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SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

DOUGLAS TERRY.

Plaintiff.

- against -

Sequence No.: 007
Index No.: 026634/99
XXX

JORDAN R. BELFORT, NADINE BELFORT and
JRB GROUP, INC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendant Nadine Belfort's (now known as "Nadine Macaluso") motion for summary judgment dismissing the complaint as asserted against this defendant or alternatively, for leave to serve an amended answer asserting certain affirmative defenses is granted in part and denied in part as set forth below.

The following facts are undisputed. In 1994 plaintiff was the owner of a stock brokerage account with the Stratton Oakmont brokerage firm. Defendant Jordan R. Belfort was a partner in said firm. After losing the entire amount of the account in the sum of \$903,045.00 plaintiff commenced an action for fraud in the United States Federal District Court of the District of Colorado which resulted in a judgment against defendant Belfort and other parties therein in the sum of \$1,153,168.15 on July 13, 1998. Plaintiff, in enforcing said judgment, commenced the instant action against Mr. Belfort, his then wife Nadine Macaluso (sued herein as "Nadine Belfort") and JRB Group, Inc., a corporation which plaintiff alleges was used to make fraudulent transfers of Mr. Belfort's assets. In his complaint plaintiff alleges causes of action for the fraudulent transfer of defendant Belfort's assets to Ms. Macaluso and from Macaluso to others as well as Ms. Macaluso's hiding and secreting said assets (see, amended complaint, causes of action one through 6), unjust enrichment (seventh cause of action), for a constructive trust on all assets received by Ms. Macaluso from Belfort (eighth cause of action) and for an accounting

from Macaluso (ninth cause of action).

Plaintiff filed a claim to recover funds from a restitution fund which was established as part of defendant Belfort's and his partner's plea arrangement in the criminal matter brought by the federal government against them. On April 30, 2003 the trustee responsible for said fund issued a check in the sum of \$38,371.38 to plaintiff with a letter from the trustee's attorney which provided that if plaintiff accepted the funds such would constitute a waiver of all rights of recovery against defendant Belfort including, but not limited to the enforcement of a judgment against Belfort. Plaintiff accepted and negotiated said check.

Defendant Macaluso moves for summary judgment dismissing the complaint as asserted against her on the bases that 1) the first six causes of action which are based upon the fraudulent transfer of Belfort's assets are barred by virtue of the elimination of the underlying debt, *i.e.*, plaintiff's acceptance of the restitution check; 2) plaintiff lacks standing to assert a cause of action for unjust enrichment; 3) plaintiff fails to set forth a claim for a constructive trust because he and defendant did not have the requisite relationship; and 4) plaintiff failed to set forth a claim for an accounting.

In moving for summary judgment defendant Macaluso must demonstrate that there are no issues of fact which preclude summary judgment as by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to oppose the motion, plaintiff must demonstrate a triable issue of fact through admissible evidence. *Id.*

At the outset plaintiff's position that this motion is untimely pursuant to the terms of a stipulation between the parties which vacated defendant Macaluso's default is unavailing. That stipulation which was "so-ordered" by the Hon. Bruce D. Alpert of this court required defendant Macaluso to submit either an answer or a motion to dismiss pursuant to CPLR 3211 or 3212 by January 6, 2006 in response to either an amended complaint which was to be served by December 7, 2005 or to the original complaint if no amended complaint was served. Such only pertains to responses to the complaint, be it amended or original. Further, plaintiff does not assert that the motion is untimely pursuant to CPLR 3212(a).

Further, although defendant Macaluso admittedly does not assert the necessary affirmative defenses of waiver, estoppel and extinguishment of the underlying debt, a motion for summary judgment may be based upon an unpled defense as long as the party opposing the motion is not taken by surprise and suffers no prejudice. See, Rosario v. City of New York, 261 A.D.2d 380 (2nd Dep't 1999). As plaintiff takes no position on this issue, the court concludes that he was not taken surprise by the bases set forth by defendant Macaluso herein on this motion and the court shall consider same. That branch of the motion which alternatively seeks an order granting defendant Macaluso leave to serve an amended answer asserting those defenses is denied as moot.

Fraudulent Conveyance Claims

It is undisputed that plaintiff received compensation from the fund established pursuant to plaintiff's plea arrangement. The check which was mailed to Mr. Belfort's attorneys was accompanied by a letter dated May 8, 2003 from the fund's trustee's attorneys. Said letter provides:

"Please be advised that if your client chooses to accept distribution from the Fund and accept payment, pursuant to the Order it will be deemed to have waived any and all right to pursue further or additional recovery against Jordan Belfort in connection with any other existing, concluded or contemplated proceedings, actions and/or arbitrations, including but not limited to the right to enforce any judgment against Jordan Belfort, except that your client is not precluded from seeking recovery in connection with any other fund that may be established for the benefit of the victims of Stratton Oakmont, Inc."

It is also undisputed that plaintiff negotiated the check. Defendant Macaluso therefore asserts that as the alleged predicate debt is satisfied, plaintiff may maintain an action against a subsequent transferee of the debtor's assets to set aside those transfers or for damages based thereon.

It has been held that a claim based upon a fraudulent conveyance shall be dismissed where the underlying debt upon which the claim is based is settled on the ground that plaintiff is no longer a creditor who is aggrieved by the alleged fraudulent conveyance. See, Oparji v. Madison Queens-Guy Brewer, LLC, 302 A.D.2d 439 (2nd Dep't 2003). See, also, Washington 1993, Inc. v. Reles, 255 A.D.2d 745 (3rd Dep't 1998).

Where, as here, defendant Macaluso meets her burden of demonstrating entitlement to summary judgment on this branch of her motion, the burden shifts to plaintiff to demonstrate a triable issue of fact. Zuckerman v. City of New York, supra.

In opposition plaintiff avers that at the time he communicated his acceptance of the payment proffered from the fund he expressly reserved his right to pursue any claims he had against "Jordan Belfort's ex-wife, Nadine [Macaluso]". Same is set forth in the letter from Mr. Terry to counsel for the fund dated August 29, 2003.

A party may accept a satisfaction of a portion of the underlying debt and reserve his rights to pursue the balance of what he believes is due him so long as he does so explicitly. See, e.g., Mari v. Equitable Variable Life Ins. Co., 178 A.D.2d 515 (2nd Dep't 1991); Ayer v. Sky Club, Inc., 70 A.D.2d 863 (1st Dep't 1979). Said reservation must be made prior to or contemporaneously with acceptance of the proffered payment. See, Sarbin v. Southwest Media Corp., 179 A.D.2d 567 (1st Dep't 1992).

Plaintiff accepted the check proffered by the fund's attorneys via the letter dated August 29, 2003. There is no proof offered that said letter was sent after plaintiff negotiated the check.

Compare, Sarbin v. Southwest Media Corp., supra. Thus, the court finds that an issue of fact exists at least as to whether plaintiff properly reserved his rights to maintain his claims as against Jordan Belfort.

That branch of the motion which seeks summary judgment dismissing plaintiff's claims based upon the alleged fraudulent transfers is denied.

Unjust Enrichment

Defendant Macaluso moves for summary judgment dismissing the seventh cause of action for unjust enrichment on the grounds that there is no proof in the record herein that plaintiff bestowed a benefit upon defendant Macaluso which she retained without adequate compensation to plaintiff. See, Aymes v. Gateway Demolition, Inc., 30 A.D.3d 196 (1st Dep't 2006). An allegation that the defendant received benefits, standing alone, is insufficient to support a claim for unjust enrichment. See, Old Republic National Title Insurance Co. v. Cardinal Abstract Corp., 14 A.D.3d 678 (2nd Dep't 2005).

Plaintiff does not oppose this branch of defendant Macaluso's motion. Same is therefore granted.

Constructive Trust

Defendant Macaluso moves for summary judgment dismissing the cause of action for a constructive trust on the bases that 1) this defendant and plaintiff lacked the requisite relationship to establish such a trust; 2) defendant Macaluso made no express or implied promise to plaintiff; and 3) plaintiff never made any transfers to defendant Macaluso. (See, Macaluso affidavit, ¶s 54, 55 and 56). The following must be pled and proven to establish entitlement to a constructive trust against a defendant: 1) a confidential or fiduciary relationship; 2) an express or implied promise; 3) a transfer by plaintiff in reliance on the promise; and 4) unjust enrichment. See, Matter of Urdans, 304 A.D.2d 586 (2nd Dep't 2003).

In opposition plaintiff contends that the application of the standard for a constructive trust is flexible and should be made to satisfy the demands of justice and to prevent unjust enrichment. See, Cruz v. McAneney, 31 A.D.3d 54 (2nd Dep't 2006). Having reviewed the record herein, plaintiff neither pleads nor raises an issue of fact as to the existence of any of the four prongs of the standard for a constructive trust. Cruz does not suggest that the court should completely abandon such a standard and the Appellate Division has recently dismissed such a claim where, as here, there is no allegation or proof of a promise by defendant to plaintiff. See, Pergament v. Roach, 41 A.D.3d 569 (2nd Dep't 2007).

The court grants this branch of the motion.

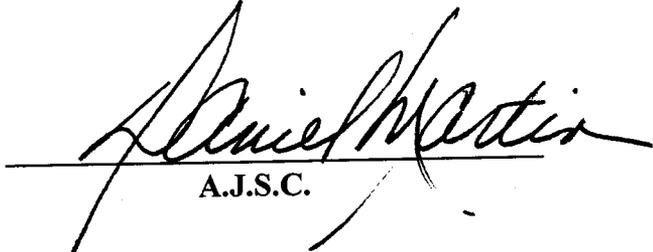
Accounting

Defendant Macaluso also moves for summary judgment dismissing the cause of action which seeks an accounting. Such a cause of action may only be sought where defendant owes a fiduciary relationship to plaintiff. Defendant Marcaluso asserts that she was never in a fiduciary relationship with plaintiff. See, LeGeffo v. Trustees of Columbia University and City of New York, 35 A.D.2d 395 (2nd Dep't 2006).

Plaintiff submits no opposition to this branch of the motion and the court accordingly grants defendant Macaluso's motion for summary judgment dismissing the ninth cause of action.

Accordingly, based upon the foregoing, it is directed that the seventh, eighth and ninth causes of action are all dismissed.

So Ordered.


A.J.S.C.

Dated: June 30, 2008

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**