SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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WALTER STIPA SPRECASE,

Plaintiff,

- v -

DANIEL TENREIRO, CARLA M BRASCHI-KARAM DE TENREIRO,

Defendant.

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INDEX NO. 652830/2018

MOTION DATE 01/17/20

MOTION SEQ. NO. 004 006

DECISION + ORDER ON MOTION

DANIEL TENREIRO

Plaintiff,

-against-

CPS 8CDE CORP., CPS 15CDE CORP., SPIRE 6304 CORP., ROBERTO STIPA, ISABEL HERNANDEZ, LUIS HERNANDEZ

Defendant.

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Third-Party
Index No. 595842/2019

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 50, 51, 52, 53, 54, 64, 81, 82

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for SANCTIONS.

This case involves a pledge of personal funds by Walter L. Stipa Sprecase (**Mr. Stipa**) as collateral for a loan from JPMorgan Chase Bank, N.A. (**JP Morgan**) to Daniel Tenreiro (**Mr. Tenreiro**) and Carla M. Braschi-Karam de Tenreiro (**Ms. Braschi**), which they used to purchase an apartment at 470 Park Avenue, Unit 8E, in New York City (**Unit 8E**). When Mr. Tenreiro

and Ms. Braschi defaulted on the loan, JP Morgan liquidated Mr. Stipa's collateral, and Mr. Stipa commenced this action to recover the funds. Upon the foregoing documents, and for the reasons set forth on the record (01/17/20), Ms. Braschi's motion to dismiss the complaint pursuant to CPLR § 3211 (a) (1) and (7) is denied, and Mr. Stipa's motion for sanctions pursuant to 22 NYCRR § 130-1.1 and CPLR § 3126 is granted to the extent set forth herein.

The Relevant Facts

The following facts are alleged in the amended complaint and are taken as true for the purposes of the instant motion (*Morone v Morone*, 50 NY2d 481, 484 [1980]). Mr. Tenreiro and Ms. Braschi lived in a residential cooperative apartment located at 470 Park Avenue, Unit 4D, in New York City (**Unit 4D**) (Complaint ¶ 10). While they were attempting to sell their apartment, they decided to bid on another apartment, Unit 8E, located in the same building (*id.* ¶¶ 8, 10). They successfully bid on Unit 8E on or about April 10, 2013 at a public auction for the purchase price of $910,000 (*id.* ¶ 8). They made a down payment of $95,000 toward the purchase price, with the balance to be paid within 30 days, *i.e.*, by May 10, 2013 (*id.* ¶ 9). In the event that Mr. Tenreiro and Ms. Braschi failed to pay the balance by May 10, 2013, the down payment was to be forfeited to the seller as liquidated damages (*id.*).

Mr. Tenreiro and Ms. Braschi did not have the funds necessary to pay the balance due for the purchase of Unit 8E (id. ¶ 11). To advance their plan to purchase Unit 8E without rushing to sell Unit 4D at a loss, they requested Mr. Stipa's assistance to secure short-term financing (*id.*). Mr. Stipa agreed to assist them, and the parties subsequently entered into a series of agreements for the purpose of enabling Mr. Tenreiro and Ms. Braschi to purchase Unit 8E.

The Agreements

Reference is made to (i) a certain Term Promissory Note (the **Original Note**), dated May 7, 2013, between Mr. Tenreiro and JP Morgan (NYSCEF Doc. No. 3), as thereafter amended by the Amended and Restated Term Promissory Note (the **Amended Note**, and together with the Original Note, the **Promissory Note**), dated June 10, 2013, by and among Mr. Tenreiro, Ms. Braschi, and JP Morgan (NYSCEF Doc. No. 44), (ii) a Collateral Agreement (the **2013 Collateral Agreement**), dated May 7, 2013, by Mr. Stipa in favor of JP Morgan (NYSCEF Doc. No. 4), (iii) a Grid Time Promissory Note (the **2015 Note**), dated February 20, 2015, between Mr. Tenreiro and JP Morgan (NYSCEF Doc. No. 5), and (iv) an additional Collateral Agreement (the **2015 Collateral Agreement**), of even date therewith, by Mr. Stipa in favor of JP Morgan (NYSCEF Doc. No. 6).

Pursuant to the Original Note, Mr. Tenreiro borrowed the sum of $500,000 from JP Morgan (the **Loan**) (NYSCEF Doc. No. 3). The Original Note was amended and restated by the Amended Note to add Ms. Braschi as a co-borrower on the Loan (NYSCEF Doc. No. 44). The Loan was originally for a term of six months, with a maturity date of November 30, 2013 (*id.*). Mr. Tenreiro and Ms. Braschi intended to repay the Loan from the proceeds from the anticipated sale of Unit 4D (Complaint ¶ 12). JP Morgan required that the full amount borrowed be collateralized by funds held on deposit at JP Morgan (*id.* ¶ 13). Mr. Tenreiro and Ms. Braschi did not have the funds needed to secure the Loan (*id.*) Mr. Stipa agreed to provide his funds held on deposit at JP Morgan to be used as collateral for the Loan (*id.* ¶ 14). Mr. Stipa executed the 2013 Collateral Agreement in favor of JP Morgan, pursuant to which Mr. Stipa agreed that $500,000 of his personal funds held in a time deposit at JP Morgan would serve as collateral for

the Loan to Mr. Tenreiro and Ms. Braschi (NYSCEF Doc. No. 4). The proceeds of the Loan were disbursed directly to Mr. Tenreiro and Ms. Braschi and were used to purchase Unit 8E (Complaint ¶¶ 19, 21).

Default on the Loan and Liquidation of Mr. Stipa's Collateralized Funds

Mr. Tenreiro and Ms. Braschi executed additional amended and restated notes renewing and extending the maturity date of the Loan on November 30, 2013 and September 5, 2014 (*id.* ¶ 23). Pursuant to the 2015 Note, JP Morgan agreed to a further extension of the maturity date to February 28, 2018 (NYSCEF Doc. No. 5; Complaint ¶ 25). On November 25, 2017, JP Morgan offered another extension of the maturity date, but this time, Mr. Tenreiro and Ms. Braschi declined the offer (Complaint ¶ 25).

By letter dated February 6, 2018, from JP Morgan to Mr. Tenreiro, JP Morgan stated that because he rejected the offer to extend the maturity date, the total amount owed on the Loan was due by February 28, 2018 (NYSCEF Doc. No. 58). JP Morgan sent an additional letter to Mr. Tenreiro dated February 21, 2018, stating that it had not received a response to its prior letter and again stating that the total amount owed on the Loan was due on February 28, 2018 (NYSCEF Doc. No. 59). Mr. Tenreiro and Ms. Braschi failed to make any additional payments on the Loan prior to the maturity date of February 28, 2018 (Complaint ¶ 28).

As a result of Mr. Tenreiro and Ms. Braschi's default on the Loan, JP Morgan liquidated Mr. Stipa's collateralized time deposit (*id.* ¶ 29). On March 5, 2018, JP Morgan served a Notice of

Termination of Loan (the **Notice of Termination**) on Mr. Stipa (NYSCEF Doc. No. 9). The Notice of Termination states:

> "Please be advised that the Maturity Date of February 28, 2018 has passed. As a consequence, we write to advise you that on March 5, 2018, the Bank exercised its rights under the Note and Collateral Agreement to liquidate certain assets included in the Collateral in order to apply the proceeds thereof to the repayment of the unpaid principal and accrued interest on the Note. The net proceeds of the Collateral Liquidation were $499,783.77" (NYSCEF Doc. No. 49).

From June 2013 to February 2018, Mr. Tenreiro and Ms. Braschi made monthly interest payments on the Loan (*id.* ¶ 20). At the time JP Morgan liquidated Mr. Stipa's collateralized funds, Mr. Tenreiro and Ms. Braschi had not made any principal reduction payments on the Loan (*id.* ¶ 30).

Mr. Stipa commenced this action by filing a summons and complaint on June 6, 2018, and an amended complaint on September 11, 2019, asserting causes of action for common-law indemnification and unjust enrichment against Mr. Tenreiro and Ms. Braschi. Mr. Tenreiro filed an answer with counterclaims and a third-party complaint on October 1, 2019. Ms. Braschi now moves to dismiss the complaint in its entirety as against her and Mr. Stipa moves for sanctions against Mr. Tenreiro. At oral argument, counsel for Mr. Stipa voluntarily withdrew the cause of action for indemnification. The first cause of action is therefore dismissed.

Discussion

Unjust Enrichment

The theory of unjust enrichment "contemplates 'an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties'" (*Georgia Malone & Co.,*

Inc. v Reider, 19 NY3d 511, 516 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). To state a cause of action for unjust enrichment, a plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscious to permit the other party to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [brackets and internal quotation marks omitted]).

Here, the complaint alleges that (a) Mr. Stipa conferred a benefit upon Mr. Tenreiro and Ms. Braschi by executing the 2013 Collateral Agreement and 2015 Collateral Agreement required by JP Morgan as a condition for the Loan, (b) they had knowledge of, accepted, and retained such benefit by receiving the proceeds of the Loan, which were used to purchase Unit 8E, which they currently own and in which they now reside, (c) Mr. Stipa did not receive any of the Loan proceeds or any other economic benefit from the Loan, (d) the Loan was satisfied and paid off using Mr. Stipa's funds as a result of JP Morgan's liquidation of his deposit, and (e) it would be inequitable for Mr. Tenreiro and Ms. Braschi to retain the benefits of the Loan and Mr. Stipa's funds without reimbursing Mr. Stipa (Complaint ¶¶ 41-47). Taken as true for the purposes of this motion to dismiss, these allegations sufficiently state a claim for unjust enrichment.

To the extent that Ms. Braschi argues that the unjust enrichment claim must be dismissed as against her because she was not a borrower under the 2015 Note and was not an obligor under the 2015 Collateral Agreement, this argument misses the point. It is irrelevant that Ms. Braschi did not execute the 2015 Note or the 2015 Collateral Agreement. In fact, in her moving papers, Ms. Braschi correctly states that unjust enrichment is only available in unusual situations in

which *the defendant has not breached a contract* but circumstances nevertheless create an equitable obligation (Def. Mem. in Support at 10). But that is precisely the situation in this case. If, as Ms. Braschi argues, she was not a party to the 2015 Note or the 2015 Collateral Agreement, and if, as the amended complaint alleges, she nevertheless received the benefit of the Loan and of Mr. Stipa's funds to purchase the apartment that she currently owns and lives in without paying for it, than this is *exactly* the kind of case for which unjust enrichment is available as a remedy to avoid an inequitable result.

In addition, because Mr. Tenreiro and Ms. Braschi are married, they are in "an economic partnership," and they are presumed by law to "share in both its profits and losses" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 420 [2009]). The Domestic Relations Law provides that "all property acquired by either or both spouses during the marriage . . . regardless of the form in which title is held," is considered marital property (NY Domestic Relations Law § 236 [B] [1] [c]; *Fields v Fields*, 15 NY3d 158, 162 [2010]). Significantly, in this case, the proceeds of the Loan were deposited into a bank account held jointly by Mr. Tenreiro and Ms. Braschi (Complaint ¶ 19). They used the funds in their joint account to acquire Unit 8E, which they jointly own (*id.* ¶¶ 19-22; NYSCEF Doc. No. 46). Under these circumstances, as alleged in the complaint, the benefits conferred on Mr. Tenreiro as a result of the Loan and Mr. Stipa's deposit of collateral were also conferred on Ms. Braschi, and it would be equally unjust for her to retain them without reimbursing Mr. Stipa.

Accordingly, the motion to dismiss is denied with respect to the second cause of action for unjust enrichment.

Sanctions for Fraud and Frivolous Conduct

Mr. Stipa moves for sanctions pursuant to 22 NYCRR § 130-1.1. A court in a civil action is authorized to award the reasonable attorneys' fees and expenses incurred by a party as a result of the opposing party's frivolous conduct (22 NYCRR § 130-1.1 [a]). Conduct is frivolous for the purposes of a motion for sanctions if (i) it is completely meritless, (ii) it is done to delay or prolong the litigation or to harass or injure another party, or (iii) asserts false material statements of fact (*id.* § 130-1.1 [c]). Mr. Stipa also moves for sanctions pursuant to CPLR § 3126. In accordance with CPLR § 2136:

> "[i]f any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: . . .
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party" (CPLR § 3126 [3]).

In addition to CPLR § 3126 and 22 NYCRR § 130-1.1, "a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice" (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]).

At issue in this motion is an admittedly falsified document produced in discovery by Mr. Tenreiro. Counsel for Mr. Tenreiro and Ms. Braschi sent a letter to counsel for Mr. Stipa, dated October 1, 2019, stating that a document provided to Mr. Stipa in discovery purporting to be a Payment Agreement between Mr. Tenreiro and Mr. Stipa was, in fact, intentionally fabricated. The letter states:

> "Dear Counsel:
>
> Please take notice that in the last two weeks, Daniel Tenreiero has advised that, while a one-page document, previously provided to you, captioned Payment Agreement and dated January 6, 2013 (the "Document," true copy attached), correctly captures certain material terms of an oral agreement reached between Mr. Stipa and Mr. Tenreiro, reached on or about January 6, 2013, ***the document itself is not genuine, in the sense that Mr. Stipa did not sign it on January 6, 2013, or ever***.
>
> Pursuant to ethical rules, I am advising you of this development essentially as soon as I became aware of it.
>
> ***Mr. Tenreiro has instructed me to apologize to you, and through you to Mr. Stipa for improperly creating this document and injecting it into the case***. Mr. Tenreiro well understands there is no excuse or justification for it. As he explained to me, however, he reacted excessively and improperly given: (a) Mr. Stipa's refusal to honor the oral agreement which was in fact reached by the two gentlemen on January 6, 2013; (b) Mr. Stipa's filing a lawsuit against a family member and; (c) Mr. Stipa's refusal to pay Daniel, or offer to pay Daniel, an amount anywhere near the reasonable value of Daniel's services. Still, Daniel has solemnly advised me he well understands the foregoing are not an excuse or justification for his conduct – and I have elected to proceed with the representation in express reliance on that understanding" (NYSCEF Doc. No. 88 [emphasis added]).

The Payment Agreement created by Mr. Tenreiro speaks directly to the critical issues at the heart of Mr. Stipa's claims and Mr. Tenreiro's defenses and counterclaims. It is the proverbial "smoking gun." Mr. Tenreiro used the Payment Agreement as leverage to pressure Mr. Stipa to withdraw his claims and went so far as to threaten sanctions against him if he failed to do so. Mr. Tenreiro falsely swore in his responses to requests for admissions that the Payment Agreement was "a true and correct copy of the original document. He falsely swore in two sets of interrogatory responses that Mr. Stipa signed the Payment Agreement on January 6, 2013, the same day that he claimed it was drafted. He also falsely represented that the Payment Agreement was genuine in multiple written communications. He fabricated not only the document itself, but also its origins, falsely claiming that he and Mr. Stipa met face-to-face,

agreed on the terms and set them down in writing, and then signed in each other's presence. Mr. Tenreiro now admits that this is completely false.

In short, Mr. Tenreiro acted in bad faith in fabricating this "smoking gun" evidence in order to defraud Mr. Stipa and the court, harass and injure Mr. Stipa, and cause unreasonable delay and expense in this litigation. This conduct warrants the imposition of sanctions. The issue before the court is what sanctions are appropriate under these circumstances.

Mr. Stipa urges the court to strike Mr. Tenreiro's answer and counterclaims. As the First Department has observed, there is no *per se* rule that the pleadings must be struck in any case in which fraud is shown (*Melcher v Apollo Medical Fund Mgt. L.L.C.*, 105 AD3d 15, 25 [1st Dept 2013], citing *Kasoff v KVL Audio Visual Servs., Inc.*, 87 AD3d 944, 945-46 [1st Dept 2011] [denying motion to strike pleadings and imposing lesser sanction where defendants admittedly altered a document and produced it in discovery as if it were an original business record]). The sanctions imposed must be proportionate to the particular discovery misconduct in each case (*see Corrigan v New York City Tr. Auth.*, 144 AD3d 495, 496 [1st Dept 2016]). Here, striking Mr. Tenreiro's answer and counterclaims would be an extreme measure that would deprive him of his day in court. Importantly, Mr. Tenreiro came forward and admitted to his misconduct and apologized for his behavior. Of course, Mr. Stipa may introduce evidence of Mr. Tenreiro's fraud and misconduct to a fact finder to impeach his credibility. This would address any potential prejudice to Mr. Stipa. Under these circumstances, the court does not agree that striking Mr. Tenreiro's answer and counterclaims is warranted.

This does not mean that his fabrication of evidence should be overlooked, however. A party's purposeful fabrication of evidence should not be countenanced merely because the party made a decision not to rely on the evidence and to admit to its fabrication (*see Melcher*, 105 AD3d at 25 ["Defendants' alleged misconduct should not be immune from inquiry merely because they made a last-minute decision not to rely upon the allegedly fabricated and spoliated document"]). In such a case, monetary sanctions, including attorneys' fees, expert fees, and disbursements, are appropriate (*id.*).

Mr. Stipa's motion for sanctions is therefore granted to the extent that Mr. Tenreiro shall pay the expenses incurred by Mr. Stipa in connection with the fraudulent Payment Agreement, including the reasonable attorneys' fees and costs of bringing this motion for sanctions and any expenses incurred in an effort to ascertain the document's authenticity.

Accordingly, it is

ORDERED that the defendant's motion to dismiss is denied; and it is further

ORDERED that the first cause of action for common-law indemnification is withdrawn and is therefore dismissed; and it is further

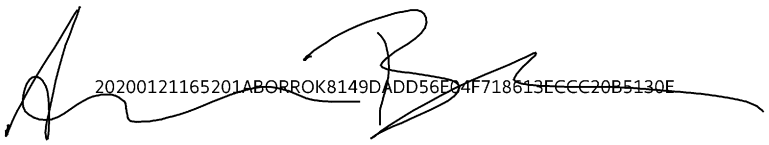
ORDERED that the plaintiff's motion for sanctions is granted and the plaintiff shall provide the defendant, Daniel Tenreiro, with a bill for the actual expenses reasonably incurred by the plaintiff, including reasonable attorneys' fees and costs, any costs incurred in attempting to

ascertain the Payment Agreement's authenticity, and any other expenses reasonably incurred as a result of Daniel Tenreiro's misconduct, on or before January 31, 2020; and it is further

ORDERED that payment of these costs shall be delivered by Daniel Tenreiro to counsel for the plaintiff within 30 days of receipt of the bill of expenses from the plaintiff and written proof of such payment shall be provided to the Clerk of Part 53 or filed on NYSCEF within 7 days of the date on which such payment is made; and it is further

ORDERED that, in the event that timely payment is not made, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment and a copy of the bill of expenses, shall enter a judgment in favor of the plaintiff and against Mr. Tenreiro in the amount due according to the bill of expenses; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).



1/17/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

652830/2018 STIPA SPRECASE, WALTER L vs. TENRIERO, DANIEL
Motion No. 004 006

APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE