

**B.B.C.F.D., S.A. v Bank Julius Baer & Co., Ltd.**

2013 NY Slip Op 30299(U)

January 24, 2013

Sup Ct, New York County

Docket Number: 604084/2003

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 39

*Justice*

Index Number : 604084/2003

**B.B.C.F.D., S.A.**

vs.

**BANK JULIUS BAER**

SEQUENCE NUMBER : 041

RENEW, etc. 039

INDEX NO. 604084/03

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

MOTION SEQ. NO. 039

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

Dated: 1/24/13



**BARBARA R. KAPNICK** *s.c.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 39**

-----x  
B.B.C.F.D., S.A. (A Panamanian Corporation),  
BIJAN NASSI as President of B.B.C.F.D.,  
S.A., and BIJAN NASSI, Individually,

Plaintiffs,

- against -

BANK JULIUS BAER & CO., LTD., et al.,

Defendants.

**DECISION/ORDER**  
Index No. 604084/03  
Motions Seq. Nos.  
039 and 042

-----x  
**BARBARA R. KAPNICK, J.:**

Motion sequence numbers 039 and 042 are hereby consolidated for disposition.

In motion seq. no. 039, plaintiff B.B.C.F.D., S.A. ("BBCFD") moves for the following relief against defendant Bank Julius Baer & Co., Ltd. (the "Bank" or "BJB"): (a) pursuant to CPLR 2221, renewal of the July 1, 2008 and November 3, 2008 Orders of this Court, and the Appellate Division decisions dated March 13, 2008 and October 14, 2010, dismissing BBCFD's claims with respect to most of the unauthorized fund transfers from its account at the Bank as time-barred based on the one-year Statue of Repose in UCC 4A-505; (b) pursuant to CPLR 3212, summary judgment on the remaining "open claims" against the Bank based on the alleged collateral estoppel effect of an arbitration between the Bank and defendant Waxfield Limited ("Waxfield"); and (c) for partial summary judgment against the Bank "with respect to \$5.7 million

awarded to Waxfield in the arbitration decision." All but the second aspect of BBCFD's motion regarding the "open claims" has been withdrawn. See Pls. Reply Mem. of Law, at 5; 11/9/11 Tr., at 3-4.

In motion seq. no. 042, BBCFD moves for summary judgment against defendant Waxfield on the fifth and sixth causes of action for unjust enrichment and money had and received. Waxfield opposes the motion, and cross-moves for summary judgment dismissing all of BBCFD's remaining claims against Waxfield.<sup>1</sup>

#### **BACKGROUND**

In this action, BBCFD alleges that funds in its bank account at BJB were stolen in a Ponzi scheme orchestrated by the late Yehuda Shiv ("Shiv"), plaintiff's former investment advisor. During 1988 and 2001, Shiv, acting pursuant to a general power of attorney given to him by BBCFD, caused 165 improper transfers of funds totaling more than \$20 million from BBCFD's account at the Bank to the accounts of, or for the benefit of, Shiv, his investment companies, Sagam Corp. and Sagam LLC ("Sagam"), and other customers of Shiv's, one being defendant Waxfield. See

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<sup>1</sup> For reasons stated, *infra*, the Court has accepted and considered the following post-submission, post-oral argument letters from counsel: letters dated November 15, 21, and 22, 2011 from Richard B. Cooper, Esq.; letters dated November 18 and 22, 2011 from Peter J. MacDonald, Esq.; and letter dated December 5, 2011 from Kenneth F. Peshkin, Esq.

Second Amended Verified Complaint dated April 5, 2005 ("Complaint"), ¶ 99. The beneficial owner of Waxfield is defendant Baruch Ivcher.

The Complaint asserts twelve causes of action against various defendants. The Bank is being sued for, inter alia, fraud, aiding and abetting fraud, conspiracy to convert, resulting in conversion, aiding and abetting conversion, unjust enrichment, money had and received, breach of contract, breach of fiduciary duty, negligence/commercial unreasonableness, violation of Section 349 of the General Business Law ("GBL") and fraudulent conveyance. After extensive motion practice and two interlocutory appeals (see *B.B.C.F.D., S.A. v Bank Julius Baer & Co. Ltd.*, 77 AD3d 463 [1st Dept 2010]; *B.B.C.F.D., S.A. v Bank Julius Baer & Co. Ltd.*, 49 AD3d 378 [1st Dept 2008]), the parties are in agreement that the only "open claims" against the Bank relate to the following seven non-UCC Article 4-A Funds transfers from BBCFD's account after December 31, 1997 totaling \$857,425:

<b>Date</b>	<b>Transferee</b>	<b>Amount</b>
22-Apr-98	Kuzniecky & Co.	\$750
15-May-98	Check to First Way Ltd.	\$4,000
19-Apr-99	Kuzniecky & Co.	\$750
17-Apr-00	Kuzniecky & Co.	\$775

13-Jun-00	Kuzniecky & Co.	\$400
30-Mar-01	Machseevet M.L. Ltd.	\$850,000
10-Apr-01	Kuzniecky & Co.	\$750
<b>Total</b>		<b>\$857,425</b>

See Pls. Reply Mem. of Law, at 1; Burkoff 1/14/11 Affirm., Ex. D.

Waxfield, another of Shiv's customers who maintained an account at the Bank, is being sued for, inter alia, money had and received and unjust enrichment. BBCFD moves for summary judgment seeking the recovery of the following four unauthorized transfer of funds from its account to Waxfield's account:

<b>Date</b>	<b>Amount</b>
02-Nov-00	\$1,000,000
30-Jan-01	1,000,000
23-Aug-01	1,475,000
20-Sep-01	675,000
<b>Total</b>	<b>\$4,150,000</b>

In order to understand the relevance, if any, of the Waxfield-BJB arbitration, it is necessary to repeat the history of Shiv's dealing with that company. During the 1990s, the Bank made loans

to Menachem Ivcher<sup>2</sup> and his companies, which at various times exceeded \$25 million. In the latter part of the 1990s, Menachem Ivcher's withdrawals from his BJB accounts to pay for substantial business and trading losses exhausted his borrowing capacity. In 1998, BJB refused to extend additional loans. Shiv used his power of attorney to pledge accounts of other of his customers without their authority, to support further lending by BJB to Menachem Ivcher and his companies. On October 20, 1997, Shiv executed three Third Party Collateral Deposit Agreements, known as the "pledges," which pledged the assets in the Waxfield account as collateral for loans by the Bank to Sagam, and to two companies controlled by Menachem Ivcher, Sydney Plastics, Inc. and Eclectic Holdings, Inc. The BJB statements for Waxfield did not show these pledges.

In 1996, Productos Paraiso Del Peru, S.A. ("PPP"), a company affiliated with Baruch Ivcher, borrowed approximately \$6 million from the Bank. Shiv pledged Waxfield's account to support that loan as well. Waxfield alleged that Shiv had no authority to pledge its accounts to the Bank, and that bank personnel knew or should have known that Shiv lacked the authority to support loans to PPP, or to any person or entity other than Waxfield itself.

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<sup>2</sup> Menachem and Baruch Ivcher are brothers.

Because of Shiv's undisclosed pledges of the Waxfield account to BJB, the account lost borrowing capacity to accommodate its own need for funds to cover its own trading losses. Shiv created capacity by shifting funds from other client accounts he controlled to the Waxfield account, and BJB made those transfers on the strength of the powers of attorney on file with the Bank. In particular, funds from accounts in the names of Skilled Investors, Inc. ("Skilled") and BBCFD were used to transfer funds to the Waxfield account. When Shiv's fraud was exposed, the Bank claimed that Waxfield owed the Bank more than \$30 million based on Waxfield's guaranty of loans to Sydney Plastics, Eclectic Holdings, and PPP, and both the Bank and Waxfield claimed entitlement to the sums remaining in the Waxfield account, which totaled approximately \$25 million at the time the S.E.C. stepped in and froze the account in December 2001.

#### DISCUSSION

##### **BBCFD's "Open Claims" Against the Bank** (mot. seq. no. 039)

BBCFD moves for summary judgment awarding it the sum of \$857,425 against the Bank based on its claims for "breach of contract and breach of BJB's statutory obligations." Cooper 12/23/10 Affirm., ¶ 12. Presumably, BBCFD's counsel is referring to the Complaint's seventh cause of action, which asserts a claim by BBCFD against the Bank as follows:

"274.. The acts and omissions of the Bank, which are described in this Complaint, constitute breaches of the

banking agreement between the depositor, Plaintiff B.B.C.F.D. and BIJAN NASSI, and the Bank, which rendered services to Plaintiffs, pursuant to their custodian and banking agreements and as set forth in various federal and state banking laws and regulations, . . . ."

Nowhere in this voluminous pleading, comprising 301 paragraphs and 125 pages, does BBCFD actually identify "the banking agreement" referred to in the seventh cause of action. However, both sides submit a document entitled "General Banking and Security Agreement" (the "Agreement") which was signed by Shiv on behalf of BBCFD on or about April 24, 1991. See Cooper 12/23/10 Affirm., Ex. 12; Burkoff 1/14/11 Affirm., Ex. E. BBCFD's counsel identifies BJB's alleged contractual breach as the failure "to use the same general business care as the bank used in handling its own affairs," citing Article XIII of the Agreement. Cooper 12/23/10 Affirm., ¶ 39. As for the alleged statutory violations, BBCFD fails to identify what statutes it relies on, what statutes were allegedly breached by the Bank, and, at oral argument of the motion, represented to the Court that "[t]his is strictly a breach of contract. They had a contractual obligation to use the utmost care of this account." 11/9/11 Tr., at 16.

BBCFD contends that it is entitled to summary judgment on its breach of contract claim, based on the doctrine of collateral estoppel or issue preclusion. Specifically, plaintiff contends

that certain factual findings were made by an arbitration panel adverse to the Bank in a very lengthy arbitration now concluded between Waxfield and the Bank that, according to BBCFD, justify awarding BBCFD summary judgment on its breach of contract claim against the Bank. The arbitration was conducted before the International Centre For Dispute Resolution, International Arbitral Tribunal (Case No. 50 148 T 00073 06) regarding the claims of Waxfield, PPP and the Bank as against each other arising out of Shiv's Ponzi scheme (the "Arbitration").

On May 21, 2010, the panel issued its "Partial Final Award."<sup>3</sup> The arbitrators absolved the Bank of being a participant in, or having actual knowledge of, Shiv's fraud, but found that, for various reasons, the Bank did not have a reasonable basis for believing that Shiv was authorized to make pledges of, or transfers out of, the Waxfield account, after October 31, 1996. Partial Award, at 95, 126. Although the pledges were put in place after

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<sup>3</sup> Only selected portions of the Partial Award have been submitted to the Court, making it very difficult to conclude what claims and defenses were actually presented to the arbitrators and what issues were decided. Indeed, extremely relevant pages of the Partial Award (i.e., pages 8 and 115) describing Waxfield's claims for relief in the Arbitration were not submitted to the Court until a slew of sur-reply letters arrived after oral argument on the motion. Since these letters, described in footnote 1, raised new arguments and purported to submit new evidence and new legal support for the parties' positions, an additional oral argument was held on December 19, 2011, and the Court has considered all of the sur-reply letters in reaching a decision on these motions.

this date (i.e., October 1996), the panel found that the pledges of Waxfield's account were not invalid to the extent that they covered loans pre-existing that date, and thus fixed Waxfield's liability for such pledges at the amount of its net exposure in 1996, plus interest. (*Id.*, at 126-127). With regard to the transfers, the panel found that all but the last transfer of \$5.7 million on March 15, 2001 to Eclectic Holdings was time-barred under UCC 4A-505, and credited Waxfield for the \$5.7 million. *Id.*, at 127-132. A "Final Award" awarding the Bank approximately \$21 million including attorneys' fees and costs was issued on November 12, 2010. The Bank's motion to confirm the award was granted by the Hon. Alvin K. Hellerstein, United States District Court of the Southern District of New York, on August 17, 2011, and Waxfield's motion to vacate the award was denied. (See letter dated Aug. 19, 2011, Doc. #455.)

BBCFD argues that the following findings by the arbitration panel serve to estop the Bank from disclaiming liability and prove that the disputed transfers from BBCFD's account would not have happened but for the Bank's misconduct:

-- A report issued by a Bank employee named Manuel Reyes in 1996 "recognized that Y. Shiv had, in many instances, acting under a power of attorney, authorized transactions that benefitted him to the detriment of the principal in question and [Reyes] recommended that the Branch specifically make Y. Shiv's principals aware of them," but the Bank failed to implement this recommendation. Partial Award, at 90.

-- Had the Bank carried out the recommendations in the Reyes report, "it would have obtained information that, at a minimum would have caused it to doubt that Y. Shiv had apparent authority over the Waxfield (or Rutland) account." *Id.*, at 125.

-- "BJB did not have a reasonable basis for believing that Y. Shiv was authorized to make a disputed pledge or transfer . . . after October 31, 1996." *Id.*, at 126.

-- "[T]he Panel views the evidence as a whole as showing that BJB's conduct with respect to the Y. Shiv accounts was, as time progressed, less than what should have been expected from a normally prudent banker. Even BJB itself -- in the Gemmer/Vazquez report -- recognized that its practices were far less than ideal." *Id.*, at 95.

-- In determining, as between BJB or Waxfield, both of whom the panel felt had not acted "prudently," which entity should bear the burden of Shiv's fraudulent conduct after October 31, 1996, the panel stated that:

"1) The fact that BJB had a contractual obligation to Waxfield to '[use] the same general business care as the Bank uses in handling its own affairs . . . .'"

"2) The ease with which BJB could have discovered Y. Shiv's fraud. All it had to do was call any of Y. Shiv's clients. Or ask them when they met with BJB personnel."

\* \* \*

"4) "The fact that Branch did not follow its own officers' recommendations, which, if it had done so, would have resulted in the exposure of Y. Shiv's fraud."

*Id.*, at 127 -128.

-- "Although there is ample evidence that if either Waxfield and BJB had acted prudently, Y. Shiv's fraudulent activities would have come to light, BJB's failure to do so is not excused by Waxfield's failure to do so. Nor is BJB's breach of its obligations excused by Waxfield's. Waxfield can be criticized both because (i) [Baruch] Ivcher knew of the powers and at least some of the pledges and did nothing and (ii) because Waxfield did not comply with its obligation to inspect the BJB monthly statements and alert BJB as to any problems; but neither is a ground for excusing BJB." *Id.*, at 128.<sup>4</sup>

--With respect to the unauthorized transfers from Waxfield's account, the panel stated that its "apparent authority analysis applies as well to the transfers." *Id.*, at 129. The panel then

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<sup>4</sup> With respect to this second criticism, the panel then states that "although Waxfield was obligated to inspect BJB's statements, it is also true that [Baruch] Ivcher only received the Sagam statements." *Partial Award*, at 129.

concluded that all but the last transfer of \$5.7 million on March 15, 2001 to Eclectic Holdings was time-barred under UCC § 4A-505, and credited Waxfield for this amount because "under the circumstances at the time of transfer BJB could not have had a reasonable basis to believe that it was authorized by Waxfield." *Id.*, at 132.

There are two necessary requirements for the invocation of the doctrine of collateral estoppel: (1) "the identical issue necessarily must have been decided in the prior action and be decisive of the present action;" and (2) "the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (citations omitted)." *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456 (1985); see also *Shanley v Callanan Indus.*, 54 NY2d 52, 55 (1981); *Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334 (1st Dept 2006). BBCFD, as the party seeking the benefit of collateral estoppel, has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas BJB has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action. *Kaufman v Eli Lilly & Co.*, 65 NY2d at 456.

The doctrine applies to factual findings made in arbitration proceedings. *Matter of Ranni (Ross)*, 58 NY2d 715, 717 (1982); *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 196 (1980); *Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 415 (1st Dept 2011); *GUS Consulting GmbH v Chadbourne & Parke LLP*, 74 AD3d 677,

678-79 (1st Dept 2010), *lv den* 16 NY3d 702 (2011). “[M]utuality of parties is not required” (*Bernard v Proskauer Rose, LLP*, 87 AD3d at 415), and it is not necessary that the “cause of action” be the same in order for collateral estoppel to apply. *Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501 (1984); see also *Ventur Group, LLC v Finnerty*, 80 AD3d 474, 475 (1st Dept 2011).

BBCFD relies on *Active Media Servs., Inc. v Grant Prideco, Inc.* 35 AD3d 165 (1st Dept 2006), which involved an action by an international corporate trader to obtain a declaration that the defendant, who purchased trade credits from plaintiff, had no claim against the plaintiff. The complaint was dismissed on the basis that another “similarly-situated” trade credit holder had just prevailed against the plaintiff in a Texas arbitration proceeding, “after having made claims virtually indistinguishable from defendant's herein,” and because the plaintiff had a full and fair opportunity to present its case in the arbitration proceeding. *Id.* at 165-166.

The first question that must be decided is whether BBCFD has met its burden of establishing that identical issues were necessarily decided in the Arbitration adversely to the Bank and are decisive of BBCFD's claim for breach of Article XIII of the Agreement. The Bank argues that collateral estoppel does not apply here for several reasons. First, the Bank contends that the two

banking agreements are different. There is no dispute, however, that Shiv signed, on behalf of Waxfield, an agreement, entitled "General Banking and Custody Agreement," or about September 10, 1997. While this agreement is different, it contains the same exact provision regarding BJB's responsibility to use "the same general business care as the Bank uses in handling its own affairs." Burkoff 1/14/11Affirm., Ex. F at 3.

Second, the Bank contends that the issue of whether the Bank had breached its agreement with Waxfield was not raised in the Arbitration nor decided by the panel. On page 8 of the Partial Award, the panel listed "Waxfield's initial causes of action against BJB" as including "breach of contract." However, on page 115, the panel, in summarizing the parties' claims for relief does not list breach of the banking agreement as one of Waxfield's claims against the Bank. No explanation for this discrepancy is offered. It can only be concluded, therefore, that the panel was not asked to decide whether the Bank breached its contract with Waxfield, and that this was not an issue that was necessarily decided adverse to the Bank despite the panel's pronouncements regarding the Bank's failure to act "prudently." Partial Award, at 128. Indeed, the dissenting arbitrator contended that there was "absolutely no testimony in the exhaustive record regarding the business care BJB applied to its own pledges, if any, for loans to

others." Burkoff 1/14/11 Affirm., Ex. A: Dissent of Eugene I. Farber, at 10.

Third, even if the arbitrators did conclude that the Bank was negligent in its dealings with Waxfield, the Bank contends that the panel did not consider whether the Bank was negligent in its dealings with BBCFD. BBCFD argues that the negligence is the same, because the panel found that had the Bank acted prudently by following the recommendations of its own employees, it could have, at least by October 31, 1996, easily discovered Shiv's fraud by calling any of Shiv's clients or asking them when they met with BJB personnel.

At first glance, BBCFD's argument appears compelling. The Reyes memorandum, however, related only to procedures with respect to the confirmation of pledge agreements,<sup>5</sup> which is not at issue with respect to BBCFD's account. It is also the case that the sole unauthorized transfer from a customer account that the Bank was held responsible for in the Arbitration was a transfer of \$5.7 million on March 15, 2001 from Waxfield's account to the account of

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<sup>5</sup> Neither party submits a copy of the Reyes memorandum in connection with this motion. The document, however, was submitted in connection with a motion in the companion case, *Skilled Investors, Inc. v Bank Julius Baer & Co., Ltd., et al.*, Index No. 603818/03 (Doc. No. 220-12). A Court may take judicial notice of its own records. *Casson v Casson*, 107 AD2d 342, 344 (1st Dept 1985), *app disp* 65 NY2d 637 (1985); *Weinberg v Hillbrae Bldrs.*, 58 AD2d 546 (1st Dept 1977).

Eclectic Holdings, a company controlled by Menachem Ivcher. The panel's finding that the Bank did not have a reasonable basis to believe that this transfer was authorized by Waxfield cannot be used to estop the Bank from defending its actions or non-actions with respect to transfers from a different client's account, during a different time period (April 22, 1998 to April 10, 2001), and to different recipients (i.e., Kuzniecky & Co., First Way Ltd., and Machseevet M.L. Ltd.), most of which were for relatively small amounts.

Fourth, the Bank argues that, even if its negligence vis-à-vis BBCFD could be said to have been established in the Arbitration, the Bank had no occasion or opportunity to put on evidence showing that BBCFD was comparatively more negligent than the Bank, citing CPLR 1411. The panel found that Waxfield's beneficial owner, Baruch Ivcher, never received any of the monthly statements sent by the Bank, but received statements only from Shiv's firm, Sagam. Partial Award, at 128-129. In addition, Baruch Ivcher lived in Peru and claimed that, for political reasons, he had little opportunity to monitor the actions of Shiv or the Bank. These two factors allegedly influenced the panel in awarding Waxfield \$5.7 million on the disputed transfer to Eclectic Holdings. In this case, it is undisputed that BBCFD's beneficial owner, Bijan Nassi, lives in New York City and received the Bank's statements on a monthly basis, along with the Sagam statements, for more than 12

years and "neither objected to the funds transfers nor consulted with his own accountants or financial advisors as to the accuracy of the statements." *B.B.C.F.D.*, 77 AD3d at 464-465.

The concept of apportioning culpable conduct is one related to tort, and CPLR 1411 is, by its terms, limited to "action[s] to recover damages for personal injury, injury to property, or wrongful death." Since the claim upon which BBCFD seeks summary judgment sounds in breach of contract, as opposed to tortious conduct, an affirmative defense based upon the notion of culpable conduct is unavailable. *American Express Equip. Fin. Corp. v Mercado*, 34 AD3d 880, 881-82 (3d Dept 2006); *Pilewski v Solymosy*, 266 AD2d 83, 85 (1st Dept 1999); *Viacom Intl. v Midtown Realty Co.*, 235 AD2d 332, 332-333 (1st Dept 1997).

The Bank counters that where, as here, a contract imports a negligence standard, principles of comparative negligence may be germane, but fails to cite any legal support for this theory. Alternatively, the Bank contends that it has a defense based on Article VI of the Agreement which states that "Statement(s) of account sent by the Bank to the Client . . . shall be binding unless written notification of a specific exception thereto shall have been received by the Bank within 30 days of the date upon which the statement(s) are sent or made available to the Client." *Cooper 12/23/10 Affirm.*, Ex. 12 at 3. "[A] party who seeks to

recover damages from the other party to the contract for its breach must show that he himself is free from fault in respect of performance." *Rosenthal Co. v Brilliant Silk Mfg. Co., Inc.*, 217 App Div 667, 671 (1st Dept 1926); see also *ALJ Capital I, L.P. v David J. Joseph Co.*, 48 AD3d 208 (1st Dept 2008) (plaintiff's failure to provide prompt written notice of a disallowance was a condition precedent to their right to demand repayment from defendant under the subject agreement, and a defense to action).

In sum, BBCFD has not met its burden of showing that the issue of whether the Bank breached its Agreement with BBCFD by failing "to use the same general business care as the Bank uses in handling its own affairs" was actually and necessarily decided in the Arbitration and thus decisive of BBCFD's claim for breach of contract. Therefore, the Court need not decide whether the Bank had a full and fair opportunity to litigate the issue in the Arbitration. BBCFD's motion for summary judgment on the seventh cause of action is, therefore, denied.

**Summary Judgment As Between BBCFD and Waxfield** (mot. seq. no. 042)

BBCFD contends that summary judgment is now proper on its claims against Waxfield for unjust enrichment and money had and received, because it is undisputed that the sum of \$4,150,000 was transferred from BBCFD's account to Waxfield's account. Although

this Court (Freedman, J.) found in her decision dated June 2, 2008 in the related *Skilled Investors* case, that all of the moneys in the Waxfield account were pledged as security for various loans that the Bank made to unrelated entities, BBCFD contends that the Arbitration panel invalidated the pledges and determined that Waxfield was entitled to this money; and, thus, \$4,150,000 of BBCFD's money became money had and received by Waxfield, which has been unjustly enriched. Waxfield, in turn, cross-moves to dismiss these claims, as well as the remaining claims of aiding and abetting fraud (second cause of action), conversion (third cause of action), aiding and abetting conversion (fourth cause of action), and aiding and abetting breach of fiduciary duty (ninth cause of action).

#### **A. Statute of Limitations**

Waxfield contends that BBCFD's claim for recovery of the \$1 million transferred on November 2, 2000 under an unjust enrichment or conversion theory is barred by the three-year statute of limitations in CPLR 214(4) for injury to property,<sup>6</sup> because this is a legal claim to recover damages for monetary losses not an equitable claim to trace and repatriate particular funds. See *Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.* 73 AD3d 581, 582 (1st Dept 2010), where the Appellate Division held

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<sup>6</sup> This action was commenced on December 31, 2003.

that "claims for wrongful transfers of development rights, sounding in conversion, unjust enrichment and breach of fiduciary duty," were subject to a three-year limitations period.

BBCFD does not deny that the applicable statute of limitations is three years, but contends that it does not apply to the November 2, 2000 transfer, because all funds in Waxfield's account were pledged to the Bank even before the transfers from BBCFD reached that account and BBCFD could not sue Waxfield in November 2000. This argument makes little sense since it undercuts the plaintiff's claim that Waxfield, not BJB, was unjustly enriched by this transfer. Nor did the pledges prevent BBCFD from suing for damages, and, in fact, BBCFD did sue Waxfield and the Bank in December 2003.

In any event, the statute of limitations for money had and received is six years. *Knobel v Shaw*, 90 AD3d 493, 495 (1st Dept 2011); *Insurance Co. of State of Pa. v HSBC Bank USA*, 37 AD3d 251, 254 (1st Dept 2007), *revd on other grounds* 10 NY3d 32 (2008); *Akinrosotu v Kellman*, 289 AD2d 112, 113 (1st Dept 2001); *Schreibman v Chase Manhattan Bank*, 15 AD2d 769, 770-771 (1st Dept 1962). Thus, BBCFD's claim for recovery of the November 2, 2000 transfer under the sixth cause of action is not time-barred.

## B. Money Had and Received and Unjust Enrichment Claims

A cause of action for money had and received "requires a showing that: (1) defendant received money belonging to plaintiff; (2) defendant benefitted from the receipt of the money; and (3) under principles of good conscience defendant should not be allowed to retain that money." *Insurance Co. of State of Pa. v HSBC Bank USA*, 37 AD3d at 255 (citations omitted).

"The law permitting a person to recover for moneys paid by mistake is based upon the principle of unjust enrichment. A person who has been unjustly enriched at the expense of another is required to make restitution to the other. A person may be unjustly enriched not only where he receives money or property, but also where he otherwise receives a benefit. He receives a benefit where his debt is satisfied or where he is saved expense or loss."

*Blue Cross of Cent. N.Y. v Wheeler*, 93 AD2d 995, 996 (4th Dept 1983) (internal citations and quotation marks omitted). Similarly, a claim for unjust enrichment requires a showing that Waxfield was enriched, at BBCFD's expense, and that "it is against equity and good conscience to permit [Waxfield] to retain what is sought to be recovered." *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 (1972).

Waxfield argues that it does not possess any of BBCFD's money, as it was wrongfully transferred into and out of Waxfield's BJB account and wrongfully pledged by Shiv to secure loans to third parties. Claiming to be the biggest victim of Shiv's Ponzi scheme,

Waxfield argues that it did not actually benefit from any of BBCFD's money. Waxfield also claims that it was an innocent recipient of the funds, and, under the Second Department's holding in *Fountoukis v Geringer*, 33 AD3d 756 (2d Dept 2006), BBCFD cannot recover damages for any of the four transfers from its account on grounds of unjust enrichment or money had and received.

*Bietola v McCue*, 308 AD2d 416 (1st Dept 2003), upon which Waxfield relies, is distinguishable. In that case, a claim for money had and received was dismissed, because the court found that the defendant "never received the money; it had disappeared into the hands of his unscrupulous former attorney-in-fact long before he was even aware that the money had fleetingly passed through his account." *Id.* at 417.<sup>7</sup> Here, in contrast, there is no dispute that four large sums of money were transferred into the Waxfield account between November 2000 and September 2001, and that this account still had assets of approximately \$25 million in December 2001. Peshkin 2/14/11 Affirm., Exs. 2, 3, 4, 5 and 23. The only wrongful transfer out of Waxfield's account during the time period at issue was the \$5.7 million transfer to Eclectic Holdings on

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<sup>7</sup> This Court has not "already held that 'the Waxfield account was a pass-through [account]' for many wrongful transactions." Waxfield's Mem. of Law, at 20. Rather, Waxfield misquotes Justice Freedman's February 22, 2005 decision, in which she merely discusses the allegations of the parties' pleadings in connection with pre-answer motions to dismiss the Amended Complaint. See Peshkin 2/14/11 Affirm., Ex. 18 at 3.

March 15, 2001, which was awarded back to Waxfield in the Arbitration. Partial Award, at 127-132. Ultimately, Waxfield had the benefit of all of the BBCFD funds, even if the benefit was only to reduce Waxfield's debt to the Bank, a debt that was not fully extinguished in the Arbitration. At the end of the day, the Bank recovered only approximately \$21 million of what was left in the Waxfield account, and the panel authorized Waxfield to withdraw the balance (Final Award, at 29-30), a balance which BBCFD's money helped create.

With one exception, discussed below, all of Waxfield's defenses to these claims have already been rejected by the Appellate Division in the companion case, *Skilled Investors, Inc. v Bank Julius Baer & Co. Ltd.* (Index No. 603818/03). Skilled, another innocent victim of Shiv's Ponzi scheme, sued Waxfield and Baruch Ivcher seeking to recover eight transfers of funds totaling about \$4.8 million between September 1999 and September 2000 from Skilled's BJB account to or for the benefit of Baruch Ivcher and one transfer directly to Waxfield. Skilled also sued the Bank to recover for the same losses, asserting, among others, claims of fraud and negligence by the Bank. In 2006, the Bank and Skilled settled all claims between them and, as part of the settlement, Skilled assigned to the Bank, for value, all of its claims against Waxfield and Baruch Ivcher.

In October 2006, the Bank moved for summary judgment on the assigned claims from Skilled, on the basis of unjust enrichment and money had and received. The Court (Freedman, J.) granted the summary judgment motion. However, the defendants moved for leave to reargue, and the Court withdrew its decision and denied summary judgment on the assigned claims in a decision and order entered June 3, 2008. In reversing her earlier decision, Justice Freedman noted that "the transfers that occurred . . . appear to have been complex," and concluded that Waxfield and Baruch Ivcher should have the chance to prove at trial, *inter alia*, that they were situated similarly to the innocent recipient of funds in *Fountoukis v Geringer, supra*. The Bank appealed, and the First Department reversed, ruling that the Bank was entitled to summary judgment on its (assigned) claims against Waxfield and Baruch Ivcher for money had and received and unjust enrichment. *Skilled Investors, Inc. v Bank Julius Baer & Co., Ltd.*, 62 AD3d 424 (1st Dept 2009), *lv dismissed* 13 NY3d 935 (2010) and *lv dismissed* 19 NY3d 1021 (2012).

Notably, in its brief to the Appellate Division, Waxfield made the same plea that it makes herein: "Baruch [Ivcher] and Waxfield cannot be liable for unjust enrichment for the Skilled Transfers, as the Waxfield account was a mere conduit in the Ponzi scheme orchestrated by the Bank and Shiv. Baruch [Ivcher] and Waxfield were by far the largest victims of the fraudulent scheme, having

lost tens of millions of dollars.” Brief for Defendants/Cross-Claim Defendants-Respondents (Waxfield and Baruch Ivcher), 2009 WL 7400194, at \*7. Waxfield also argued, as it does here, that its account was fully encumbered by the fraudulent pledges to the Bank, that millions of dollars had been fraudulently transferred out of Waxfield’s account, and that the trial court properly applied the holdings in *Fountoukis v Geringer, supra*, and *Bietola v McCue, supra*, to deny summary judgment on Skilled’s assigned claims for money had and received and unjust enrichment. All of these arguments were rejected by the Appellate Division.

Waxfield argues that the *Skilled Investors* case differs from the present case, because Waxfield has defenses based on BBCFD’s contributory negligence, laches, ratification and equitable estoppel due to its failure to contest the transfers at issue. No such defense was apparently offered in the *Skilled Investors* case. Justice Freedman described Skilled as an “innocent” victim of Shiv’s fraud. Peshkin 2/14/11 Affirm., Ex. 26 at 6. According to the Complaint filed in the *Skilled Investors* action, Skilled was a Panamanian corporation beneficially owned by Aliza Huber and her children, residents of Israel. Aliza Huber’s husband, alleged to be the founder of Skilled, died in December 2000. The Skilled Complaint alleged that Shiv took advantage of Mr. Huber, at a time when he was fighting non-Hodgkin’s lymphoma and undergoing painful

and debilitating chemotherapy and radiation, and that Sagam covered up his fraud by sending only the fraudulent Sagam statements.

To prevail on its claim for money had and received, BBCFD "must show that it is against good conscience for [Waxfield] to keep the money. Though it may be termed an action at law, it is, of course, founded upon equitable principles aimed at achieving justice." *Federal Ins. Co. v Groveland State Bank*, 37 NY2d 252, 258 (1975) (internal citations and quotation marks omitted). Thus, "a depositor's negligence in examining his monthly bank statements will bar a recovery for money had and received." *Id.*, citing *Arrow Bldrs. Supply Corp. v Royal Nat. Bank of N.Y.*, 21 NY2d 428 (1968), and *Potts & Co. v Lafayette Nat. Bank*, 269 NY 181 (1935).

BBCFD does not deny that its own negligence is a defense, but argues that it was not negligent in reviewing the account statements. However, it is undisputed that Mr. Nassi received statements from both Sagam and BJB concerning his account, and that the BJB statements showed all four debits. See Peshkin 2/14/11 Affirm., Exs 2-5. The August 23 and September 20, 2001 debits also identify the recipient of the transfers as "WAXFIELD, A/C 426353" and "WAXFIELD LTD.," respectively. It is also undisputed that the Sagam statements were very different from the BJB statements in terms of format and content. For example, the Sagam statement for

the period ending May 31, 2000 showed a net asset value of \$46,983,729.48 (Cooper 3/1/11 Affirm., Ex. 3), while the BJB statement for the same period showed total assets of only \$10,192,032. *Id.*, Ex. 4.

At his deposition, Mr. Nassi testified in rather broken English that personnel at the Bank on more than one occasion assured him that the numbers on the Sagam statements were correct and that the Sagam statements were designed to be easier for him to understand. Nassi 5/2/06 Dep. at 211-212; Nassi 5/3/06 Dep. at 406. While the Appellate Division ruled that Mr. Nassi's testimony did not support a claim of fraud against the Bank so as to toll the Statute of Repose (*B.B.C.F.D., S.A. v Bank Julius Baer & Co. Ltd.*, 49 AD3d at 379), this ruling does not, as a matter of law, establish that Mr. Nassi was guilty of contributory negligence or laches sufficient to dismiss BBCFD's claims against Waxfield for unjust enrichment or money had and received. A court, on summary judgment, may not determine credibility or judge the reasonableness of the behavior of the parties. *Ugarriza v Schmieder*, 46 NY2d 471, 474 (1979). Therefore, a triable issue of fact as to Mr. Nassi's own negligence or laches prevents the Court from granting summary judgment to either party on the fifth and sixth causes of action.

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### C. The Remaining Claims Against Waxfield

The remaining claims of aiding and abetting fraud (second cause of action), conversion (third cause of action), aiding and abetting conversion (fourth cause of action), and aiding and abetting breach of fiduciary duty (ninth cause of action) are all dismissed, as BBCFD fails to adduce any evidence in support of these claims in opposition to Waxfield's cross-motion for summary judgment. Any claim based on the \$850,000 letter of credit (see Complaint, ¶¶ 92, 99), is also dismissed as the undisputed evidence shows that this was booked as a contingent liability to BBCFD's account, and, when it became due in March 2002, the Bank paid the \$850,000 with its own funds and never debited BBCFD's account. Thus there was no actual loss to BBCFD. See Nassi 5/2/06 Dep. at 1445.

### CONCLUSION AND ORDER

It is hereby

**ORDERED** that plaintiff's motion (mot. seq. no. 039) for summary judgment against Bank Julius Baer & Co., Ltd. on the seventh cause of action is denied; and it is further

**ORDERED** that plaintiff's motion (mot. seq. no. 042) for summary judgment against Waxfield Limited on the fifth and sixth causes of action is denied; and it is further

**ORDERED** that Waxfield Limited's cross-motion for summary judgment dismissing the remaining causes of action as against it is

granted to the extent of dismissing any claims based on the \$850,000 letter of credit, and dismissing the second, third, fourth and ninth causes of action; and is otherwise denied.

This constitutes the decision and order of this Court.

Dated: January 24, 2013



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BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**