts or, for that matter, to Charlene, and the court finds that Borg has failed to prove a material breach in this regard.

Borg presented no evidence about his claim that Charlene did not pay his car lease for the six-month period following the closing,⁷ and the court finds that Borg failed to show a breach of the agreements with respect to the car lease.

Borg testified at the trial that he did not have health insurance for the six-month period commencing on October 28, 1997 (tr. 60-61), the period of time during which the Agreement states that Charlene would pay for health insurance for Borg and his family. Borg's one statement is the totality of the evidence that Borg presented with respect to health insurance. In the context of the agreements, the nonpayment of health insurance for a six-month period, even assuming that Borg had been able to attribute it to Roberts rather than to Charlene, would constitute a *de minimus* breach, certainly one insufficient to excuse Borg from transferring the \$1,000,000.00 life insurance policy to Roberts (*see Anderson Clayton & Co. v Alanthus Corp.*, 91 AD2d 985, 985 [2d Dept 1983] [citation omitted]).

In sum, the court finds that Borg failed to prove a material breach of the agreements by Charlene or Roberts and, further, failed to demonstrate any grounds that would have excused him from transferring the life insurance policy to Roberts. Assuming that the court had found a material beach of the agreements, several issues raised by Borg would have had to have been

⁷Upon the petitioner's objection, the court ruled that Borg's testimony about the car lease that was the subject of the Agreement was barred by CPLR 4519, and Borg did not present any evidence with respect to alleged nonpayment of the car lease.

addressed. They are: (1) whether Roberts intended to be bound in his individual capacity (*see France v Beda*, 83 AD2d 802 [1st Dept 1981]); (2) if Roberts intended to be bound only in his corporate capacity, whether Borg met his burden of proving that the facts required piercing the corporate veil (*see Maggio v Becca Constr. Co., Inc.*, 229 AD2d 426, 427 [2d Dept 1996] [citations omitted]; *Ravel v Dirco Enters., Inc.*, 159 AD2d 564, 565 [2d Dept 1990] [citation omitted]); and (3) whether the promise to transfer the life insurance was dependent on the promises Borg alleges were breached and thus a condition precedent to the petitioner's right to recover for breach of contract (*see Broad Props., Inc., v Wheels, Inc.*, 43 AD2d 276, 279 [2d Dept 1974] [citation omitted], *affd* 35 NY2d 821 [1974]). However, having found that there was no material breach of the agreements, the court need not reach these issues.

Waiver

In his amended answer, Borg pleads as an affirmative defense that “[t]he within Petition is barred pursuant to the Doctrine of Waiver.” In his post-trial brief, Borg argues that Roberts effectuated a waiver of his contractual rights with respect to the return of the insurance policy because of his failure to respond to a letter (resp. ex. 50) dated November 28, 1997 from Mr. Newman to Mr. Krongold. The letter references the “still undelivered inventory” and Finova not having “released [Borg] from liability under his guarantee of Charlene’s obligations.” Borg also asserts that Roberts’ waiver of his right to the insurance policy is evidenced by his purchase of a \$1,000,000 10-year term policy of which he was the insured and Abed was the beneficiary. In response to a question on the application (resp. ex. 45), “Will life insurance or annuity in any Company be replaced or changed if insurance applied for is issued,” Robert put an “x” in the box marked “Yes” and explained that the policy for which he was applying was “[r]eplacing Wm Penn

Bus. Term Life Ins.” Roberts’ purchase of the replacement policy is substantiated by the testimony at trial of Kenneth Jacoby, the insurance agent used by Charlene (tr. 77-81).⁸ Subsequently, the replacement policy lapsed (resp. ex. 48). Borg also argues that Roberts’ “silence” after the closing with respect to return of the life insurance policy on Roberts’ life on which Borg was the beneficiary manifests Roberts’ intention to waive his contractual right to have the policy returned to him. “Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned” (*Fundamental Portfolio Advisors v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006], citing *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). Abandonment “may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage” (*Fundamental Portfolio Advisors v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006], quoting *General Motors Acceptance Corp. v Clifton-Fine Cent. School Dist.*, 85 NY2d 232, 236 [1995]). However, waiver “should not be lightly presumed” and must be based on “a clear manifestation of intent” to relinquish a contractual protection (*Fundamental Portfolio Advisors v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006], quoting *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]; see *Curley v Giltrop*, 68 NY2d 651 [1986] [express waiver]).

Based on the totality of the evidence, the court finds that Borg has failed to prove that Roberts knowingly, voluntarily and intentionally waived his contractual right to have the subject

⁸Jacoby testified that Roberts told Jacoby that Roberts had no interest in continuing the policy on Borg’s life (tr. 77). No evidence was introduced that Roberts told anyone he had no interest in the policy on Roberts’ life that Borg was supposed to transfer to Roberts pursuant to the Agreement.

life insurance policy returned to him by Borg. Accordingly, Borg's affirmative defense of waiver is dismissed for failure of proof.

Damages for Breach of Contract

For the failure by Borg to transfer ownership of the life insurance policy, the estate is entitled to the value of Borg's performance measured at the time of the breach (*J. M. Rodriguez & Co., Inc. v Moore McCormack Lines, Inc.*, 32 NY2d 425, 429 [1973] [citations omitted]; *Simon v Electrospace Corp.*, 28 NY2d 136, 145 [1971] [citations omitted]). The value at the time of the breach was the cost of replacing the policy. The measure of damages does not change because the respondent may have received a "windfall." Damages are determined by the loss incurred or gain denied to the petitioner, not the gain realized by the respondent (*Orange & Rockland Utils., Inc. v New England Petroleum Corp.*, 60 AD2d 233, 235 [1st Dept 1977] [citations omitted]).

Jacoby testified that the annual premium for the replacement policy was \$4,610.00 (tr. 79). This is substantiated by a document from Aetna Insurance entitled, "Policy Specifications" (resp. ex. 48), which shows the annual premium of \$4,610.00 and the beginning date of the policy as March 2, 1998. A letter dated May 17, 1999 from Jacoby to Roberts (resp. ex. 49) discusses what Roberts would have to do to reinstate the replacement policy. There is no proof in the record that Roberts ever had the replacement policy reinstated. Thus, the petitioner would be entitled to damages on the breach of contract claim in the amount of \$4,610.00, plus interest thereon at the statutory rate of nine percent, but for the court's determination regarding the imposition of a constructive trust, *infra*.

Conversion

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession . . . Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property . . . and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights . . .” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006] [citations and internal citations omitted]).

The petition properly sets forth the elements of a cause of action for conversion. The measure of damages for conversion is usually the “value of the property at the time and place of conversion, plus interest” (*Fantis Foods, Inc. v Standard Importing Co. Inc.*, 49 NY2d 317, 326 [1980] [citations omitted]). These are the same damages addressed by the breach of contract claim.

Unjust Enrichment and Money Had and Received

“The causes of action to recover damages for unjust enrichment and money had and received are quasi-contract claims, and therefore are not viable where, as here, it is undisputed that the parties entered into an express agreement” which addresses the same subject matter for which an implied contract is sought (*Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559-560 [2d Dept 2005]; *see also MT Prop., Inc. v Ira Weinstein & Larry Weinstein, LLC*, 50 AD3d 751, 752 [2d Dept 2008] [citation omitted]; *Shovak v Long Island Commercial Bank*, 50 AD3d 1118, 1120 [2d Dept 2008] [citation omitted]).

Equitable Relief

The parallel remedy in equity to unjust enrichment is the constructive trust, which is implemented to prevent unjust enrichment (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]). The court finds under these facts that the legal remedy of damages on the breach of contract claim is insufficient, as compared to the equitable one of constructive trust (*see Poling Trans. Corp. v A & P Tanker Corp.*, 84 AD2d 796, 797 [2d Dept 1981] [citation omitted]). As a result of Borg's failure to transfer the life insurance policy to Roberts, the petitioner, as administrator of Roberts' estate, "acquired not only a right at law to sue [Borg] for breach of contract, . . . , but also an equitable right in the policies, a right which, upon [Roberts'] death, attached to the proceeds" of the policy (*Simonds v Simonds*, 45 NY2d 233, 240 [1978] [citations omitted]).

Borg points out, correctly, that the petitioner did not plead a cause of action for the imposition of a constructive trust. However, a "constructive trust will be erected whenever necessary to satisfy the demands of justice" (*Latham v Father Devine*, 299 NY 22, 27 [1949]). This is precisely the type of case when the court should exercise its equitable powers.

The usual elements required for the imposition of a constructive trust are: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Losner v Cashline, L.P.*, 41 AD3d 789, 790 [2d Dept 2007]), but these criteria are not rigidly applied (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]). As principals and majority shareholders in Charlene, Roberts and Borg were in a fiduciary relationship. In the Agreement, Borg promised to transfer to Roberts the life insurance policy on Roberts' life and in so doing renounced his right to be the beneficiary under the policy (pet. ex. 3). In reliance thereon, Roberts transferred to Borg the policy on Borg's life,

and Borg eliminated Roberts as the beneficiary. There is no question that after the closing, Borg was obligated to transfer the subject policy. In fact, Borg did not have an insurable interest in Roberts' life once Borg surrendered his stock in Charlene, and the petitioner has the right to sue Borg to recover the proceeds of the policy (*see* Ins. Law § 3205 [a] [1] [B], [b] [4]). Having failed to honor his promise, the court finds that Borg was acting as a constructive trustee for Roberts with respect to the policy and that Borg was unjustly enriched after Roberts' death when he collected the proceeds. Equity dictates that the court impress a constructive trust upon the proceeds of the policy. Accordingly, the court directs Borg to relinquish to the petitioner the proceeds, along with statutory interest thereon at the statutory rate of nine percent from the date of receipt to the date of payment.

CONCLUSION

Accordingly, the court imposes a constructive trust on the proceeds of the policy in the amount of \$1,006,628.12, plus interest thereon at the statutory rate of nine percent. The court denies the petitioner's request for costs and disbursements.

The court dismisses Borg's affirmative defense of waiver and denies Borg's request for costs, disbursements and reasonable counsel fees incurred in defending this proceeding.

Settle decree.

Dated: September 30, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court