

**Hersko v Hersko**

2025 NY Slip Op 35022(U)

December 22, 2025

Supreme Court, Kings County

Docket Number: Index No. 520492/2021

Judge: Wayne Saitta

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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 22nd day of December 2025.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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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

DECISION, ORDER  
JUDGMENT and DECREE

ABRAHAM WEISEL, as escrow agent,

Defendants.

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The following papers read on this motion:

NYSCEF Doc Nos

Notice of Motion/Order to Show Cause/  
Petition/Affidavits (Affirmations) and  
Exhibits

1010-1012, 1021,1022,  
1033-1057, 1072,1073,  
1803-1095, 1100-1114,

Cross-motions Affidavits (Affirmations)  
and Exhibits  
Answering Affidavit (Affirmation)

1062, 1067, 1076-1077  
1115-1123,1132-1138

Reply Affidavit (Affirmation)  
Supplemental Papers

1082  
1124-1131

This matter had been set down for an inquest pursuant to the order of Judge Karen Rothenberg granting Plaintiff's motion for a default judgment. An inquest was conducted on July 7, 8, 9, 10 and August 7, 8, 11, 12, 13, 14, 2025.

This action stems from a dispute between two brothers, ISAAC HERSKO and Defendant BARRY HERSKO ("the brothers"), concerning nine 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 "Properties"), and a declaration that Plaintiff was 50% owner of each Property.

The Plaintiff had also sought 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 sought an accounting and money damages relating to the other businesses.

Plaintiff alleged that he and his brother had an agreement that ISSAC HERSKO would fund the investment 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.

Subsequently, the brothers entered into a written agreement entitled "Document of Confession" ("the Document") dated September 13, 2016, which Plaintiff alleged memorialized their agreement and provided that the brothers were equal partners in the Properties, as well as in other investments, and that all monies deposited with Defendant

WEISEL belong to both brothers equally. The Document was also referred to at various times as an Agreement, or a *Shtar*.

Plaintiff ISAAC HERSKO died on October 26, 2024, and ABRAHAM HERSKO and MORRIS HERSKO, co-executors of the ESTATE OF ISAAC HERSKO (the ESTATE) moved to be substituted as Plaintiffs.

Defendants opposed the motion for substitution and argued that Plaintiff's complaint was based on an allegation of a partnership between the brothers and therefore those claims were extinguished upon ISAAC HERSKO's death.

The Court found that the ESTATE's claims relating to the nine Properties named in the complaint did not arise from a partnership between the brothers, but that the remaining claims, based on various investments and loans, were based on the ESTATE's allegation that a partnership existed between them.

By decision and order dated February 13, 2025, the Court granted the substitution but also dismissed Plaintiff's claims relating to businesses and investments apart from the claims relating to the nine Properties set forth in the complaint and the income generated from those Properties.

This matter had been set down for an inquest pursuant to an order by Judge Karen Rothenberg which granted Plaintiff's motion for a default judgment.

Although Defendants' failure to timely answer constituted a default, that default alone did not automatically entitle Plaintiff to a default judgment. The default results only in the Defendants being deemed to have admitted the traversable facts alleged in the complaint (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003]; *Lamin v Stevenson*, 276 AD2d 531, [2d Dept 2000]).

To be entitled to a default judgment, the Plaintiff was also required to show he had a meritorious claim. This showing may be made through a verified complaint or through

supporting affidavits. Because the complaint in this case was not verified, Plaintiff was required to submit additional proof to demonstrate that his claims were meritorious (*Hersko v Hersko*, 224 AD3d 810 at 812 [2d Dept 2024]; see also *Pemberton v Montoya*, 216 AD3d 988 [2d Dept 2023]).

Judge Rothenberg held that in the context of a motion for a default judgment, “to demonstrate the facts constituting the cause of action, the plaintiff need only submit sufficient proof to enable a court to determine if the cause of action is viable” (Citing *Loughran v Gianotti*, 160 AD3d 709, at 710 [2d Dept 2018]).

Applying that standard, Judge Rothenberg granted Plaintiff’s motion for a default judgment. In addition to Defendants’ failure to answer timely, she found that Plaintiff had submitted “proof of the facts constituting the claims in a factually detailed affidavit.” Based on the allegations in the complaint and the Plaintiff’s affidavit, which are deemed true by virtue of the default, Judge Rothenberg found that Plaintiff demonstrated his claims were meritorious.

She found that the affidavit of BARRY HERSKO “does not dispute the allegations contained in the complaint or provide any factual support to establish a defense to the claims.”

Thus, Judge Rothenberg found that not only did the complaint and affidavit demonstrate valid claims, but also that the Defendants’ opposition did not establish a defense against Plaintiff’s claims.

In her decision granting Plaintiff’s motion for a default judgment, Judge Rothenberg found that “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.”

Judge Rothenberg further found that “the plaintiff sufficiently states a cause of action for constructive trust in that he alleges a transfer in reliance upon a fiduciary relationship and unjust enrichment.” Although this finding was in the part of the decision denying Defendants’ motion to dismiss the claim for a constructive trust, it constitutes a finding by Judge Rothenberg that, based on the facts pled by Plaintiff, he had met his burden for a default judgment for a constructive trust.

Having determined that Plaintiff had demonstrated entitlement to a default judgment, she directed that the matter would proceed to inquest for an assessment of damages.

The decision of Judge Rothenberg granting the motion for a default judgment and setting the matter down for an inquest on damages was affirmed by the Appellate Division (*Hersko v Hersko*, 224 AD3d 810 [2dDept 2024]).

The Appellate Division stated that in addition to showing proof of the facts constituting the defendant’s default, a Plaintiff seeking a default judgment must show proof of the facts constituting the claim.

The Appellate Division also noted that “Once the plaintiff has made such a showing, the defendant, in order to avoid entry of a default judgment, must show either that there was no default, or that [the defendant] has a reasonable excuse for its delay and a potentially meritorious defense.” The Appellate Division held that Judge Rothenberg “also properly determined that the defaulting defendants failed to establish a potentially meritorious defense to the action” (*Hersko v Hersko* at 812; see also *Arnav Industries Inc., v 3449-3461 Hamilton FT LLC*, 237 AD3d 786 [2d Dept 2025]).

“An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court” (*Esposito v Larig*, 241 AD3d 781 [2d Dept 2025]; *J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809 [2d Dept 2007]).

Judge Rothenberg's decision that Plaintiff is entitled to the entry of a default has been affirmed and is law of the case (see *Strujan v Glencord Bldg Corp*, 137 AD3d 1252 [2d Dept 2016]; *Fourth Federal Sav Bank v Nationwide 20 Associates Inc.*, 183 Misc2d 165 [Sup. Ct. N.Y. Cnty. 1999]).

At the time of Judge Rothenberg's decision, Plaintiff had asserted claims for both equitable relief and monetary damages, however, Plaintiff has since withdrawn its claims for monetary relief in this action.

As the Plaintiff no longer seeks monetary damages in this action, the scope of the inquest was narrowed to a determination of what equitable relief Plaintiff is entitled to.

Only the first two causes of action remain. The first cause of action seeks declaratory judgment that Plaintiff is a 50% owner in each of the Properties and a declaratory judgment that Plaintiff Isaac is entitled to an accounting all monies from the Properties including 50% share of income and profit. The second cause of action seeks an imposition of a constructive trust over the Properties.

As these remedies are equitable in nature, the court must decide the content of both the declaratory judgement and the form of the constructive trust, even though it has already been determined that Plaintiff is entitled to a constructive trust.

Plaintiff contends that the Court need not hold an evidentiary hearing to determine the equitable relief to be awarded based on Judge Rothenberg's decision and the traversable facts admitted by the default.

However, even though the claim for monetary damages has been withdrawn, an inquest was necessary.

The complaint sought imposition of a constructive trust on the Properties. However, the complaint also alleged that the Document memorialized the agreement between that brothers and the Document stated that ISAAC HERSKO could have his name added to the corporations rather than to the titles of the Properties.

The Court held an inquest to determine what form of equitable relief was warranted as well as whether the Plaintiff is entitled to an accounting.

At the inquest the Court heard evidence regarding the Document and its execution. Much of the testimony regarding the Document related to its enforceability, specifically whether under Halachic law it memorialized an agreement already in existence or one that could come into existence at a future date. However, the Court did not consider the question of whether the Document constituted an enforceable agreement because there was not a claim for specific enforcement of the document before it, but a claim for a constructive trust.

Evidence concerning the Document was admitted for the limited purpose of shedding light on the intent of the brothers in transferring the title to the Properties into corporations where BARRY HERSKO was the sole shareholder. This could be relevant in determining appropriate equitable relief, as well as determining whether imposing a trust on the shares of the corporation would constitute relief similar or different in kind from a trust on the Properties themselves.

Plaintiff MORRIS HERSKO testified that the Document memorialized an earlier agreement between the brothers, under which the Properties would be held by corporations in the name of BARRY HERSKO, with ISAAC HERSKO holding a half interest in the Properties. MORRIS HERSKO testified that the Document was entered

into because ISAAC HERSKO wanted an acknowledgment of his interest in the Properties to protect his family.

BARRY HERSKO testified that the Document did not memorialize a prior agreement and was not meant to be an operative document. He testified that he signed the Document not in order to transfer an interest in the Properties to ISAAC HERSKO but only to give him peace of mind because he had been told that ISAAC HERSKO was going to die imminently. His version is essentially that the Document was intended to deceive his brother, that the agreement would not become effective unless he agreed to its release, and that he had not intended to agree to its release.

BARRY HERSKO's testimony on this point was not credible since it is improbable that all of the persons and professionals involved in the drafting and signing the Document were part of an elaborate charade to deceive ISAAC HERSKO.

There was conflicting testimony about whether the Document reflected an agreement in existence at the time it was executed, or whether the document would create the agreement only when the physical Document held by Rabbi Aron Mandel was released by him.

Plaintiff's translation states: "We committed to the foregoing via a binding procedure performed with an halachically acceptable garment for binding procedures, concurrently from the time of the binding procedure."

Defendant's translation states: "We accept this as a valid and final contract from this time, the time of entering into it"

The Document also states: "This document shall remain in the possession of Rabbi Benzion Mandel for the benefit of both parties, and the rights of neither party shall be diminished by not having this document in his possession."

Aside from the question of enforceability, the testimony concerning the Document did not provide an explanation as to why the Document refers to having ISAAC HERSKO's name added to the corporations rather than the Properties, or why the corporations were put in BARRY HERSKO's name and under what conditions ISAAC HERSKO could have his name added to the title or to the corporate shares.

The Document also states: "For the time being, for reasons known to both parties, the properties shall remain formally as is, but G-d willing, when the aforementioned reason is nonexistent, Party A may then demand that he be added formally to the name of the corp."

The document does not state what the reason is, or how it is to be determined that the reason no longer exists.

Professor Chaim Saiman, an expert called by Defendants, testified that Jewish law restricts the use of conditional contracts but that over time, workarounds developed to enable people to enter into such conditional contracts. He testified that one such workaround was to write the agreement without conditions but put the agreement in the possession of an escrow agent to hold and tell the escrow agent the conditions orally. However, in this case Rabbi Mandel, who drafted the Document and had possession of it, testified that he did not know what the conditions referred to in the Document were.

Rabbi Mandel also testified, "I asked Barry why its only in his name. So he said they have, between themselves, they have something that they decided it should be in his name and after that it's going to be, it's going to go to both names or it's going to go backward, he has the right to be added to the corporation."

BARRY HERSKO testified that he did not know what the reasons referred to in the Document were.

MORRIS HERSKO testified that the reasons referred to the fact that ISAAC HERSKO had signed an affidavit submitted in litigation with the City of New York that could be viewed as in conflict with ISAAC HERSKO being listed as an owner of the buildings. However, this does not explain why the Properties were put in the corporations controlled by BARRY HERSKO, since the Properties were purchased, years before the litigation with the City was commenced.

MORRIS HERSKO's explanation was also inconsistent with the affirmation submitted in this case by ISSAC HERSKO, in which he stated that the reason for the arrangement was that ISAAC HERSKO wanted to protect his personal assets, and that BARRY HERSKO did not have as many assets to protect.

The testimony concerning the Document was of little assistance in determining what equitable relief is appropriate. The Document was drafted some years after the brothers had put title to the Properties in corporations.

In the end, neither the text of the Document nor the testimony surrounding its drafting provided any answers as to why the Properties were put in corporations of which Barry was the sole shareholder.

However, there was testimony that was relevant to the issue of whether, under the circumstances of this case, a constructive trust on the shares of the corporations would constitute relief different in kind from a trust on the Properties themselves.

BARRY HERSKO testified that the corporations engaged in other business in addition to managing the real property that each corporation held title to. He testified that the corporations owned other properties, as well as lent, and borrowed monies from other properties that are not the subject of this case.

Given that the corporations were engaged in other activities, aside from managing the building that they each owned, the Court finds that an imposition of a trust on the

shares of the corporations would differ in kind from an imposition of a trust on the Properties themselves.

Therefore, Defendants are correct in arguing that the imposition of a trust on the shares of the corporations would be barred by CPLR 3215(b) and 3017(b).

Additionally, the Defendants have raised several objections to the imposition of a constructive trust on the Properties and argue that they are entitled to show the Plaintiff is not entitled to any equitable relief.

Defendants allege that the ISAAC HERSKO did not provide any funds to purchase the Properties and therefore it would be inequitable to grant the ESTATE a constructive trust.

Defendants argue that the ESTATE is not entitled to equitable relief because they have an adequate remedy at law.

Defendants allege that ISAAC HERSKO is estopped from asserting an ownership interest in the building because he has made prior statements in judicial proceedings indicating that he did not own or have an interest in the Properties.

Defendants argue that the ESTATE is not entitled to equitable relief because it has unclean hands.

Defendants argue that the court cannot impose a constructive trust upon the Properties because that would violate the corporate merger doctrine.

Defendants also argue that the Court cannot impose a constructive trust upon the Properties because that would violate the tax estoppel doctrine. However, the Court in an earlier decision held that the tax estoppel doctrine was inapplicable in this case.

As a preliminary matter, Defendants are not entitled to present evidence at inquest to contest that Plaintiff established his cause of action for a constructive trust, as Judge Rothenberg has already ruled that Plaintiff has demonstrated his claims, and also that the

Defendants did not establish a defense to those claims, and she set the matter for an inquest on damages.

A defaulting defendant may, at an inquest, offer proof in mitigation of damages if it involves circumstances intrinsic to the transactions at issue in the plaintiff's complaint (*Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878 [1985]; *21st Mortgage Corporation v Raghu*, 197 AD3d 1212 [2d Dept 2021]). However, they may not introduce evidence to defeat plaintiff's claims (*Rokina Optical Co., Inc. v Camera Kings, Inc.*, 63 NY2d 728, [1984]; *Carter's Home Gyms, LLC v Pulse Group USA, Inc.*, 236 AD3d 982 [2d Dept 2025]).

A constructive trust is both a remedy, as well as an equitable cause of action (*Chavez v Morales*, 232 AD3d 757 [2d Dept 2024]; *Morales v Rolon*, 226 AD3d 765 [2d Dept 2024]). The Defendants may contest what specific form of equitable relief should be granted as a remedy, but they cannot contest that Plaintiff has made out his cause of action for a constructive trust.

Among the allegations in the complaint deemed admitted by Defendants' default are that ISSAC HERSKO funded the acquisition of the real property located at 149 Wilson Avenue; that after ISAAC HERSKO purchased the Wilson Avenue Property, he and BARRY HERSKO granted a mortgage on the premises to Green Point Savings Bank; and that the brothers took the money they made from the granting of the mortgage on the Wilson Avenue Property and used it to invest in acquiring further properties.

Also deemed admitted by the default are the allegations in the complaint and in ISAAC HERSKO's affidavit in support of his motion for a default judgment that, pursuant to his agreement with BARRY HERSKO, the Plaintiff would provide the monies to purchase the Properties and have the title to the Properties be held by corporations of

which BARRY HERSKO was the sole shareholder in reliance of the promise by BARRY HERSKO that they would be 50% owners of the Properties.

Based on these allegations, Judge Rothenberg held that Plaintiff had established their claim for a constructive trust and that decision is law of the case. For this reason, the Court held the Defendants could not use the inquest to contest Plaintiff's claim that he provided the funds for purchase of the Properties. The Court precluded Defendants from offering any evidence that ISAAC HERSKO did not provide the funds for the Properties.

Additionally, Defendants' argument that the ESTATE is not entitled to any equitable relief because they have an adequate remedy at law must be rejected because the ESTATE does not have a remedy at law as to their claim of half ownership in the nine Properties.

The ESTATE does not claim there is a written conveyance of title on which it can base an action to quiet title or other claim at law for a 50% ownership of the Properties. The claim is that ISAAC HERSKO provided funds for the purchase of the Properties in reliance of BARRY HERSKO's promise that he would hold the Properties in trust for ISAAC HERSKO and that he was entitled to a 50% interest in the Properties. The ESTATE's only available cause of action for these claims is for a constructive trust to be imposed on the Properties based on the promise made by BARRY HERSKO (see *Morales v Rolon*, 226 AD3d 765 [2d Dept 2024]).

The imposition of a constructive trust is a remedy, but it is also a cause of action (*Kissane v Cashman*, 217 AD3d 932 [2d Dept 2023]; *Hernandez v Florian*, 173 AD3d 1144 [2d Dept 2019]; *Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688 [2d Dept 2012]).

It is an equitable cause of action to prevent unjust enrichment where a quiet title action is not available (*Chavez v Morales*, 232 AD3d 757 [2d Dept 2024]; *Morales v Rolon*, 226 AD3d 765 [2d Dept 2024]).

While the absence of a written conveyance may preclude a quiet title action, it does not preclude an action for a constructive trust (*Toobian v Golzad*, 193 AD3d 784 [2d Dept 2021]).

Defendants cite the case of *Davis v Richmond Capital Group, LLC*, 194 AD3d 516, [1st Dept 2021], for the proposition that a claim for constructive trust fails where there is an adequate remedy at law. However, that case is distinguishable because it involved a Merchant Cash Advance Agreement which provided the plaintiff there a basis for a breach of contract claim at law.

While the ESTATE may have an adequate remedy at law for their claims for rents and profits from the Properties, those claims were withdrawn and were not a subject of the inquest.

Defendants also argue that the ESTATE is judicially estopped from claiming an interest in the Properties because of inconsistent positions taken in prior proceedings.

Defendants cite testimony by MORRIS HERSKO concerning an affirmation by ISAACE HERSKO in an action referred to as the Sapp litigation. The Sapp litigation referred to is the case of *Dianna Sapp et al., v Clark Wilson Inc., et al*, Index No. 12230/2015 in Kings County, which involved claims by occupants of these Properties that they were rent-stabilized tenants.

However, ISAAC HERSKO was not a party in the Sapp litigation and there was no evidence presented that he submitted an affirmation in that action.

Defendants appear to be referring to an affirmation of ISAAC HERSKO dated March 25, 2016, which was submitted in the matter of *Hersko v Rubin*, Kings County Index No. 514948/2015. This affirmation was also filed as an exhibit in an earlier motion in this action (NYSCEF docket 298). It was marked for identification at the inquest and the Court took judicial notice of the affirmation during the inquest.

The proceeding in which the March 25, 2016, affirmation was submitted sought to quash a subpoena served on ISAAC HERSKO for information about the Properties that are the subject of this proceeding. Defendants cite to paragraph 5 of this affirmation, which states, "I am *not* the owner of any of the Buildings. I have no ownership interest in any of the Buildings, and I do *not* manage the Buildings." Defendants argue that because ISAAC HERSKO denied any ownership interest in the buildings in that affirmation, he is judicially estopped from claiming an ownership interest in this action.

The ESTATE argues in turn that the affidavit is not inconsistent with its position in this case because ISAAC HERSKO does not allege that he is a title owner of the subject Properties, only that he is a beneficial owner of the subject Properties, as a result of BARRY HERSKO's promise.

The doctrine of judicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to one previously advanced, where the first position was successfully maintained (See *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76 [1st Dept 1999], *aff'd*, 94 NY2d 659 [2000]; *Env't Concern, Inc. v. Larchwood Constr. Corp.*, 101 AD2d 591 [2d Dept 1984]).

There has been no showing that the position asserted in the affirmation, namely that the subpoena should be quashed because ISAAC HERSKO was not owner of the buildings, was successfully maintained or that it resulted in ISAAC HERSKO obtaining relief in that proceeding. In fact, in that case, ISAAC HRESKO was ordered to respond to that part of the subpoena that sought information as to his ownership of the Properties involved in this case.

Defendants further argue that the ESTATE is barred from any equitable relief by the doctrine of unclean hands. Defendants articulate three bases for their claim of unclean hands. First, that ISAAC HERSKO put the Properties in the name of corporation

controlled by BARRY HERKSO to avoid creditors. Second, that ISAAC HERSKO did not live up to the terms of his alleged agreement in that he did not pay for the purchase of the Properties and did not share in the liabilities of the Properties. Third, that ISAAC HERSKO lied about his dying of cancer to induce his brother into signing the Document.

A party asserting the equitable defense of unclean hands must show that (1) 'the offending party is guilty of immoral, unconscionable conduct,' (2) that 'the conduct relied on is directly related to the subject matter in litigation,' and (3) the complaining party was injured by the conduct (*Toobian v Golzad*, 193 AD3d 784 [2d Dept 2021]; *CitiMortgage, Inc v Heyman*, 186 AD3d 1487 [2d Dept 2020]).

However, the doctrine of unclean hands will bar the court from granting equitable relief where the a party transferred property to conceal them from creditors, even where there is no injury to the party asserting the defense (*Dolny v Borck*, 61 AD3d 817 [2d Dept 2009]; *Festinger v Edrich*, 32 AD3d 412 [2d Dept 2006]; *Langdon v Langdon*, 138 AD2d 358 [2d Dept 1988]).

In this case, there was no evidence that there were any creditors that ISAAC HERSKO was attempting to frustrate by putting title in the buildings in the Defendant corporations. Putting ownership of specific property in a corporation to limit liability and protect one's personal assets is different from transferring property to avoid actual creditors or persons to whom one is indebted.

ISAAC HERSKO's affirmation, and MORRIS HERSKO's testimony, was that the buildings were put in corporations owned by BARRY HERSKO to protect ISAAC HERSKO's personal assets from any liabilities that might arise from the buildings themselves. The use of corporate ownership to limit personal liability is commonplace and is neither illegal nor immoral where it was not used to frustrate any actual creditors.

Defendants' second unclean hands argument, that it would be inequitable to impose a constructive trust because ISSAC HERSKO did not pay for the purchase of the Properties, must fail because as discussed above, Defendants are precluded by their default, and by Judge Rothenberg's decision from contesting the fact that ISAAC HERSKO provided funds for the purchase of the Properties.

The third unclean hands argument, that ISAAC HERSKO falsely told BARRY HERSKO that he was dying of cancer in order to induce him to sign the Document, if true, would only go to the validity of the Document. The alleged representations are not relevant to the original agreement to put the buildings in corporations owned by BARRY HERSKO. Therefore, whatever representations ISAAC HERSKO made about his health in 2016 would not be a bar to equitable relief based on the original arrangement as to ownership of the buildings.

Defendants further argue that the imposition of a constructive trust on the Properties is barred by the corporate merger doctrine. Defendants argue that in its Order of February 13, 2024, which allowed substitution of the ESTATE, the Court held that brother's alleged partnership or joint venture, which preceded the formation of each of the Corporate Defendants, "merged" with the corporations when they were formed.

In that Order, the Court made a distinction between the claims that related to the nine Properties and those that related to other investments. The Court held that the Properties were not partnership property because they were purchased in the name of corporations and that the shares of the corporation were held by BARRY HERSKO not by a partnership (*Weissman v Awnair Corp of America*, 3 NY2d 444 [1957]; see also *Weiner v Hoffinger Friedland*, 298 AD2d 453 [2d Dept 2002]; *Berk v Hamby* 279 AD2d 491 [2d Dept 2001]).

The Court did not find that the Properties were purchased as partnership property and subsequently converted to a corporate form (see *Weisman v Awnair Corp.* 3 NY2d 444 [1957]). What the Court held was that the fiduciary relationship existed between the brothers at the time ISAAC HERSKO furnished funds in reliance of the promise that he would be added as an owner of the corporations.

The Court held that the brothers did not have a partnership as to the Properties because the Properties were purchased in the names of the corporate defendants. ISAAC HERSKO's rights in the Properties were not merged into that of a shareholder because BARRY HERSKO was the sole shareholder.

The fact that ownership of the Properties is in a corporation is not a bar to imposing a constructive trust (*Toobian v Golzad*, 193 AD3d 784 [2d Dept 2021]; *Hightower v Reid*, 5 AD3d 440 [2d Dept 2004]; *Iwanow v Iwanow*, 39 AD3d 476 [2d Dept 2007]; *Meinhard v Salmon*, 249 NY 458 [1928]).

In *Toobian v Golzad*, 193 AD3d 784 [2d Dept 2021], the court affirmed the denial of a motion to dismiss a claim for a constructive trust of a property held by an LLC. The plaintiff alleged that he provided fund towards the purchase of a property that was placed in the name of an LLC controlled by the defendant, based on an agreement that the property would be transferred to plaintiff when he was able to secure credit.

In *Hightower v Reid*, 5 AD3d 440 [2d Dept 2004], the court affirmed the granting of a preliminary injunction, finding that the plaintiff had established a likelihood of success on her cause of action to impose a constructive trust on real property that was owned by two corporations.

In *Iwanow v Iwanow*, 39 AD3d 476 [2d Dept 2007], the court reversed a dismissal of a claim for constructive trust where the plaintiff allowed property purchased for her benefit to be put in the name of the defendant corporation.

Defendants' reliance on *Weissman v Awnair Corp. of America*, 3 NY2d 444 [1957] is misplaced. In *Weissman*, the plaintiff's claims were that he and the defendants entered into a joint venture agreement in which they agreed to conduct business through a corporation and that the plaintiff would receive 60% of the stock of the corporation and defendant would receive the balance. The court held that the parties could not be both joint venturers and stockholders because joint ventures and corporations are governed by different laws. It explained that when parties adopt a corporate form, they cease to be partners and have only the rights obligations and duties of shareholders (*Id at 449*).

In the present case, there was no partnership formed relating to the Properties. Here, ISAAC HERSKO funded the purchase of the Properties and put title in the corporations held by BARRY HERSKO in reliance of the promise that he could have one half ownership of the Properties put in his name. The imposition of the constructive trust would not impose a partnership on the Properties but would result in a tenancy in common with the respective corporate owners and the ESTATE OF ISAAC HERSKO (see *Watson v Pascal* 65 AD3d 1333 [2d Dept 2009]; *Diaz v Diaz*, 130 AD3d 560 [2d Dept 2015]).

There has been no evidence presented that the rights of any creditors would be frustrated or prejudiced by the imposition of a constructive trust.

The case of *Fraw Realty Co Inc v Natanson*, 261 NY 396 (1933), also cited by Defendants, is not a bar to the imposition of a constructive trust on real property where the parties put title in a corporation.

In *Fraw*, the defendant Natanson brothers set up two corporations that they used in buying various properties. The Natanson brothers were the sole shareholders of each corporation. The first corporation would pay the downpayment on a property while the

title would be put in the name of the second corporation. The second corporation would then give a note and mortgage for the balance of the purchase price.

There was no written agreement memorializing this arrangement but merely a general understanding between the Natanson brothers.

Title of all the properties remained in the name of the second corporation until the second corporation defaulted on one of the mortgages. Following the default, all of the properties were conveyed from the second corporation to the first corporation. The holder of the note and mortgage foreclosed and obtained a deficiency judgment against the second corporation. However, because of the conveyances, the second corporation had no assets to satisfy the judgment.

The holder of the note then commenced an action to set aside the conveyances. The Natanson brothers asserted as a defense that the second corporation only held bare legal title for the benefit of the first corporation and that the conveyance merely returned title to the true owner.

The Court of Appeals reversed a lower court decision which had dismissed the note holder's action to set aside the conveyances. The court held that the Natanson brothers had not established the requisites of a constructive trust for two reasons. First, because there was no confidential relationship between the two corporations. Second, because recognizing a constructive trust for the benefit of the first corporation would have "produced rather than prevented an unjust enrichment" (*Id* at 403).

While the court in *Fraw* found that there was no confidential relationship between the two corporations, in the present case ISAAC HERSKO was not a shareholder and provided the funds to purchase property based on the promise of his brother, with whom he did have a confidential relationship (*Id*).

More significantly, in *Fraw* the court found that the arrangement and the purpose of the transfer was to defraud an actual creditor. The court noted that the transfer left the note holder with no remedy because the first corporation would escape liability because it was not the signer of the note or mortgage, and the second corporation would escape liability as well, because it conveyed all of its assets (*Id* at 403).

The court held that upholding the arrangement under such circumstances would be an improper exercise of equity.

In the present case, there was no evidence presented that imposing a constructive trust on the Properties to give the ESTATE a one-half interest in each property would frustrate any creditors.

There has been no evidence presented that there are any judgment creditors against the corporations or that the corporations are in default of any obligations. As discussed above, ISAAC HERSKO putting title to the Properties in a corporation to shield his personal assets from potential liability arising from operation of the Properties is not the same as transferring property to frustrate actual creditors.

For the above reasons, under the facts and circumstances herein, the corporation merger doctrine is not a bar to imposing a constructive trust on the Properties.

However, as Defendants point out, the complaint does not seek a declaration as to ISAAC HERSKO's right to income and profits from the Properties. Instead, it only seeks a declaration that ISSAC HERSKO has a 50% ownership interest in the Properties. Also, the ESTATE has withdrawn its monetary claims.

Therefore, the Court will not issue a declaration as to any rights that the ESTATE may have to the income or profits from the Properties, but only a declaration that the ESTATE is entitled to the imposition of a constructive trust granting it 50% of each of the Properties as a tenant in common.

Lastly, as part of the first cause of action, the ESTATE also seeks an accounting of the rents and profits from the Properties.

As the monetary claims are no longer part of this action and the complaint did not seek a declaration as to Plaintiff's rights to the income of the property, the Plaintiff's entitlement to an accounting would be based on its being conveyed a half interest in the Properties as a tenant in common (*Kohn v Esposito*, 2022 WL 10607914 [EDNY 2022]; *Pichler v Jackson*, 157 AD3d 450 [1st Dept 2018]; RPAPL 1201).

However, the imposition of a constructive trust requiring conveyance of a half interest in the Properties is not retroactive. The imposition of a constructive trust does not constitute a determination that the Plaintiff was a half owner of the Properties in the past, but that equity requires that he be made a half owner.

The essence of the cause of action for a constructive trust is that a property was transferred in reliance of a promise to convey it back, or that funds were given to another to purchase property in reliance on a promise that the property would be conveyed to the furnisher of the funds. The remedy of an imposition of a constructive trust is not a declaration that the Plaintiff had title but an order directing that title to the property be transferred or conveyed to the Plaintiff.

As the imposition of the constructive trust does not convey title retroactively, the Estate is not entitled to an accounting of past income and profits from the Properties based on its being conveyed a half interest in the Properties.

WHEREFORE, it is hereby ORDERED, ADJUDGED, DECREED and DECLARED that Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO is entitled to have a constructive trust imposed on the Properties conveying to the ESTATE a half interest in each property as a tenant in common; and it is further,

ORDERED, ADJUDGED AND DECREED that Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO is granted a constructive trust of a 50% interest as a tenant in common on each of the Properties located at 553 Hinsdale Street, Brooklyn, NY 11207, Block: 3835, Lot: 1; 930 Dekalb Avenue, Brooklyn, NY 11221, Block: 1601, Lot: 18; 279 Kosciuszko Street, Brooklyn, NY 11221, Block: 1781, Lot: 58; 401 East 21st Street Brooklyn, NY 11226, Block: 5152, Lot: 28; 666 Hancock Street, Brooklyn, NY 11233, Block: 1662, Lot: 12; 60 Clarkson Avenue, Brooklyn, NY 11226, Block: 5064, Lot: 40; 250 Clarkson Avenue, Brooklyn, NY 11226, Block: 5066, Lots: 31; 270 Clarkson Avenue, Brooklyn, NY 11226, Block: 5066, Lots: 39; 516 Kingston Avenue, Brooklyn, NY 11225, Block: 4793, Lots: 47, 1301, 1302, 1303, 1304, 1305 and 1306; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant WILSON-HINS ASSOCIATES, INC. shall execute a deed conveying a 50% interest in 553 Hinsdale Street, Brooklyn, NY 11207, Block: 3835, Lot: 1, to Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO within 60 days of service of notice of entry of the ORDER, JUDGMENT and DECREE; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant WILSON PROPERTIES & EQUITIES, INC. shall execute a deed conveying a 50% interest in 930 Dekalb Avenue, Brooklyn, NY 11221, Block: 1601, Lot: 18 to Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO within 60 days of service of notice of entry of the ORDER, JUDGMENT and DECREE; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant WILSON-MER ASSOCIATES, INC shall execute a deed conveying a 50% interest in 279 Kosciuszko Street, Brooklyn, NY 11221, Block: 1781, Lot: 58 to Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO within 60 days of service of notice of entry of the ORDER, JUDGMENT and DECREE; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant WILSON FLAT, INC shall execute a deed conveying a 50% interest in 401 East 21st Street Brooklyn, NY 11226, Block: 5152, Lot: 28 to Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO within 60 days of service of notice of entry of the ORDER, JUDGMENT and DECREE; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant WILSON HAN ASSOCIATES, INC., shall execute a deed conveying a 50% interest in 666 Hancock Street, Brooklyn, NY 11233, Block: 1662, Lot: 12 to Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO within 60 days of service of notice of entry of the ORDER, JUDGMENT and DECREE; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant CLARK WILSON, INC. shall execute a deed conveying a 50% interest in 60 Clarkson Avenue, Brooklyn, NY 11226, Block: 5064, Lot: 40, to Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO within 60 days of service of notice of entry of the ORDER, JUDGMENT and DECREE; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant B. CLARK ASSOCIATES, INC., shall execute a deed conveying a 50% interest in 250 Clarkson Avenue, Brooklyn, NY 11226, Block: 5066, Lots: 31 to Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO within 60 days of service of notice of entry of the ORDER, JUDGMENT and DECREE; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant B. CLARK ASSOCIATES, INC. shall execute a deed conveying a 50% interest in 270 Clarkson Avenue, Brooklyn, NY 11226, Block: 5066, Lots: 39, to ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO within 60 days of service of notice of entry of the ORDER, JUDGMENT and DECREE; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant 516 Kingston LLC shall execute a deed conveying a 50% interest in 516 Kingston Avenue, Brooklyn, NY 11225, Block: 4793, Lots: 47, 1301, 1302, 1303, 1304, 1305 and 1306, to Plaintiff ESTATE OF ISAAC HERSKO a/k/a YITZCHOK SHLOMO HERSKO within 60 days of service of notice of entry of the ORDER, JUDGMENT and DECREE.

This constitutes the Decision, Order, Judgement and Decree of this Court.

ENTER:



\_\_\_\_\_  
JSC

HON. WAYNE SAITTA  
J.S.C.