

Hart v Cappa

2023 NY Slip Op 33470(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 156732/2016

Judge: James G. Clynes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES

Justice

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PENNY F. HART,

Plaintiff,

DECISION AFTER TRIAL

- v -

THOMAS V. CAPPA,

Defendant.

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The court conducted a non-jury trial during which both parties, Plaintiff Penny F. Hart (Hart) and Defendant Thomas V. Cappa (Cappa) testified. Both parties submitted Post-Trial Memoranda.

Pursuant to the Decision and Order dated January 9, 2018, the issues to be decided at trial include (1) the disposition of the combined apartment Units M2003 and M2004 located at 383 Grand Street (the Grand St Apt) (Hart's First Cause of Action seeks the partition and sale with an accounting of the Grand St Apt pursuant to Real Property and Proceedings Law [RPAPL] 901 [1] and in equity and Cappa's First Counterclaim seeks the imposition of a constructive trust on the Grand St Apt in favor of Cappa); (2) the disposition of jewelry given by Cappa to Hart during their relationship (Hart's Second Cause of Action seeks a declaratory judgment that she may retain the jewelry, and alternatively, Hart's Third Cause of Action seeks the return of cash and other gifts from Hart to Cappa during their relationship pursuant to Civil Rights Law 80-b, and Cappa's Fourth and Sixth Counterclaims seeking return of the jewelry pursuant to Civil Rights Law 80-b and fraud); (3) the disposition of a Vanguard investment account (Hart's Fourth Cause of Action alleges conversion by Cappa of funds Hart deposited into their jointly held Vanguard investment account); (4) Cappa's Seventh Counterclaim for Breach of Contract seeking the payment of interest due on an \$850,000 loan from Cappa to Hart; (5) Cappa's Ninth Counterclaim for Fraud seeking repayment of the outstanding unpaid principal from Cappa to Hart that was obtained by Hart through fraud; (6) Cappa's Tenth Counterclaim for Breach of Contract in connection with an alleged agreement between the parties that Cappa, in exchange for managing the renovations of an apartment located at 200 East End Avenue, Apt 12APE (the EE Apt), would receive payment in

the amount of twenty percent of the increase in value of the EE Apt; and (7) Cappa's Thirteenth Counterclaim for Breach of Contract in connection with an alleged agreement between the parties that Cappa, in exchange for managing the renovations of an apartment located at 530 E72nd Street (the E72 Apt), would receive payment in the amount of twenty percent of the profit from the sale of the E72 Apt.

This Court makes the following findings of fact and conclusions of law:

The parties met in April 2002 and began a romantic and business relationship that lasted for more than a decade, ending in late 2013 or early 2014. During this period, the parties exchanged extravagant gifts, traveled extensively, shared joint bank and investment accounts including a Vanguard investment account, acquired and combined the two apartments that make up the Grand St Apt. Also during this period, Hart acquired and Cappa managed the renovations of the EE Apt (Hart's residence) and the E72 Apt.

When they met, Cappa was single and had been released from federal prison in February 2002 after serving more than eight years. Cappa testified that upon his release, he had an apartment in his mother's building on Cropsey Avenue in Brooklyn. He soon moved into Unit M2004 of 383 Grand Street while working with his brother at Liberty Pest Control, would soon begin working as a foreman with SSC Contracting, and was overseeing family buildings. At the time, Hart was married and living with her husband and three children (two daughters and one son who were then 9, 8, and 6 years old) in an apartment at 500 East 83rd Street (500 East 83rd Street or the Marital Residence). Hart was the CEO of an insurance company (TSC) she founded with family money, and she eventually sold TSC in 2008, receiving over \$20 million dollars. Hart continued to run the company for the new owners after the sale.

Hart's husband left the Marital Residence in 2004. Soon thereafter Cappa was cooking dinner and staying over five nights per week with Hart and the children at the Marital Residence. Hart and her husband each maintained separate apartments and alternated their weekends with the children at the Marital Residence.

Hart was involved in litigation with her brother relating to TSC from 2003 through 2008 and in divorce proceedings from 2004 through June 2006. Cappa testified that in 2005, he added Hart's name to a Vanguard account he controlled, that was in his and his mother's names, and that he then had his mother take her name off the account. He testified that at the time the account was first in the names of Cappa and Hart only, the amount in the account was \$300,000.

Cappa testified that he loaned Hart \$350,000 in 2004 or 2005 and that he loaned Hart another \$500,000 in 2007 to help Hart meet attorney fees relating to the litigation and other expenses. Cappa also testified that he was unable to recall from which of his accounts he obtained the \$350,000 and that Hart repaid this amount by making deposits into the Vanguard account in July 2006. Hart testified that she hit a financial brick wall in 2007 because indemnification for her legal bills relating to TSC had not been approved and that Cappa gave her \$500,000 in 2007 and told her she did not need to repay it. Hart testified that she recently came to the realization that Cappa obtained the \$500,000 from a November 2007 redemption from the Vanguard account.

Hart testified that she made monthly stipend or allowance payments of approximately \$10,000 to Cappa, but could not recall when the payments started. Hart testified that although her name was on the joint Citibank account, she never received statements for the account and never made a withdrawal from the account. Cappa closed the account with her name on it in 2014.

Cappa testified that Hart wrote checks out to cash, Cappa, and to the Vanguard account to reimburse Cappa for money he spent during the renovations of the properties and for cash he provided to Hart to pay her domestic staff (cleaner, nannies, dog walkers).

Cappa testified that payments made by Hart to the Vanguard account in both parties' names were repayments of the \$350,000 he loaned Hart in 2005 and also represented reimbursements for amounts he paid Hart in cash. Cappa added Hart's name to a Citibank account that was in his name and to investment accounts that were in his mother's name and in both his and his mother's name.

The parties offered conflicting accounts on whether they were engaged to be married and on the final date of their breakup.

Hart testified that she made it clear to Cappa that she would not marry again, but admitted that she wore an engagement ring given to her by Cappa and that she referred to him as her fiancé publicly and in legal documents. Hart testified that she wore the ring to signal that she was taken and off the market. Cappa testified that in 2005 he proposed to Hart in Rome and that she accepted his proposal and wore the diamond ring he gave her. Cappa testified that the parties did not make wedding plans or set a date because a clause in Hart's Divorce Decree required the sale of the Marital Residence upon her remarriage, but he could not explain why the couple did not marry or make wedding plans after the sale of the Marital Residence in 2010 or 2011.

Hart testified that she believes the last break up was at the end of 2013, not in 2014, but testified in a 2018 examination before trial that the final breakup was in 2014. Hart points to a July 2014 email between the parties in which she states, "I wanted to do this when were together," (Plaintiff's Exhibit 8) and an email, dated March 10, 2014, in which Cappa states, "we are not together," (Plaintiff's Exhibit 40) as evidence that the parties were broken up before March 2014.

Cappa testified that the parties were still together in 2013 and that their final breakup came after March 2014 when Cappa became aware that Hart was unfaithful to Cappa while Cappa was in the hospital that month. On cross-examination Cappa admitted he was mistaken when he signed at least three affidavits placing the parties' breakup date in April 2012, September 2013, and earlier than September 2013 and when he testified during his examination before trial that the parties' relationship broke up in January 2014 (Tr. 794-807; Plaintiff's Exhibits 36, 37, 38, 39).

The Court is unable to conclude that the parties were engaged and contemplated marriage during their relationship and is unable to determine the final date of the parties' break up as a couple.

Cappa worked three days a week at TSC from before it was sold in 2008 until September or October 2014. Cappa managed the building where TSC was located and reviewed insurance claims from homeowners.

Findings of Fact and Conclusions of Law

Parties' Credibility

Both parties testified as interested witnesses because each has a financial and emotional stake in the outcome of this case. After hearing both parties testify, the court has the impression that more was left unexplained than explained during this trial. Neither party was entirely credible, and their testimony was not entirely substantiated. Cappa provided testimony that was vague, unspecific, in conflict with prior sworn statements, and uncorroborated by documentary evidence. Cappa's testimony that he did not need to disclose to the government assets (bank and investment accounts and real property) he controlled because they were in his mother's name is not credible (Tr. 582). Cappa's testimony concerning loans to Hart and the expenses he paid for construction costs was conclusory and unsubstantiated.

The Grand Street Apartment

Cappa testified that in 1998, while Cappa was in prison, he purchased the two-bedroom apartment, Unit M2004 at 383 Grand Street from his mother's boyfriend Mario Freda in exchange for \$225,000 and that Freda then put the apartment under the name of Cappa's mother Ellen Cappa. Cappa testified that he paid for renovations to Unit 2004 and moved into the unit approximately one month after his release from prison. There is no evidence to corroborate Cappa's conclusory and unsubstantiated testimony that he purchased Unit 2004 from Mario Freda. It is undisputed that Cappa resided in Unit M2004 at 383 Grand Street after his release from prison.

In September 2007, Unit M2004 was purchased from Ellen Cappa and put in the name of Penny Hart in exchange for the price of \$675,000, which consisted of \$348,365.05 paid by Hart (from funds redeemed from a joint Vanguard account held by Cappa and Hart and deposited into Hart's checking account), and other credits set forth in the settlement agreement, dated April 23, 2007 (signed by Cappa, Hart, Ellen Cappa, Richard Cappa and Laura Cappa and their attorneys) (Plaintiff's Exhibit 3). The credits referred to in the stipulation of settlement include, among other things, a \$100,000 credit relating to a real estate property in Florida and a \$200,000 UBS account.

In October 2011, Hart acquired the adjacent one-bedroom Unit 2003. It is undisputed that Hart paid the entire purchase price of \$550,000 for Unit M2003 (Plaintiff's Exhibit 6; Tr. 929:25, 930:1-3). Between October 2011 and September 2013, construction and renovations took place, managed by Cappa, to combine Units M2004 and M2003 into one unit. Cappa testified that he paid \$300,000 for the renovation without contribution from Hart and that the work performed was valued at \$700,000 (Tr. 627-628, 706; Defendant's Exhibit H). There are no contemporaneous records to corroborate the cost of the renovations. Hart points to a July 2013 email in which she claims to have paid \$450,000 toward the renovations (Tr. 67, Plaintiff's Exhibit 9).

In September 2013, Hart added Cappa to the stock certificates and the proprietary lease, and the parties became Joint Tenants with Right of Survivorship of the combined Grand Street Apartment (Plaintiff's Exhibit 1). In October 2013, the parties took out a mortgage on the Grand Street Apartment in the amount of \$833,625 (Plaintiff's Exhibit 9). Most of mortgage amount went to Hart and a smaller amount went to Cappa.

RPAPL 901 (1) provides that "[a] person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may

maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners” (RPAPL 901 [1]).

There is no dispute that the parties are joint tenants with the right of survivorship of the Grand St Apt, which consists of the combined co-operative apartment units M2003 and M2004 located at 383 Grand Street (Plaintiff’s Exhibit 1, the September 24, 2013 Proprietary Lease and House Rules and Stock Certificate). Cappa admitted as much in his testimony (Tr. 1053).

The Court finds that the sale of the Grand St Apt is appropriate because partition of the combined units would greatly prejudice the parties by reducing the value of the combined apartments. The parties submitted evidence and testimony during the trial concerning their contributions to the purchase price, renovation, and maintenance of the combined units of the Grand St Apt. Therefore, prior to any sale, an accounting is necessary to determine the current value of the Grand St Apt and the value of each party’s share of the apartment.

The Court does not credit the July 2013 Ownership Agreement of Trust (Defendant’s Exhibit L) and Assignment of Lease (Defendant’s Exhibit M) as those documents are not notarized and were not authenticated at trial. The signatures on the document are not notarized and Cappa testified that he did not see Hart sign the undated document. Even if the Court were to find the Ownership Agreement of Trust to be a legally enforceable agreement, it is superseded by the September 24, 2013 Proprietary Lease for the Grand St Apt (Plaintiff’s Exhibit 1), which states, among other things, that “[t]his lease represents the entire agreement of the parties, and supersedes any occupancy agreement or other agreement in effect between the parties with respect to the Apartment as of the date of this lease” (Plaintiff’s Exhibit 1, Paragraph 17 [1]).

The Court does not credit Defendants Exhibits consisting of the December 2013 Security Agreement, relating to a loan of \$850,000 from Cappa to Hart secured by the Grand Street Apt (Defendant’s Exhibit N) or Promissory Note relating to an \$850,000 loan from Cappa to Hart secured by the Grand Street Apt (Defendant’s Exhibit O) or letter agreement relating to the October 25, 2013 mortgage (Defendant’s Exhibit Q) as those documents are not notarized and were not authenticated at trial.

The Court also finds that the evidence does not support the imposition of a constructive trust in favor of Cappa in relation to the Grand St Apt. To impose a constructive trust, the following factors must be shown: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, (4) a breach of the promise and (5) unjust enrichment. (*Sharp v Kosmalski*, 40

NY2d 119, 121 [1976]). Cappa has failed to establish the requisite element of transfer made in reliance upon a promise. The evidence does not demonstrate that Cappa transferred ownership of Unit M2004 to Hart in reliance on any promise.

The evidence does not support a finding of unjust enrichment, because it is undisputed that Hart paid \$550,000 for Unit M2003 in 2011. Moreover, there is evidence that both parties made maintenance payments between 2007 and 2014 and that Cappa paid maintenance costs from 2014. Cappa's unsubstantiated claims that he paid for renovations combining apartments does not support a finding of unjust enrichment, because as the sole occupant of the apartment, he benefitted from those renovations.

Accordingly, the Court finds in favor of Hart and against Cappa on Hart's First Cause of Action seeking partition and sale of the Grand St Apt. Prior to the sale of the Grand St Apt this matter is referred for an accounting to determine the value of the Grand St Apt. and the value of each party's respective share. Cappa's First Counterclaim seeking the imposition of a constructive trust in favor of Cappa in relation to the Grand St Apt is dismissed.

The Vanguard Account

"Conversion is the 'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights'" (*State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002], quoting *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex*, 87 NY2d 36, 43 [1995]). "The tort of conversion is established when one who owns and has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]).

Hart failed to establish conversion by Cappa of the Vanguard account. The evidence and testimony adduced at trial established that Hart voluntarily transferred the Vanguard account into Cappa's name in August 2014 (Defendant's Exhibit V). Hart testified that she did not recall the forms given to her by Cappa and did not recall any specific conversation with Cappa prior to the voluntary transfer (Tr. 401-411). It belies logic that Hart would turn over \$1,000,000 in an account to Cappa so that he could "manage it for her" when the parties' romantic relationship had ended and she was seeking to cut her ties to Cappa.

Hart's Fourth Cause of Action in Conversion seeking judgment in the amount of \$825,000 for "the return of Plaintiff's funds in the Vanguard account, plus appreciation and interest as appropriate" is dismissed.

The Jewelry

"In order to recover property pursuant to Civil Rights Law 80-b, a plaintiff must demonstrate that he or she gave the property as a gift in 'sole consideration ... [of] a contemplated marriage which has not occurred'" (*Northern Trust, NA v Delley*, 90 AD3d 1644 [4th Dept 2011]). "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)." (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 [2009]).

Cappa's Fourth Counterclaim seeks the return of jewelry given by Cappa to Hart during their relationship under Civil Rights Law 80-b as given solely in contemplation of marriage. Alternatively, Cappa's Sixth Counterclaim seeks the return of jewelry given by Cappa to Hart during their relationship under a theory that the gifted jewelry was obtained by Hart through fraud, in that she falsely represented that she was in a committed and exclusive relationship with Cappa in order to obtain the gifted jewelry.

Hart's Second and Third Causes of Action as set forth in her Amended Complaint seek a declaratory judgment that she may retain gifts, specifically jewelry gifted to her by Cappa during their relationship, on the basis that the jewelry was not given solely in contemplation of marriage, or, alternatively, should the court find that the gifts exchanged by the parties during their relationship were given in contemplation of marriage, seeks the return of moneys given by Hart to Cappa during their relationship. Hart contends that the jewelry Cappa gave to her during their relationship was not given in contemplation of marriage because she made it clear to Cappa that she would not marry him. Hart also contends that should the court find the parties exchange of gifts was in contemplation of marriage that she is entitled to the return of monies gifted by her to Cappa during their relationship.

It is undisputed that Hart returned the diamond engagement ring given to her by Cappa and that in a July 2012 email to Hart, Cappa stated, "Keep the jewelry, you earned it. Just the ring back" (Plaintiff's Exhibit 15; Tr 773: 16-21).

Cappa did not establish that the jewelry given to Hart during their relationship was given solely in contemplation of marriage and has not established that the gifted jewelry was obtained by Hart from Cappa through fraud. Based upon the evidence and conflicting testimony of the parties on the issue of their engagement, the court is unable to determine that the parties were engaged or even contemplated marriage. Hart testified that she made it clear to Cappa that she would not marry him. Cappa explained that the parties did not make wedding plans during their relationship because if Hart remarried, she would be required to sell the Marital Residence, which neither Hart nor her ex-husband wanted. Cappa could not explain why the parties did not marry after the Marital Residence was sold in 2010 or 2011.

Cappa has failed to establish fraud on the part of Hart because Cappa has not established that the parties were engaged to be married and has not satisfied the requisite elements of fraud by Hart. Cappa did not establish Hart's infidelity during their relationship. Hart denied infidelity during the parties' relationship and the conflicting testimony of the parties concerning the final date of their break-up makes it impossible for the court to determine that Hart obtained the gifted jewelry by fraud.

For the foregoing reasons, Cappa's Fourth and Sixth counterclaims and Harts Second and Third Causes of Action are dismissed.

The Loans

Under New York law, the four elements of a breach of contract are: "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept. 2010]).

Cappa's Seventh Counterclaim for Breach of Contract seeks repayment of a loan from Cappa to Hart in the amount of \$850,000 and unpaid interest on the loan in the amount of \$363,000. Cappa's Ninth Counterclaim for fraud seeks repayment of a loan from Cappa to Hart in the amount of \$850,000 with a compound interest rate of 6% on the grounds that the loan was obtained by Hart's fraudulent representation that she was in a long-term romantic relationship with Cappa in

order to obtain an \$850,000 loan from Cappa to pay legal fees, specifically fees paid to the Michael Kaufman Law Firm for commencing a certain lawsuit.

The testimony and evidence adduced at trial does not establish that Cappa loaned Hart \$850,000 at 6% interest during their relationship and does not establish that Hart obtained said loan as a result of fraud.

Cappa's testimony concerning the alleged loans is inconsistent and uncorroborated by documentary evidence. At trial, Cappa testified that he loaned Hart \$350,000 in 2004 or 2005 which she then repaid without interest in July 2006 and that he loaned Hart another \$500,000 in 2007 which she did not repay. Cappa testified that he does not recall from which accounts in his or his mother's name he used to make the \$350,000 loan. Cappa testified that nothing is in writing. Cappa did not establish the date of loans or the dates and amounts of any payments on the loans, so any alleged damages relating to unpaid interest, such as the \$363,000 in unpaid interest set forth in Cappa's Seventh Counterclaim are purely speculative.

Cappa testified that the loan to Hart in 2004 or 2005, placed a strain in his relationship with his mother that led to his mother seeking to evict him from Unit M2004 at 383 Grand St.

Cappa testified that he would not have made loans to Hart if he did not think he was in an exclusive relationship with her. Having failed to establish that he made loans to Hart, Cappa also fails to establish that Hart obtained the loans through fraud.

Cappa has not raised sufficient evidence to substantiate his inconsistent testimony that he loaned Hart \$350,000 in 2004 or 2005 and that he loaned Hart another \$500,000 in 2007 to help Hart meet attorney fees relating to the litigation and other expenses. Cappa was unable to recall from which of his accounts he obtained the \$350,000 and provided no evidence to substantiate his conclusory testimony. Cappa admits that the loans and their terms are undocumented. Cappa's testimony concerning the dates he made the loans is inconsistent. Hart repaid this amount by making deposits into the Vanguard account in July 2006. Hart testified that she hit a financial brick wall in 2007 because indemnification for her legal bills relating to TSC had not been approved and that Cappa gave her \$500,000 in 2007 and told her she need not to repay it. Hart also testified that because Cappa had given her the \$500,000 in 2007, she felt obligated to provide \$500,000 in additional backing of a loan related to The Original Soupman International (TOSI) when asked to do so by Cappa in 2011. Hart also testified that she only recently became aware

that Cappa obtained the \$500,000 he gave her in 2007 through a November 2007 redemption from the Vanguard account.

As previously stated, the court does not credit Defendant's Exhibit N (December 2013 Security Agreement, relating to a loan of \$850,000 from Cappa to Hart secured by the Grand Street Apt) and Defendant's Exhibit O (Promissory Note relating to an \$850,000 loan from Cappa to Hart secured by the Grand Street Apt) because those documents are not notarized and Hart's signature was not properly authenticated at trial. There is no evidence that Cappa made a loan of \$850,000 to Hart in December 2013 that was secured by the Grand St Apt.

Cappa's Seventh and Ninth Counterclaims are dismissed.

The Renovations of the 530 E72nd Street Apt (E72 Apt) and the 200 East End Avenue Apt (EE Apt) (10th and 13th Counterclaims)

Cappa's Tenth Counterclaim for Breach of Contract alleges that in connection with an alleged agreement between the parties that Cappa, in exchange for managing the renovations of an apartment located at 200 East End Avenue (the EE Apt), would receive payment in the amount of twenty percent of the increase in value of the EE Apt.

Cappa's Thirteenth Counterclaim for Breach of Contract alleges that in connection with an alleged agreement between the parties that Cappa, in exchange for managing the renovations of an apartment located at 530 E72nd Street (the E72 Apt), would receive payment in the amount of twenty percent of the profit from the sale of the E72 Apt.

The testimony and evidence at trial did not establish agreements between the parties that Cappa would receive twenty percent of the appreciation in value of the EE Apt and twenty percent of the profits from the sale of the E72 Apt in exchange for overseeing the renovation projects (Tr. 667-686).

According to Cappa's testimony, the E72 Apt was purchased before the EE Apt and the renovations were completed on the EE Apt before the E72 Apt (Tr. 667-671). Cappa testified that upon completion of the renovation of the EE Apt, which was completed within twelve weeks, Hart and her children decided to live in the EE Apt and that the E72 Apt would be sold. According to Cappa, the parties agreed that Cappa would receive twenty percent of the profit from the sale of the E72 Apt (Tr. 667-671).

Cappa testified in relation to the EE Apt project, that the parties agreed that Cappa would receive twenty percent of the appreciation on the work that he did, because he only charged cost, labor, and materials, and no profit (Tr. 680). Cappa testified that the EE Apt was purchased for \$2.2 million, cost \$600,000 in renovations, and was appraised by Joe Schwartz for \$5.7 or \$6.7 million (Tr. 680-681). However, Cappa did not submit evidence to corroborate the renovation cost and the appraisal was never entered into evidence. According to Cappa, the agreement in relation to the EE Apt was made after the renovations were complete and the apartment was appraised (680-681). Hart testified that she never discussed with Cappa paying him to manage the apartment renovations. According to Hart she never discussed with Cappa giving him twenty percent of the increase in value of the EE Apt in exchange for managing renovations (Tr. 509-510). Hart testified that when the renovations were almost complete, she did tell him, “[t]his came out great. When I sell the apartment, I’m going to give you twenty percent of the profits” (Tr. 45). Hart testified that the services performed by Cappa in relation to the renovation of the apartments were rendered in the context of the parties’ romantic relationship (Tr. 47-48). Cappa did not provide evidence to refute Hart’s contention that she lost money on the E72 St Apt and Cappa provided no evidence as to the cost of the renovations for the E72 Apt upon which his profit calculations are based. The calculations set forth in Cappa’s emails are purely speculative and unsupported by evidence. For these reasons, Cappa’s Tenth and Thirteenth Counterclaims are dismissed.

CONCLUSION

Upon hearing the testimony and the evidence submitted during the non-jury trial of this action, it is hereby

ORDERED that in relation to Hart’s First Cause of Action, the combined apartment Units M2003 and M2004 located at 383 Grand Street (the Grand St Apt) is to be sold with an accounting; and it is further

ORDERED that Cappa’s First Counterclaim is dismissed; and it is further

ORDERED that, in relation to Hart’s Second Cause of Action, Hart may retain the jewelry given by Cappa to Hart during their relationship; and it is further

ORDERED that Hart’s Third Cause of Action and Cappa’s Fourth and Sixth Counterclaims are dismissed; and it is further

ORDERED that in relation to the Vanguard Account, Hart's Fourth Cause of Action is dismissed; and it is further

ORDERED that Cappa's Seventh and Ninth Counterclaims are dismissed; and it is further

ORDERED that Cappa's Tenth and Thirteen Counterclaims are dismissed.

This constitutes the Decision and Order of this Court.

Plaintiff shall serve a proposed judgment on notice to opposing counsel.

The parties are directed to retrieve from the Clerk their respective trial exhibits by November 5, 2023.

James G. Clynes

JAMES G. CLYNES, JSC

DATE: 10/5/2023

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify _____)