At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of February 2024.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO,

Plaintiff,

-against-

BARRY HERSKO a/k/a ZEV DOV HERSKO a/k/a BEREL HERSKO, BELLA HERSKO, WILSON-HINS ASSOCIATES, INC, CLARK WILSON, INC., WILSON PROPERTIES & EQUITIES, INC., WILSON FLAT, INC., WILSON HAN ASSOCIATES, INC., WILSON-MER ASSOCIATES, INC., B. CLARK ASSOCIATES, INC., 516 KINGSTON, LLC and

ABRAHAM WEISEL, as escrow agent,

Defendants.

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Index No 520492/2021

DECISION and ORDER

MS 44

The following papers read on this motion:

	NYSCEF Doc Nos
Notice of Motion/Order to Show Cause/ Petition/Affidavits (Affirmations) and Exhibits	885-888
Cross-motions Affidavits (Affirmations) and Exhibits	
Answering Affidavit (Affirmation)	889-891
Reply Affidavit (Affirmation)	892-897
Supplemental Affidavit (Affirmation)	933-938

This action stems from a dispute between two brothers, Plaintiff ISAAC HERSKO and Defendant BARRY HERSKO ("the brothers"), concerning nine real properties in

Brooklyn, as well as income from various other joint business ventures undertaken by the brothers.

Plaintiff sought, the imposition of a constructive trust on the following nine real properties: 1) 553 Hinsdale Street, Brooklyn, NY; 2) 930 Dekalb Avenue, Brooklyn, NY; 3) 279 Kosciuszko Street, Brooklyn, NY; 4) 401 East 21st Street Brooklyn, NY; 5) 666 Hancock Street, Brooklyn, NY; 6) 60 Clarkson Avenue, Brooklyn, NY; 7) 250 Clarkson Avenue, Brooklyn, NY; 8) 270 Clarkson Avenue, Brooklyn, NY; 9) 516 Kingston Avenue, Brooklyn, NY, (collectively, the "Real Properties"), and a declaration that Plaintiff was 50% owner of each Property.

The Plaintiff also seeks a declaration, that he is 50% partner of other business investments of the brothers, and of monies in an escrow account held by Defendant ABRAHAM WEISEL. Plaintiff further seeks an accounting and money damages relating to the other businesses.

Plaintiff alleged that he and his brother had an agreement that they would invest in real properties and that separate and distinct entities would be formed to purchase and hold title to each real property, but that BARRY HERSKO would be listed as the sole shareholder of these companies.

The brothers entered into a written agreement entitled "Document of Confession" dated September 13, 2016, which memorialized their agreement and provided that the brothers were equal partners in the real properties, as well as in other investments, and that all monies deposited with Defendant WEISEL belong to both brothers equally.

Plaintiff ISAAC HERSKO died on October 26, 2024, and the action has been stayed following his death.

Abraham Hersko and Morris Hersko, co-executors of the Estate of ISAAC HERSKO, now move to be substituted as Plaintiffs for the deceased Plaintiff ISAAC HERSKO.

Defendants oppose the motion, arguing that all of Plaintiff's claims to the Real Properties, and to the monies in the WEISEL escrow account were extinguished upon his death because they are based on a claim of a partnership between the brothers.

New York Partnership Law (NYPL) provides that "[a] partner is co-owner with his partners of specific partnership property holding as a tenant in partnership[.]", (NYPL §51(1)), and that "[o]n the death of a partner his right in specific partnership properly vests in the surviving partner or partners[.]" *Id.* § 51(2)(d).

The Plaintiff argues that he and his brother did not have a partnership with respect to ownership of the Real Properties and income therefrom, however they did have a partnership as to other business ventures, including investing in life insurance policies and making loans, which were separate from their ownership of the Real Properties.

Plaintiff argues that his claims that relate to the nine Real Properties and the income generated from those properties are not based on a partnership but on the agreement that Plaintiff would be a 50% owner of the properties in return for putting up the money to purchase the properties.

Both the complaint and written agreement between the brothers describe their relationship as partners in several places. However, the fact that they may have called themselves partners is not determinative of whether they are partners in a legal sense. *Brodsky v Stadlin* 138 AD2d 662 [2d Dept 1988]; *Weisner v Benenson*, 275 A.D. 324 [1st Dept 1949], aff'd 300 N.Y. 669 [1950]).

In deciding whether the brothers were partners, one must look to whether they intended to, and did in fact, conduct their business as partners, such as sharing profits and losses and management of the assets. (*Leonard v Cummings,* 196 AD3d 886 [3d Dept 2021]; *Czernicki v Lawniczak* 74 AD3d 1121 [2d Dept 2010]).

The complaint alleges six causes of action: (1) a declaration that Plaintiff has a 50% ownership interest in each of the Real Properties, (2) the imposition of a constructive trust on each of the Real Properties, (3) monetary damages for monies Plaintiff alleges he was entitled to and that his brother converted, including his share of the rents generated from the Real Properties, (4) that Plaintiff's brother wrongfully received monies owed to Plaintiff (5) an accounting of the profits and rents generated from the Real Properties, and (6) a declaration that Plaintiff has a 50% ownership interest all funds held in the escrow account of Defendant WEISEL, and an accounting of the funds in the WEISEL escrow account.

The first, second, and fifth of the causes of action relate to the nine specific Real Properties, and income generated from those properties. The third, fourth, and sixth causes of action relate to both income from the Real Properties and to income from other businesses the brothers engaged in, and the monies from those ventures that were deposited in the escrow account of Defendant WEISEL.

For the purposes of deciding which claims survived the death of Plaintiff ISAAC HERSKO, it will be clearer to consider those claims based on the Real Properties and the income from the real properties, separately from those claims based on the other business ventures, rather than considering the claims by cause of action.

Claims relating to the Real Properties

In terms of the claims relating to the Real Properties, Plaintiff sought a declaration that he was 50% owner of the Real Properties, the imposition of a constructive trust on the Real Properties, an accounting of the monies generated from these properties, and a judgment for monies allegedly taken by Defendant BARRY HERSKO that exceeded his 50% share in the income generated by the Real Properties.

In her decision of April 21 2022, granting Plaintiff's motion for a default judgment, Judge Karen Rothenberg found, "the complaint, as amplified by plaintiff's affidavit, indicates that plaintiff and his brother Barry entered into a business arrangement for the funding and purchase of distressed real estate wherein plaintiff would provide the money to purchase the properties and Barry would hold (through separate holding corporations) title to each of the purchased properties, with each 50% equitable owners of the properties and sharing equally in the profits."

Judge Rothenberg held that the Plaintiff had submitted proof of the facts constituting his claims and that Defendants failed to establish a potentially meritorious defense to the action. Judge Rothenberg specifically found that affidavit of Defendant BARRY HERSKO, "does not dispute the allegations contained in the complaint or provide any factual support to establish a defense to the claims." This part of Judge Rothenberg's decision was upheld by the Appellate Division and is law of the case.

Defaulters are deemed to have admitted all traversable factual allegations contained in the complaint and all reasonable inferences that flow from them (*Woodson v Mendon Leasing Corp.,* 100 NY2d 62 [2003]; *Rokina Opt. Co. v. Camera King,* 63 N.Y.2d 728 [1984]). When submitting proof of facts constituting a claim, a plaintiff need only "set forth enough facts to enable the Supreme Court to determine that the plaintiff

alleged a viable cause of action" (*Star 201 LLC, v Duran*, 223 AD3d 726 [2d Dept 2024]; *Rosenzweig v Gubner,* 194 AD3d 1086 [2d Dept 2021]).

Defendants argue that the granting of the motion for a default judgment did not establish Plaintiff's rights to an interest in the Real Properties because a declaratory judgment cannot be granted on default without live testimony.

Defendants cited several appellate cases for this proposition, but those cases do not in fact state that live testimony is required to grant a default judgment on a claim for declaratory judgment. (see *Ameriprise Ins. Co. v. Kim,* 185 A.D.3d 995 [2d Dept 2020]; *JBBNY, LLC v. Dedvukaj*, 171 A.D.3d 898, [2d Dept 2019]; *Foddrell v. Utica First Ins. Co*., 178 A.D.3d 901 [2d Dept 2019]).

What these appellate cases hold is that a declaratory judgement will not be issued based on a default and the pleadings alone, that the movant must submit proof of the facts underlying the claim. These decisions do not hold that that proof of the underlying claim must be live testimony as opposed to affidavits or documents. (*Id.*)

Defendants also cite *Onrubia de Beeck v Lopez Costa, (*39 Misc3d 347 [Sup Ct NY County 2013]), however in that case, while the Court held a hearing, it did not hold that live hearings were necessary to grant a declaratory judgement on default. The Court held only that a Plaintiff must establish their right to the declaration and observed that this is rarely done without a hearing.

The Court stated,

> "New York courts "rarely, if ever" grant declaratory judgments on default "with no inquiry by the court as to the merits." (*Tanenbaum v Allstate Ins. Co*., 66 AD2d 683, 684 [1st Dept 1978]). Default declaratory judgments " 'will not be granted on the default and pleadings alone' " but require that the " 'plaintiff establish a right to a declaration against . . . a defendant.'[internal citations omitted].)" (*Id.* at 355).

Defendants also cite the decision of the trial court in *Foddrell v. Utica First Ins. Co.*, (50 Misc 3d 1215(A) [Sup Ct Queens County 2016]). The trial court there held that "it is necessary that the party establish a right to a declaration by taking the stand to attest to all parts of the claim. A declaratory action is unlike ordinary actions where proof on a default application can be made solely on paper" (*Id.* at 4). The decision cites CPLR 3215(f) as authority for this proposition.

However, CPLR 3215(f) requires only proof of the facts constituting the claim, not live testimony. In fact, CPLR 3125(f) contains no language setting forth any specific requirements of proof for defaults judgments in declaratory judgment cases different from default judgments in other cases.

In the instant case, Judge Rothenberg found that Plaintiff's affidavit was sufficient evidence to establish his right to a declaration that he was 50% owner of the Real Properties and that Defendants had failed to establish a potential defense that would require a hearing. Significantly, Judge Rothenberg directed the matter be set for an inquest on damages, not on whether Plaintiff was 50% owner of the Real Properties.

Thus, as a result of the granting of the motion for a default judgment, the Defendants are deemed to have admitted the facts that the brothers had an agreement under which they would that they would each be 50% owners of the Real Properties listed in the complaint and each be entitled to 50% of the monies generated from the Real Properties, even though the title was in the name of Defendant BARRY HERSKO alone.

The facts entitle Plaintiff to a constructive trust. A constructive trust is not based on the existence of a partnership. The bases for the imposition of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance

thereon, and (4) unjust enrichment" (see *Harounian v Harounian*, 198 AD3d 734 [2d Dept 2021], *citing Sharp v Kosmalski,* 40 NY2d 119 [1976]).

A partnership on the other hand, is based on an agreement to conduct business as a partnership, to share in profits and losses, and to joint control of the management of the business. (*Czernicki v Lawniczak* 74 AD3d 1121 [2d Dept 2010]; *Leonard v Cummings,* 196 AD3d 886 [3d Dept 2021]; *Hammond v Smith,* 151 AD3d 1896 [4th Dept 2017]).

In determining whether a partnership exists, the NYPL provides that, "Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property" (NYPL § 11(2); *Leonard v Cummings,* 196 AD3d 886 [3d Dept 2021]; *Hammond v Smith,* 151 AD3d 1896 [4th Dept 2017]).

Further, the brothers' interests in the Real Properties cannot be considered a partnership because the title in all of the Real Properties is held in a corporation, except for one which is owned by an LLC.

When parties "adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders. They cannot be partners inter sese and a corporation as to the rest of the world" (*Weissman v Awnair Corp of America,* 3 NY2d 444 at 449 [1957]; *see also Weiner v Hoffinger Friedland* 298 AD2d 453 [2d Dept 2002]; *Berk v Hamby* 279 AD2d 491 [2nd Dept 2001];).

The cases cited by Defendant in support of the argument that Plaintiff's claims for a constructive trust and an accounting were extinguished because the requisite fiduciary relationship terminated upon Plaintiff's death are distinguishable from the situation here.

The court in *Wynne v. Gruber*, (237 A.D.2d 284, [2d Dept 1997]), cited by Defendants, rejected a claim of a constructive trust against a Plaintiff's former partners for actions they took after the partnership had been dissolved, because at that point there was no longer a fiduciary relationship. In *LMEG Wireless, LLC v. Farro,* (190 A.D.3d 716 [2d Dept 2021]), while the Appellate Division stated that a claim for accounting requires the existence of a confidential or fiduciary relationship, it affirmed the denial of a motion to dismiss the claim for accounting because the Defendant had a fiduciary duty at the time the accounting was demanded.

In the instant case the fiduciary relationship existed at the time Plaintiff's transferred property in reliance of the promise that he would be added as an owner of the corporations, as well as at the time that he commenced this action.

Here, Plaintiff sought a constructive trust on property acquired before the dissolution of the partnership. The co-executors of Plaintiff's Estate do not have to demonstrate that they themselves had a fiduciary relationship with Defendants because they are substituting to prosecute Plaintiff's claims, and stand in his shoes. An estate is permitted to assert a claim for the imposition of a constructive trust on real property on behalf of a deceased Plaintiff. (*Malmeth v Malmeth,* 71 AD2d 880 [2d Dept 1979]).

Since the Real Properties are not partnership properties, Plaintiff's 50% interest in the income generated from those properties similarly is not partnership property, and not extinguished by the death of Plaintiff.

By reason of the foregoing, the co-executor's motion to be substituted for Plaintiff should be granted.

Partnership claims

The Plaintiff's claims relating to the brothers' other business ventures differ from those based on the Real Properties because they are based on a partnership.

The complaint alleges that the brothers were partners in the businesses of making loans and investing in assets, such as life insurance policies.

The "Document of Confession" between the brothers states that in addition to the Real Properties, the brothers also had "investments in life insurance policies on other people" in which they were equal partners, and that they have deposited monies with Defendant WEISEL, which belong to both equally. The agreement also states that the brothers have assets that are not part of the agreement.

Neither the complaint or the agreement identifies specifically what these other investments are, other than a general description that they involve investing in life insurance policies of third parties, and making loans.

Movant's argument that Plaintiff's non-real property claims relating to investments and loans survive Plaintiff's death is misplaced. It is true that generally causes of action for injury to property are not lost by virtue of the death of the person bringing such claim, and that such claims may be continued by the decedent's personal representative. (Estates, Powers & Trust Law [EPTL] §11-3.2[b]).

However, the brothers made these other investments and loans as part of their partnership and therefore the investments and income from the investments are partnership property (NYPL §51[1]). As discussed above, upon his death the Plaintiff's interest in these other specific partnership investments vested in Defendant BARRY HERSKO as surviving partner (NYPL §51[2][d]). As of that point, neither Plaintiff nor his estate had an interest in partnership property.

Therefore, those claims that relate to the partnership property were extinguished upon the death of Plaintiff.

Based on their default, the Defendants are deemed to have admitted the traversable facts in the complaint and all reasonable inferences that flow from them. However, all that can be deemed admitted as to the brothers' business ventures outside of the Real Properties, is that they engaged in the business of making various investments as equal partners.

It has not been shown what those specific investments were and what income was generated by those investments. Therefore, Defendants cannot be deemed to have admitted that any particular investments were partnership property.

Plaintiff's interest in the Partnership

While the Estate may cannot assert a claim to the partnership property, it can assert a claim in Plaintiff's interest in the partnership. The Estate maintains rights to the Plaintiff's interest in the partnership and is entitled to an accounting of the Plaintiff's interest in the partnership (NYPL §74).

The case of *Hermes v Compton,* (260 A.D. 507 [2d Dept 1940]), cited by Defendants, which held that an executrix was not entitled to an accounting because she did not have a fiduciary relationship, is distinguishable from this instant case.

In *Hermes,* there was a written partnership agreement that provided upon the death of the partner the surviving partners would continue to operate the partnership and in exchange for the deceased partner's interest in the partnership the surviving partners would make specified payments to the estate based on a percentage of the profits, in full satisfaction of the interest of the deceased partner in the partnership. (*Id.)* The Court

held that the provision to pay the deceased partner's estate a percentage of the profits constituted a sale to the surviving partners of his interest in the partnership. (*Id.)*

Here, the was no agreement to buy out Plaintiff's interest in the partnership, therefore his Estate may pursue an action related to Plaintiff's interest in the partnership.

WHEREFORE, it is hereby ORDERED that the motion of Abraham Hersko and Morris Hersko as co-executors of the Estate of ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO to be substituted for Plaintiff ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO is granted; and it is further,

ORDERED that the clerk of the Court is directed to amend the caption of this action to read:

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ABRAHAM HERSKO and MORRIS HERSKO
As CO-EXECUTORS of the ESTATE OF
ISAAC HERSKO a/k/a YITZCHOK SHLOMO
HERSKO,

Plaintiffs, Index No 520492/2021

-against-

BARRY HERSKO a/k/a ZEV DOV HERSKO
a/k/a BEREL HERSKO, BELLA HERSKO,
WILSON-HINS ASSOCIATES, INC, CLARK
WILSON, INC., WILSON PROPERTIES &
EQUITIES, INC., WILSON FLAT, INC., WILSON
HAN ASSOCIATES, INC., WILSON-MER
ASSOCIATES, INC., B. CLARK ASSOCIATES, INC.,
516 KINGSTON, LLC and

ABRAHAM WEISEL, as escrow agent,

Defendants.
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and it is further,

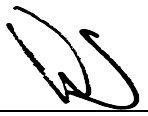
ORDERED, that the stay of this action is vacated; and it is further,

ORDERED, Plaintiff's claims relating to businesses and investments apart from the claims relating to the nine Real Properties set forth in the complaint and the income generated from those properties, are dismissed without prejudice to ABRAHAM HERSKO and MORRIS HERSKO As CO-EXECUTORS of the ESTATE OF ISAAC HERSKO filing an action concerning the Estate's claims to ISAAC HERSKO's interest in the partnership; and it is further,

ORDERED, this matter is set down for an inquest on damages on Plaintiff's claims relating to the Real Properties and monies generated from the Real Properties, to be held upon filing of Note of Issue and Certification of Readiness.

This constitutes the Decision and Order of the Court.

E N T E R:



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