SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

KARAN SUNAR,
Plaintiff,

- against -

RAMASH SUNAR,
Defendant.

INDEX NO. 167/2009

MOTION DATE April 28, 2009

MOTION CAL. NO. 25

MOT. SEQ. NUMBER

The following papers numbered 1 to 8 read on this motion by the defendant to dismiss the plaintiff's complaint pursuant to CPLR §3211.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits-Memo of Law.....	1 - 5
Memo of Law in Opp.-Exhibits.....	6 - 7
Replying Memo of Law.....	8

Upon the foregoing papers the motion is determined as follows:

In this breach of contract/equity action, the plaintiff seeks to obtain a money judgment against the defendant, who is the plaintiff's brother. By this motion the defendant seeks to dismiss the plaintiff's complaint pursuant to CPLR §3211 based upon his alleged failure to state a cause of action and his assertion that the claims therein are barred by the statute of limitations and the statute of frauds.

Within the complaint, under a heading titled "FACTS", the plaintiff made the following allegations:

> 4. During the period from or about December 21, 1989 through December 1995, Plaintiff, at the request of Defendant, either lent, or paid on Defendant's behalf, sums totaling $141,158.83. Those sums included, but were not limited to, payment of the Defendant's airfare to come to the United States, Defendants' college and dental school tuition fees, living expenses and rent, medical expenses, and purchase of a car and other items, as well as loans for Defendant.
>
> 5. Defendant married Plaintiff's wife (sic) and thereby became a United States citizen. Defendant was a person of

trust and confidence of Plaintiff at the time the aforementioned loans were made.

6. At all times relevant hereto, Defendant promised to repay plaintiff all sums loaned, advanced or paid by the plaintiff.

7. As a result of plaintiff's loans and expenditures on Defendant's behalf, Defendant is now a successful endodontist with several private practices located in the state of North Carolina.

8. Defendant honored his promise of repayment, but only to the extent of making the following repayments: $40,000.00 on July 29, 2003, $10,000.00 on December 31, 2004, and $5,000 on June 19, 2008. However, Defendant has failed or refused to pay Plaintiff the balance due of $88,158.83 which remains due and owing to plaintiff by Defendant from December 21, 1989.

The plaintiff asserts four causes of action based upon these facts, to wit: breach of contract, unjust enrichment, conversion and constructive trust.

In support of and in opposition to the motion, neither the plaintiff nor the defendant submitted any affidavits of fact.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true and liberally construed (Palazzolo v Herrick, Feinstein, LLP, 298 AD2d 372; Schulman v Chase Manhattan Bank, 268 AD2d 174). In determining such a motion "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268, 275).

Contrary to the defendant's assertion, the plaintiff's complaint states a cause of action for breach of contract. The defendant's claim that the pleading is defective since a written copy of the parties' contract was not annexed is meritless. Where the parties so intend, an oral agreement is as enforceable as a written contract (See, Schwartz v Greenberg, 304 NY 250, 254; Charles Hyman, Inc. v. Olsen Indus., 227 AD2d 270, 275 ["In theory, of course, a parol contract is as enforceable as a written one"]; Farnsworth, Contracts §6.1 at 392 [2nd ed]).

The complaint also states material terms of a contract. In addition to those facts spelled out above, the plaintiff alleged under the breach of contract heading in the complaint that the "[d]efendant requested that plaintiff make numerous loans and payments on his behalf, and promised to begin repaying said sums as soon as he was able to do so". These facts allege the existence of a simplified no interest loan

made by the plaintiff to the defendant where repayment has been only partially made and full repayment has been "refused" by the defendant (See generally, Furia v Furia, 116 AD2d 694). The defendant's argument that the complaint does not indicate what consideration existed for this agreement is incorrect. It is apparent that the defendant confuses the concept of consideration with profit. "'A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.' Courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him'" [internal citations omitted] (Hamer v Sidway, 124 NY 538, 545).

Here, the consideration that is alleged to have existed were the benefits that accrued to each party, namely the defendant's receipt of a loan and the plaintiff's receipt of a promise of repayment. Under the logic proffered by the defendant, every no interest loan would fail as a matter of law for lack of consideration.

The defendant fails to offer specific express arguments to support his assertion that the plaintiff's unjust enrichment and constructive trust claims fail to state a cause of action. Accordingly, the branch of the motion to dismiss the breach of contract, unjust enrichment and constructive trust causes of action pursuant to CPLR §3211[a][7] is denied.

The plaintiff's cause of action for conversion is dismissed for failure to state a claim since such a claim may not be, as it is here, "predicated on a mere breach of contract" (See, Wolf v National Council of Young Isr., 264 AD2d 416, 417; see also, Automobile Coverage, Inc. v American Intl. Group, Inc., 42 AD3d 405, 407).

The defendant's argument that the breach of contract claim is barred by the Statute of Frauds fails. Section 5-701[a][1] of the General Obligations Law, requires that any agreement that cannot be performed within a year must be in writing. The application of this restriction is limited "to those contracts . . . which by their very terms have absolutely no possibility in fact and law of full performance within one year" (D & N Boening v Kirsch Beverages, 63 NY2d 449, 454). Where an agreement may be "'fairly and reasonably interpreted' such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame" (Cron v Hargro Fabrics, 91 NY2d 362, 366).

In this case, the plaintiff has alleged in his breach of contract cause of action that the defendant promised to begin repayment "as soon as he was able to do so". This type of open-ended obligation contingent

upon an ability to repay is not within the Statute of Frauds (See, Gallo v Swan Optical Corporation, 78 AD2d 632, 633; see also, Moon v Moon, 6 AD3d 796, 798; Costantini v Bimco Industries, Inc., 125 AD2d 531).

As to the branch of the defendant's motion to dismiss the complaint on the basis that the plaintiff's claims are time barred, on a motion "pursuant to CPLR 3211[a][5] . . . a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired" (Savarese v Shatz, 273 AD2d 219). Concerning the breach of contract claim in particular, "[w]here, as here, the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the plaintiff 'possesses a legal right to demand payment'" (Swift v New York Med. Coll, 25 AD3d 686, 687, quoting Matter of Prote Contr. Co. v Board of Educ. of City of N.Y., 198 AD2d 418, 420).

Here, on the issue of the accrual date, the defendant relies on an express statement in the complaint that "balance . . . of $88,158.83" has been "due and owing to plaintiff by Defendant from December 21, 1989". Nevertheless, when interpreting a complaint, "[t]he whole pleading must be considered . . . [and it] is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" [internal citations omitted] (Kober v Kober, 16 NY2d 191, 193-4). In the complaint at issue, although payment is alleged to have been "due and owing" from 1989, the plaintiff also alleges that repayment is conditioned on the defendant's ability to do so. "[W]hen the right to final payment [under a contract] is subject to a condition, the obligation to pay arises and the cause of action accrues, only when the condition has been fulfilled" (John J. Kassner & Co. v New York, 46 NY2d 544, 550). Where, as in this case, there is no proof in the complaint or proffered by the defendant when the defendant's ability to pay arose, this branch of the motion must be denied (See, Schwartz v Liebowitz, 44 AD3d 779; Swift v New York Med. Coll, supra).

The defendant also failed to establish that the unjust enrichment and constructive trust claims are time barred. The statute of limitations on the equitable claims of unjust enrichment and constructive trust are triggered upon "the occurrence of the wrongful act giving rise to a duty of restitution" (See, N. Salem Cent. Sch. Dist. v Mahopac Cent. Sch. Dist., 1 AD3d 418, 419; see also, Sitkowski v Petzing, 175 AD2d 801, 802).

In the present case, the defendant incorrectly asserts that the accrual date for the equitable claims is the same as the breach of contract claim, specifically December 21, 1989. However, it is only alleged by the plaintiff that the money was "due and owing" from that date. There is no allegation that any of the money lent or advanced to the defendant was "wrongfully" held from its inception. Indeed, as the plaintiff expressly pleads that repayment was only required when the defendant was "able to do so", the money allegedly given to the defendant by the plaintiff was not "wrongfully" held until such time the

defendant was "able" to make repayment and refused (See, Zane v Minion, 63 AD3d 1151, 1153-54). As the complaint does not contain and the defendant did not submit any proof to indicate when repayment was appropriate and refused, the question of whether these equitable claims are time barred can not be determined (See, Panish v Panish, 24 AD3d 642; Jakacic v Jakacic, 279 AD2d 551; Mardiros v Ghaly, 206 AD2d 414; Sitkowski v Petzing, supra).

The branch of the defendant's motion for the imposition of costs and sanctions is without merit and denied.

Turning to the plaintiff's request for leave to re-plead, as the defendant moved pre-answer to dismiss the plaintiff's complaint pursuant to CPLR §3211[a][7], this act "extended the defendant['s] time to answer (See, CPLR 3211[f]) and thus extended the time in which the [plaintiff] could amend [his] complaint as of right" (STS Mgmt. Dev. v New York State Dep't of Taxation & Fin., 254 AD2d 409; see also, Johnson v Spence, 286 AD2d 481). Accordingly, the plaintiff is entitled by rule to serve an amended pleading until ten days after service of notice of entry of this order or within twenty days after the defendant serves an answer (See, CPLR §3025[a], §3211[f]).

Dated: September 21, 2009

Peter J. Kelly, J.S.C.