

<b>Sacerdote v Frederick</b>
2020 NY Slip Op 32733(U)
August 20, 2020
Supreme Court, Kings County
Docket Number: 519769/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

X

**DEREK SACERDOTE,**

**Plaintiff,**

**-against-**

**PAUL JERRY FREDERICK and GYLAIN ADE,**

**Defendants.**

X

**DECISION/ORDER**

**Index No. 519769/2018**

**Motion Seq. No. 001**

**Date Submitted: 07/30/2020**

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment.*

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmations, Affidavits and Exhibits Annexed.....	<u>7-19</u>
Affirmation in Opposition, Affidavits and Exhibits Annexed.....	<u>20-22</u>
Reply Affirmation and Exhibit Annexed.....	<u>23-24</u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

This is action for unjust enrichment. Plaintiff claims he loaned defendants \$50,000 in 2008 by taking out a home equity loan on his home. Plaintiff and Frederick were "long time friends" who had a "long-time business relationship" with each other, and Ade was Frederick's romantic partner at the time the loan was made (NYSCEF Doc. 8 [plaintiff's aff]). Plaintiff avers that he loaned this money to defendants pursuant to an (apparently oral) agreement to fund renovations on defendants' jointly owned property at 738 East 86<sup>th</sup> Street, Brooklyn, NY. Plaintiff asserts that the parties' agreement was that defendants would make all monthly payments on the loan until the entire balance was repaid, but in 2013, the regular payments stopped and became sporadic, and then stopped entirely, requiring plaintiff to make the payments himself. Plaintiff asserts that the unpaid principal

balance is \$46,370.90 at the time this motion was filed. Plaintiff seeks to recover that sum plus the sums he has paid since defendants stopped paying regularly.

Plaintiff moves, pursuant to CPLR 3212, for summary judgment on his unjust enrichment cause of action (the sole claim in the complaint). He seeks a money judgment. Defendants concede in their Answer that they accepted a \$50,000 loan from plaintiff (NYSCEF Doc. 5) as well as in Frederick's affidavit in opposition to this motion (NSYCEF Doc. 21). Defendants' sole argument in opposition to this motion is that plaintiff has not adequately demonstrated the amount of the indebtedness that remains outstanding.

### **Discussion**

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see generally* CPLR 3212). Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"To prevail on a claim of unjust enrichment, a plaintiff must establish that it conferred a benefit upon the defendant, and that the defendant will obtain that benefit without adequately compensating the plaintiff therefor" (*MT Prop., Inc. v Ira Weinstein and Larry Weinstein, LLC*, 50 AD3d 751, 752 [2d Dept 2008]). A plaintiff demonstrates prima facie entitlement to summary judgment for such a claim when she establishes that "(1) the defendant was enriched; (2) at the plaintiff's expense; and (3) it is against equity and good

conscience to permit the defendant to retain what is sought to be recovered” (*Travelsavers Enters., Inc. v Analog Analytics, Inc.*, 149 AD3d 1003, 1006 [2d Dept 2017]).

Here, defendants expressly acknowledge that they accepted the \$50,000 loan from plaintiff and impliedly concede that they did not repay the loan in full (see NYSCEF Doc. 21 [Frederick’s aff]). Defendants argue that summary judgment must be denied because plaintiff has not eliminated all issues of fact as to the unpaid balance of the \$50,000 loan, but do not, for instance, argue that the claim is barred by a “valid and express agreement between the parties which explicitly covers the same specific subject matter” (*MT Prop., Inc. v Ira Weinstein and Larry Weinstein, LLC*, 50 AD3d 751, 752 [2d Dept 2008]).

Accordingly, plaintiff has tendered sufficient evidence to eliminate any triable issues of fact with regard to issue of liability. Defendants admit they received the benefit of the funds at plaintiff’s expense and have not repaid it in full (see e.g. *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The court concludes that plaintiff is entitled to summary judgment on the issue of liability. Plaintiff does not seem to be seeking summary judgment on the issue of damages, and, in any event, he has not substantiated his conclusion that he is owed the sum \$57,206.90. A trial will be necessary to determine the amount of damages if the parties cannot reach agreement on their own.

Accordingly, it is **ORDERED** that plaintiff’s motion is granted to the extent that plaintiff is entitled to summary judgment on the issue of liability; and it is further **ORDERED** that the parties shall complete, sign and submit a proposed preliminary conference discovery order electronically to the court with thirty (30) days, to be so-ordered, by using the document name “Stipulation-Request to so order.” If they cannot agree to a

proposed preliminary conference by such time, the Request for Preliminary Conference form must be e-filed.

This constitutes the decision and order of the court.

Dated: August 20, 2020

ENTER:



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Hon. Debra Silber, J.S.C.