SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY **PART** IAS MOTION 48EFM

Justice

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VITTORIO ANTONINI, individually and as a : member of BRIDGEVIEW AT BROADWAY, LLC, on behalf of Himself and all other members of BRIDGEVIEW AT BROADWAY, LLC : similarly situated, and in the right of BRIDGEVIEW AT BROADWAY, LLC

Plaintiff,

- v -

ORAZIO PETITO and ROCCO PETITO,
Defendants.

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INDEX NO. 652070/2010

MOTION DATE _____

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 226, 227, 228, 229, 230, 231

were read on this motion to/for SET ASIDE VERDICT.

Upon the foregoing documents, it is

Plaintiff Vittorio Antonini moves pursuant to CPLR 4404(a) "for judgment overturning the jury verdict in certain respects"[1] and pursuant to CPLR 5519 for a stay of judgment.[2] Plaintiff asks the court for an award of $1,489,000 in damages that the jury declined to award him.

The trial testimony established that plaintiff and defendant Orazio Petito were lifelong friends who went into business together by purchasing buildings in Brooklyn,

[1] The court rejects defendant's objection based on semantics: plaintiff's "overturning the jury verdict" vs. CPLR 4404's "setting aside" the jury verdict. Plaintiff lost and is clearly moving to vacate that unfavorable jury verdict. The court also rejects defendant's procedural objections. For example, a CPLR 4401 motion is not a prerequisite to a CPLR 4404 motion.

[2] As plaintiff's request for a stay is not otherwise mentioned in plaintiff's motion papers, the court does not address it.

renovating them, and renting them. (NYSCEF Doc. No. [NYSCEF] 222, Testimony of Antonini, Tr. at 183:16-20.)[3] The parties created an entity called Bridgeview at Broadway LLC (Company) pursuant to an operating agreement (Agreement) (NYSCEF 173, Agreement)[4] by each contributing $285,000; plaintiff and defendant each held a 1/3 ownership interest.[5] (NYSCEF 221, Antonini Tr. at 45:1.)

On September 13, 2006, the parties purchased two adjacent buildings at 146-150 Broadway in Brooklyn. (*Id.*, Tr. at 42:8-9; 201:16; NYSCEF 174, photo of premises.) The parties took a two-year interest-only $2.5 million loan, including a construction reserve, with interest at 12.5%, yielding interest payments of $26,000 per month. (*Id.*, Tr. at 45:10-46:3.) In July 2009, defendant failed to make the mortgage payment and continued to withhold payments for 13 months. (*Id.*, Tr. at 52:18.) To prevent foreclosure, plaintiff paid the mortgage totaling $330,000. (*Id.*, Tr. at 52:19.)

As a result of settling a number of pending litigations among the parties and other investors, plaintiff acquired his additional interest in the Company by signing a conditional promissory note to defendant in the sum of $165,000 (Settlement). (NYSCEF 175, Settlement at 11-12.) These notes were only due and payable on the occurrence of specific events, namely, the transfer of plaintiff's interest in the Company, a refinancing of the Company's mortgage if sufficient proceeds were raised, and a transfer or refinancing regarding another property where the parties had been co-owners. (*Id.*, p. 12.)

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[3] The court references trial testimony with the name of the witness or speaker, page and line.

[4] All documents cited in this decision were entered into evidence unless noted otherwise.

[5] Defendant's brother Rocco was also partner, but he is no longer a party to this action.

On October 8, 2010, plaintiff served defendant with a forfeiture notice pursuant to Article V of the Agreement that authorized plaintiff to declare a forfeiture of defendant's shares in the Company (Notice). (NYSCEF 209, the Notice.) As a result, plaintiff became the 100% owner of the Company.

In the November 19, 2010 complaint, plaintiff sought declaratory judgments that defendant's membership in the Company was terminated due to forfeiture, and that plaintiff had the authority as majority member to remove defendant as managing member. Plaintiff also alleged in the complaint claims for breach of fiduciary duty, misrepresentation, interference with contractual relations, and breach of the implied covenant of good faith and fair dealing. (NYSCEF 1, Complaint.)[6]

In his January 21, 2011 answer, defendant asserted counterclaims for: (1) breach of fiduciary duty; (2) breach of the contract's implied covenant of good faith and fair dealing for which he sought return of his investment in the Company; and (3) fraud for which he sought $165,000 plus interest. (NYSCEF 2, Answer.)[7]

Plaintiff moved for summary judgment on the first two causes of action in the complaint seeking a declaratory judgment that defendant had forfeited his membership interest in the Company under Article V of the Operating Agreement for the Company (NYSCEF 173, Agreement, p. 8) because of defendant's unexcused failure to make mortgage payments for thirteen months. The Appellate Division held that defendant had forfeited his membership interest in the Company, granting plaintiff judgment on the first cause of action. (*Antonini v Petito*, 96 AD3d 446 [1st Dept 2012].) Accordingly,

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[6] Not in evidence.
[7] Not in evidence.

plaintiff came to be 100% owner of the Company – the owner of the 2 adjacent buildings. Despite this success, plaintiff proceeded with the balance of the action for damages against defendant. [8]

After a four day trial, the jury returned a verdict dismissing plaintiff's breach of contract claim, denying plaintiff damages for breach of fiduciary duty claim, and awarding defendant damages in the amount of $260,000 for unjust enrichment and $3,300 for defendant's claim for interest arising out of plaintiff's failure to pay the promissory note on a timely basis.

Unjust Enrichment

Defendant's contract counterclaim was not viable after the Appellate Division sustained plaintiff's termination of defendant's LLC membership; since defendant was no longer a party to the Agreement, there could be no breach of the Agreement. Defendant testified that plaintiff demanded monthly contributions pursuant to the Agreement and, after a 13-month hiatus, defendant initiated such payments in January 2011 with a payment of $165,000. (NYSCEF 222, Petito Tr. at 207:15-208:4; 209:23-210:4; 210:22-24; 227:1-16.) Defendant testified to making three more contributions investing a total of $1.3 million in the Company and he wanted his contributions returned. (Id., Tr. at 210:1-4.)[9] Plaintiff corroborated that payments were made.

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[8] The court notes that plaintiff alleged that he had no adequate remedy at law. (Complaint ¶¶ 71, 79.) However, there was no other dispositive motion practice in this case; only 5 motions to withdraw as defendant's counsel. For example, there was no motion to dismiss after plaintiff was successful on his motion for declaratory relief.

[9] Defendant clearly articulated what he wanted and why, but he did not know the proper legal terminology. While "'[a] litigant appearing pro se acquires no greater right than any other litigant and such appearance may not be used to deprive defendants of the same rights enjoyed by other defendants" (*Roundtree v Singh*, 143 AD2d 995, 996 [2d Dept 1988], citing *Morgan v Sylvester*, 125 F Supp 380, 388, *affd* 220 F2d 758, *cert*

(Antonini Tr. at 179:2-6.)[10] However, plaintiff denied that he waited for defendant to make those post-forfeiture payments before plaintiff triggered the forfeiture. (*Id.*, Tr. at 179:24-180:14.)

Accordingly, the court added jury instructions tracking PJI 4:2[11] for unjust enrichment. (Final Charge Conference, Tr. at 329:8-333:3.) The questions on the verdict sheet in summary are as follows: 5A: Did defendant make contributions to the Company between October 2010 Notice of Forfeiture and June 2012, the date of the Appellate Division's decision holding the forfeiture valid? Next, 5B: was plaintiff enriched by those contributions? 5C: If so, how much? (NYSCEF 169, Verdict Sheet.) When the court added PJI 4:2 at the charge conference and inquired of plaintiff if he had any objection, he said no. (Attorney Aronstam, Tr. at 215:23-216:3; 218:3.) Rather, plaintiff objected that the unjust enrichment claim was procedurally improper because defendant had never filed a motion to amend. (*Id.*, Tr. at 311:16-17.) Plaintiff also objected to the omission of whether defendant made the payments voluntarily or not, though the PJI does not require a finding as to willfulness. (*Id.*, Tr. at 333:22-334:12.) At the conclusion of the jury charge and review of the verdict sheet, plaintiff had no objection. (*Id.*, Tr. at 358:2.)

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denied 350 U.S. 867, *reh denied* 350 US 919), the court has an ethical obligation to ensure that an unrepresented litigant is not treated unfairly by reason of their unfamiliarity with legal terminology. (Rules of Judicial Conduct 100.3; *See also* ABA Model Code of Judicial Conduct Rule 2.2, comment 4.)

[10] The court notes that plaintiff's statement was stricken as not responsive to defendant's question.

[11] The court notes a typographical error at Tr. at 215:24 of the transcript which should state PJI "4.2" which is the charge for unjust enrichment and not "3:2" which is the charge for assault.

Now, plaintiff objects to the claim having been added to conform the pleadings to the proof. It was not specifically pleaded as a counterclaim and defendant never moved to amend the pleadings in this 2010 action. However, the court may do so sua sponte pursuant to CPLR 3025. (*Dampskibsselskabet Torm A/S v Thomas Paper Co.*, 26 AD2d 347, 352 [1st Dept 1966] [citations omitted]; *Harbor Associates, Inc. v Asheroff*, 35 AD2d 667 [2d Dept 1970], *leave to appeal denied*, 27 NY2d 490 [1970].) A motion is not required. (CPLR 3025 [c]; *See* Siegel & Connors, NY Prac §404 at 782, 6th ed [2018].)

Conforming the pleadings to the proof under CPLR 3025 (c) is a matter within the sound discretion for the court. (*Murray v City of New York*, 43 NY2d 400, 405 [1977], *reargument denied*, 45 NY2d 966 [1978].) The test is whether plaintiff was prejudiced by the amendment. (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *reargument denied*, 55 NY2d 801 [1981].) "Where no prejudice is shown, the amendment may be allowed 'during or even after trial.'" (*Murray*, 43 NY2d at 405.) "Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." (*Loomis*, 54 NY2d at 23.)

Defendant has been seeking return of his investment in the Company since he filed his answer. (NYSCEF 2, Answer ¶ 248.) That his legal theory changed from breach of contract to unjust enrichment is permissible. (*Diemer v Diemer*, 8 NY2d 206, 211-212 [1960] [husband had not moved to amend to change legal basis for divorce complaint from cruel and inhuman treatment to abandonment].) Indeed, the responsive

proof would have been the same under any theory: did defendant have an obligation to pay to pay the Company? Did he actually pay the Company? And if so, how much?

If plaintiff sincerely believed after that after nine years of litigation, he needed more discovery, he could have requested an adjournment to permit him to gather evidence, but he did not. (*See also Amherst Magnetic Imaging Assocs., P.C. v Cmty. Blue*, 286 AD2d 896, 897 [1st Dept 2001], *leave to appeal denied*, 97 NY2d 612 [2002] [defendant prejudiced where plaintiff did not move to amend until trial and defendant was not given an opportunity to investigate or defend claims]; Siegel & Connors, NY Prac §404 at 782, 6th ed [2018].) The court rejects plaintiff's suggestion that he was prejudiced by a tardy amendment precluding plaintiff in some way. Plaintiff fails to identify any discovery that was precluded. Plaintiff avers that it could have presented documentary evidence to counter defendant's unjust enrichment claim if it had been added sooner. However, the first charge conference occurred during defendant's direct when the issue with the contract claim was identified. Plaintiff could have crossed defendant on this issue. Plaintiff could have also called a rebuttal witness. Indeed, plaintiff's attorney informed the court that he intended to do so, but reversed course. (Aronstam Tr. at 287:4.) Plaintiff cannot blame the jury or the court for plaintiff's strategic decisions.

Moreover, the document plaintiff offers as a defense is not a defense at all. Plaintiff now states that he would have offered a November 5, 2010 letter from defendant's counsel threatening plaintiff with severe consequences if he acted on the Notice of Default. (NYSCEF 217, Letter.)[12] Plaintiff opines that the letter in some way

[12] Not in evidence.

undermines defendant's long-held position that the notice of forfeiture was null and void. Until the Appellate Division ruled, defendant consistently rejected plaintiff's forfeiture notice which is corroborated by the proposed documentary evidence. (NYSCEF 209, Notice.) On the other hand, since plaintiff filed the complaint, he insisted that the contract was terminated by forfeiture. Defendant's demand for return of the funds defendant paid pursuant to the Agreement after it terminated can come as no surprise to plaintiff.

As to plaintiff's objection to the unjust enrichment claim as untimely, the court agrees. The unjust enrichment claim accrued in either October 2010, when plaintiff terminated defendant's membership interest in the company with the forfeiture notice (NYSCEF 209, Notice) or June 2012 when the Appellate Division ruled that defendant had forfeited his membership interest in the Company, as plaintiff opines. (*Antonini v Petito*, 96 AD3d 446.) Either way, the six-year statute of limitations expired by the time defendant's claim for unjust enrichment was added in April 2019. (CPLR 213 [1]; *Chanler v Roberts*, 275 AD2d 625 [1st Dept 2000].) However, this does not bar defendant's counterclaim for unjust enrichment, but limits it to offset or neutralize an award to plaintiff. (CPLR 203 [d].) Since the jury awarded plaintiff nothing, there is nothing to offset against. Were plaintiff to succeed on its JNOV motion, addressed below, reversing the jury and awarding plaintiff $424,000 for mortgage overpayments, $372,000 for lost residential rents, $693,000 for lost commercial rents, then the jury award in defendant's favor could reduce the amount of a judgment against defendant.

Interest

Plaintiff also objects to defendant's claim for interest on the promissory notes for which the jury awarded defendant $3,300. Plaintiff asserts that this claim was not in the answer and the pleadings were never amended. Plaintiff argues that if he had more notice, he would have put a document into evidence showing that when he paid the notes, he also paid the interest. (NYSCEF 218, January 20, 2014 attorney cover letter with copies of checks.)[13]

In his third counterclaim for fraud, defendant sought damages in the amount of the note "plus interest from April 6, 2009." (NYSCEF 2, Answer ¶ 253.) In his second counterclaim, defendant asserted a breach of contract. (*Id.*, ¶¶ 236-249.) During the charge conference, the court dismissed both parties' fraud claims but left a breach of contract claim arising from plaintiff's failure to pay interest to defendant on the note for $165,000. (Petito Tr. at 216:10-18.) Before plaintiff concluded defendant's cross, the court reviewed the charge and verdict sheet again at which time defendant clarified that he was still seeking interest. (*Id.*, Tr. at 253:23-254:9.) Prior to giving the final charge, the court reviewed the verdict sheet again with the parties. Plaintiff had no objection to the relevant question. (Charge Conference, Tr. at 328:19-329:7.) Again, plaintiff's timing objection is rejected because he could have inquired on cross or called a rebuttal witness, which would have effectively been a defense witness to defendant's counterclaims. Plaintiff chose neither.

Plaintiff next objects that defendant never testified as to the amount of damages on this claim nor did he produce documentary evidence in support of it such as the promissory note. Plaintiff argues that there was no evidence on this claim except

[13] Not in evidence.

defendant's unsupported testimony. While defendant failed to submit documentary evidence, his testimony is evidence and the jury found him credible. Plaintiff cites to no authority for the proposition that defendant's testimony must be corroborated. Moreover, plaintiff overlooks his own testimony about the notes and section 2.3.1 of the Settlement (NYSCEF 175, Settlement) that sets forth the provisions of the loan that is in evidence as exhibit 3. (Antonini Tr. at 109:24-110:14; 189:22-190:3.) Moreover, defendant walked the jury through the document and the interest calculation. (Petito Tr. at 275:23-279:13.) Accordingly, the court rejects plaintiff's contention that it is impossible to tell how the jury calculated the interest damages at $3,300.00.

The court also rejects plaintiff's argument that the claim for interest on the promissory notes was also time-barred. Plaintiff sought interest on the notes in the January 21, 2011 answer, unlike the unjust enrichment claim which evolved after the answer was filed.

Setting Aside the Jury Verdict

Plaintiff moves pursuant to CPLR 4404(a) to set aside the jury verdict and for judgment as a matter of law in plaintiff's favor. Plaintiff challenges three parts of the jury verdict and attacks defendant's credibility. Plaintiff rejects the need for a new jury trial instead arguing that the jury's verdict was irrational and must be set aside as a matter of law. In exercising its discretion under CPLR 4404(a), the court is guided by the following:

> "a trial judge is required to utilize his or her 'own common sense, experience, and sense of fairness rather than look to precedents" to determine whether substantial justice has been done. The court must construe the evidence from the trial record in the light most favorable to the non-moving party. And in the absence of an indication of substantial injustice, a litigant is entitled to the benefit of a favorable verdict. A court may not set aside a jury's verdict merely because

> it disagrees with the outcome. For a court to decide as a matter of law that a jury verdict is not supported by legally sufficient evidence, requires a "harsher and more basic assessment of the jury verdict.' It is necessary for the court to conclude that there is 'no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury on the basis of evidence presented at trial.' To reach this conclusion, the court must exercise considerable caution in balancing 'the great deference to be accorded to the jury's conclusion against the court's own obligation to assure that the verdict is fair.' Where the evidence is such that it would be 'utterly irrational' for a jury to reach the verdict, and a valid question of fact exists, the court may find that the jury verdict is as a matter of law not supported by the evidence adduced at trial."

(*Fantazia Intl. v CPL Furs NY, Inc.*, 20 Misc 3d 1113[A], 2008 NY Slip Op 51338, * 5 [Sup Ct, NY County 2008] [citations omitted], *affd in part and modification not relevant to this decision*, 67 AD3d 511 [1st Dept 2009].)

As a preliminary matter, the court rejects plaintiff's attack on defendant's credibility. Plaintiff insists that defendant lied about his ability to make mortgage payments. Plaintiff challenges defendant's testimony that he fell on hard times in 2010 and could not get a loan in order to make his monthly contributions towards the Company's mortgage payments. Plaintiff opines that defendant had no credibility and a rational jury would not have given his positions on the issue any weight. The jury believed defendant, not plaintiff. Assessing conflicting evidence and determining credibility are quintessentially jury functions. (*Windsch v Weiman*, 161 AD2d 433 [1st Dept 1990].)

First, plaintiff challenges the verdict that no damages arose from defendant's breach of fiduciary duty as inconsistent. According to plaintiff, if there was a breach, there must be damages in the amount plaintiff asserted: $1,489,000. Fixing damages is a peculiar function of the jury which this court will not invade. (*Po Yee So v Wing Tat Realty, Inc.*, 259 AD2d 373, 374 [1st Dept 1999].) This is not a case where there was

an agreement as to the amount of damages if the jury found a breach of fiduciary duty. (*See SCC Assoc. v Mfrs. & Traders Trust Co.*, 9 AD3d 809 [3d Dept 2004].) It is entirely possible that the jury found plaintiff's evidence of damages speculative or not reliable or that plaintiff was not damaged by defendant's breach or plaintiff was not credible.

Next, plaintiff challenges the jury's award of $260,000 to defendant on the unjust enrichment claim. Plaintiff surmises that the jury calculated the damages by taking the monthly mortgage payment to BRT of $26,000, multiplying it by twenty months and then dividing by half to obtain defendant's share. However, plaintiff insists that this hypothetical calculation is wrong because defendant's membership interest in Company was 25% until it was forfeited.

As plaintiff testified to an initial payment of $165,000 to restore the payments he had missed for 13 months, after he had breached the Agreement in July 2009, and three additional monthly contributions, there is a factual basis for the jury's calculation. However, as explained above, since these damages can only be awarded as an offset, defendant cannot have a judgment for this amount unless plaintiff is awarded damages first. The court is compelled to vacate the prior judgment.

Finally, question 1A on the verdict sheet concerned plaintiff's claim against defendant for breach of the Agreement and Settlement. Plaintiff challenges the jury's verdict that plaintiff did not perform his duties pursuant to the Operating Agreement and/or Settlement Agreement. Plaintiff insists that defendant failed to offer evidence that plaintiff did not perform his duties according to the Operating Agreement and/or the Settlement Agreement at any time after the Settlement Agreement was entered into in April 2009. The jury's finding that plaintiff breached first is supported by defendant's

testimony that plaintiff failed to cooperate in the building renovation and day-to-day duties such as opening a bank account. Indeed, in question 4B of the verdict sheet, the jury found that plaintiff violated the Settlement by failing to pay interest on the note. Accordingly, the court denies plaintiff's motion to set aside the jury's verdict.

The court is compelled to note that this jury was prompt, paid attention, was engaged, and appeared to take this matter very seriously. The jury deliberated for 1 hour and 38 minutes.

The court has considered the parties' remaining arguments and finds them unavailing, without merit, or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the judgment in favor of defendant is vacated. Defendant shall have judgment for $3,300. If circumstances change and plaintiff is awarded a money judgment, then it is subject to offset.

Entered.

5/15/2020
DATE

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[X]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE