Miraglia v Fridman

2017 NY Slip Op 30817(U)

March 8, 2017

Supreme Court, Rockland County

Docket Number: 034844/2014

Judge: Thomas E. Walsh II

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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PETER MIRAGLIA,

DECISION AFTER TRIAL
Index No.: 034844/2014

Plaintiff,

-against-

ALEX FRIDMAN and NEW IMAGE COMPUTER SERVICES, INC.,

Defendant.
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Thomas E. Walsh, II, J.S.C.

The following constitutes the Decision and Order of the undersigned on the issues presented from a trial conducted in the above-captioned litigation on October 17, 2016. Plaintiff was represented by counsel during the trial, and Defendant also appeared by counsel.

During the trial, the Court provided each party with a full and fair opportunity to: present witnesses, prosecute claims, present defenses, cross-examine witnesses, admit and/or object to the admission of documentary evidence, proffer comments on contested rulings, and make arguments which they believed were persuasive. Additionally, prior to trial, the Court conducted several conferences with the parties where the issues were fully discussed. Additionally, the parties submitted post-trial memorandum arguing their positions.

In arriving at this decision, the Court has reviewed, evaluated, and considered the entirety of the admissible evidence, including testimony from the two witnesses (Plaintiff and Defendant), arguments from both sides during the trial, and the various exhibits introduced into evidence.

By way of background, this matter was commenced by Plaintiff with the filing of a Summons and Verified Complaint (verified by counsel) through the NYSCEF system on October 21, 2014 According to an affidavit of service filed through the NYSCEF system on November 14, 2014, Plaintiff served the commencement documents upon Defendant ALIX FRIDMAN (hereinafter FRIDMAN) by delivering the documents to Defendant, pursuant to *Civil*

Practice Law and Rules § 308(1). Defendant NEW IMAGE COMPUTER SERVICES, INC. (hereinafter NICS) was served through the Department of State on October 27, 2014. Defendants joined issue with the filing of an Answer on January 23, 2015.

This action stems from loan payments made by Plaintiff to Bank of America, in the amount of $27,623.92, pursuant to a personal guaranty he signed on a line of credit issued to Defendant NICS. Plaintiff maintains that he was an employee, not an owner or shareholder, of Defendant NICS, which is solely owned by Defendant FRIDMAN. According to Plaintiff, Defendants applied for a business loan and asked Plaintiff to sign as a co-guarantor of the loan, on the oral promise that Plaintiff would be indemnified and/or reimbursed for and against all loss he might sustain by reason of executing and delivering the personal guaranty. Plaintiff maintains that in reliance on these promises, Plaintiff executed and delivered the personal guaranty on May 8, 2006. Defendant FRIDMAN was also a co-guarantor and is the sole stockholder and owner of Defendant NICS. When Defendants defaulted on the loan in August 2013, Plaintiff paid the creditor $27,623.92 and now asserts that Defendants have failed to reimburse him, despite their oral promise to do so.

Plaintiff filed an Amended Verified Complaint asserting causes of action for breach of implied contract of indemnity, promissory estoppel and unjust enrichment. The crux of Plaintiff's claims is that Defendants induced Plaintiff to execute and deliver the personal guaranty by, jointly and severally, promising and agreeing to pay the entire loan and reimburse and indemnify Plaintiff for and against all loss and damages that he might sustain by reason of executing and delivering the personal guaranty. Defendants dispute that FRIDMAN told Plaintiff that he would indemnify him in case of a default. FRIDMAN avers that he and Plaintiff founded NICS together, with FRIDMAN being the sole shareholder and president. He maintains he and Plaintiff shared responsibility for running the company, with Plaintiff being the "finance guy." Defendant FRIDMAN further maintains that when the business started to suffer, Plaintiff proposed obtaining a line of credit which Plaintiff arranged through Bank of America and that

he and Plaintiff were business partners who both took a calculated business risk upon signing the loan documents. Further, Defendant FRIDMAN asserts that both parties benefitted from the risk through the payment of their salaries and benefits. Defendant avers that Plaintiff signed the guaranty because it was in Plaintiff's best interests to do so and not because of a promise made by FRIDMAN to indemnify him. Defendant FRIDMAN also stated that Plaintiff benefitted from the loan, which kept the business going for several years and Plaintiff benefitted from that income.

In a Decision and Order dated October 17, 2016, the Court denied Plaintiff's motion for summary judgment indicating there were issues if fact in dispute and scheduled a trial for October 17, 2016.

During the trial, Plaintiff called the Defendant FRIDMAN and he testified that he and Plaintiff, PETER MIRAGLIA, (hereinafter MIRAGLIA), were friends. Further, Defendant testified that he and Plaintiff had worked in a prior business together and upon the closing of the first business Defendant NICS was formed in 1998. According to Defendant FRIDMAN's testimony, Plaintiff was involved from the beginning with Defendant NICS. However, Defendant FRIDMAN testified that he was the sole incorporator, and the sole stockholder of NICS. Defendant FRIDMAN also testified that he never considered Plaintiff an "employee," but rather Plaintiff worked with Defendant NICS from the beginning and drew a salary just as Defendant FRIDMAN had done. Defendant FRIDMAN testified that Plaintiff, who was the "numbers guy of the business" informed the Defendant of the need for cash flow in the business, Defendant NCIS and came up with the idea to apply for a home equity line of credit. Defendant FRIDMAN further testified that Plaintiff MIRAGLIA suggested the business, Defendant NICS, needed to solicit a loan, as that was a manner in which the business could obtain funds. According to Defendant's testimony, Plaintiff, on behalf of Defendant NICS, arranged for a loan from Bank of America in the amount of $100,000 for which Plaintiff signed the note and agreement. Both parties agree in their testimony that due to Defendant FRIDMAN's credit issues Plaintiff and

Defendant were required to sign a guarantee regarding the loan.

Defendant FRIDMAN in his testimony stated that the aforementioned business loan was paid by automatic deduction from Defendant NICS' corporate account until the parties reached a money issue in 2011. At the time of the "money issue," Plaintiff no longer worked for Defendant NICS and Defendant FRIDMAN was solely attempting to pay the loan. According to FRIDMAN's testimony, Plaintiff was no longer working for Defendants, but returned for several months in 2011. Defendant FRIDMAN testified that Plaintiff received a salary and other compensation upon his return, but subsequently left Defendant NICS employee a few months later. In 2012, Defendant testified that Plaintiff contacted him and informed him that Plaintiff had received a collection letter. Plaintiff testified that the result of that contact was that Defendant FRIDMAN assured Plaintiff that he was "working on" the defaulted loan. Again in 2013, Defendant FRIDMAN testified that Plaintiff contacted him and stated that collections were coming after Plaintiff for the defaulted business loan. According to Defendant FRIDMAN's testimony, he sent a letter to the Department of Treasury (owner of the defaulted business loan) and informed them that despite the personal guarantee signed, Plaintiff was not an employee of NICS, had no stock in the company seeking to remove Plaintiff from his personal guarantee. Defendant FRIDMAN asserted in his testimony that the letter was sent because he felt badly for Plaintiff, his long time friend. Defendant FRIDMAN also testified that there was no language within in the letter that indicates there was any indemnification agreement in existence between the parties. Further, Defendant FRIDMAN's testimony indicates that he never intended the letter to demonstrate the existence of an indemnification agreement. Rather Defendant FRIDMAN testified that he sent the letter on Plaintiff's behalf based on the length of the parties relationship and was an attempt by Defendant FRIDMAN to help an old friend. Defendant FRIDMAN also testified that if he had the money to pay Plaintiff's portion of the defaulted loan he would have, due to their friendship. In Defendant FRIDMAN's direct testimony he conceeded Plaintiff paid $27,623.92 of his own money as guarantor of the loan.

The following exhibits were introduced during Defendant FRIDMAN's testimony:

Plaintiff's Exhibit 1 - A note and agreement .

Plaintiff's Exhibit 2 - A letter sent by Defendant FRIDMAN to the Department of Treasury on August 8, 2013 indicating Plaintiff is not an employee of their business and that Defendant FRIDMAN was solely responsible for the debt.

Defendant's counsel cross-examined Defendant FRIDMAN.[1] Within the testimony of Defendant ALEX FRIDMAN on cross examination he reiterated his relationship with Plaintiff and Defendant NICS, the reason behind the sending of the letter to the Department of Treasury regarding Plaintiff's role in Defendant NICS company and stated that Plaintiff had no ability to guarantee the funds owed by Defendant NICS. Also, during Defendant FRIDMAN's cross examination he indicated that the total amount borrowed by NICS under the line of credit was $920,000 dollars of which Defendant NICS paid back $885,724.81, Defendant paid back $38,416.67 personally and Plaintiff paid back $27,623.92 personally. Defendant FRIDMAN testified that based on the nature of the friendship between himself and Plaintiff, there were several times that Defendant attempted to help Plaintiff with funds, including giving Plaintiff $10,000 when he left the company. Subsequently, according to Defendant FRIDMAN's cross examination, when Plaintiff returned to employ at NICS the Defendant also paid health care for Plaintiff as an independent contractor so that Plaintiff and his family had health insurance.

During Defendant FRIDMAN's testimony, he stated that his portion of the funds paid back to Bank of America came from the sale of several accounts in the business and his personal funds. He also stated that he never made a promise (implied, oral or written) to

[1]Defendant was called by Plaintiff as their first witness.

Plaintiff that keep wouldn't have to pay on the aforementioned guarantee agreement. Defendant FRIDMAN asserted that Plaintiff and himself both benefitted from the home equity line of credit, as the funds received paid both parties salaries, allowed for benefits (i.e. car payments cell phone payments) and kept the business afloat for some time. Further, Defendant FRIDMAN testified that Plaintiff, as the "financial guy of the business," understood the ramifications of a personal guaranty and was aware that Bank of America or their assignees could collect on part or the whole home equity loan if there was a default.

In support of his testimony, Defendant FRIDMAN offered as Defendant's Exhibit A, the guarantee agreement of Plaintiff and as Defendant's Exhibit B, the certified transcript of the loan account.

Plaintiff MIRAGLIA also testified as to the parties relationship and history of their business arrangements. MIRAGLIA stated that he had worked with Defendant FRIDMAN in a prior company and in 2003-2004 he began working with Defendant FRIDMAN for the new company Defendant NICS in the "operations end." MIRAGLIA testified that his role in the "operations end" was scheduling, receivables, payables, working with the staff, quality assurance and anything regarding the day to day operations of the business. According to Plaintiff MIRAGLIA, in 2006 the line of credit loan was first discussed, though he could not recall if the conversation had occurred with Defendant FRIDMAN or FRIDMAN's wife. He testified that he believed that "they" spoke with him about the loan for the purpose of implementing it, which he did after researching and gathering documents from several banks. Plaintiff MIRAGLIA testified that Defendant FRIDMAN picked the bank for the loan, signed the paperwork and even attempted to apply for the loan with his name as the sole guarantor. Further, Plaintiff MIRAGLIA testified that Defendant FRIDMAN was rejected due to his credit rating and at that point Defendant FRIDMAN asked Plaintiff MIRAGLIA to sign a co-guarantee. Plaintiff avers that along with that request Defendant FRIDMAN made an oral agreement that Plaintiff MIRAGLIA would not be responsible for the obligations on the loan. Plaintiff MIRAGLIA additionally

testified that the aforementioned assurance was made orally to him on several occasions prior to the signing of the guarantees, at the time of the signing of the guarantees and in 2012 (after Plaintiff had left Defendant NICS employ and after the default on the loan).

Plaintiff MIRAGLIA subsequently testified that he left his employ with Defendants in late 2010, early 2011, but returned to the company approximately three to four months later. According to Plaintiff upon his return to Defendant NICS' employ he was given a salary and he went back to his old health insurance. However, Plaintiff testified in September or October 2011 that Defendant could no longer afford to pay him and Plaintiff left his employment. Plaintiff testified that he subsequently learned the aforementioned line of credit was in default when he began receiving collection calls from Bank of America. As a result of the calls, Plaintiff testified he contacted Defendant FRIDMAN and they spoke about how to handle the situation. According to Plaintiff, Defendant FRIDMAN assured him that Plaintiff would "take care" of the loan. According to Plaintiff, he continued to receive collections calls and eventually money was collected by the creditor from him for the default of the line of credit, specifically Plaintiff's 2013 tax return. Plaintiff asserts that he again contacted Defendant and that as a result of their conversation Defendant FRIDMAN wrote a letter to the Department of Treasury trying to remove Plaintiff as personal guarantor. According to Plaintiff's testimony the aforementioned letter was written by Defendant FRIDMAN, as the intent of the parties agreement was always for Plaintiff to be indemnified as to the repayment of the loan. According to Plaintiff he ultimately paid at least $27,000 upon the default of the line of credit.

Upon cross examination, Plaintiff MIRAGLIA acknowledged that the language in the guarantee he signed indicated that it could not be contradicted by any "prior contemporaneous or subsequent oral agreements or understandings of the parties." Upon immediate re-direct examination Plaintiff indicated that he believed that the guarantee agreement and the references to the outside agreements pertained to the bank providing the loan, Bank of America, and did not address any agreements between himself and Defendant

FRIDMAN. Plaintiff continued to contend in his testimony that Defendant made an agreement to indemnify Defendant prior to the signing of the guarantees at issue in this action.

At the close of testimony, the Court permitted each side to make summations. Plaintiff's counsel asked the Court to disregard the extraneous arguments about Plaintiff's title while employed by Defendant FRIDMAN at Defendant NICS and instead focus on whether Defendant FRIDMAN induced Plaintiff into signing a guarantee based on an oral agreement that Defendant FRIDMAN would reimburse or indemnify Plaintiff. Plaintiff further argued that Defendant testified that the parties were close friends, that the Defendant could not pay the money and if he could have he would have paid the money so that Plaintiff was not responsible for his portion of the loan guarantee. Defendant FRIDMAN argued the desire to pay the money was due to parties long standing friendship and not the existence of an implied indemnification agreement. Additionally, Plaintiff asserted that through his testimony and documents he had demonstrated that from the inception of the loan Plaintiff thought that Defendant FRIDMAN would pay the money owed on the line of credit, that Plaintiff relied upon that belief and would not have signed the guarantee if he believed he was financially responsible for the debt.

Defendant argued that the three causes of action in the instant matter all hinge upon the explicit promise alleged to have been made by Plaintiff. Further he stated that he first cause of action is breach of an implied promise of indemnification, the second was unjust enrichment and the third was for promissory estoppel. Defendant avers that the Court is presented with dueling testimony of the two witnesses and a signed guarantee agreement, which is assumed to be legitimate and made knowingly and voluntarily and that is a presumption that Plaintiff must overcome. Additionally, Defendant argues that there was no evidence presented that the personal guarantee at issue was not made knowingly, voluntarily and intelligently by the Plaintiff. As a result, Defendant asserts that no evidence has been presented by Plaintiff to rebut or overcome the presumption that goes against the Plaintiff.

As to the cause of action for unjust enrichment, Defendant argues that payments were made on the line of credit, the money received went to the parties mutual benefit (i.e. salary, benefits and continued existence of the employer Defendant NICS). However, the Court notes the parties disagree about the account in which the money was placed and the use of the funds in their entirety. Additionally, in opposition to the unjust enrichment and promissory estoppel Defendant asserts that there must be a promise to rely on, and that there has been "absolutely no evidence presented" that Plaintiff was aware of a promise, or that a promise was made and that states that no promise was ever made.

In making this decision, the Court has also relied on its personal observations of the witnesses in determining issues of credibility. It should be noted that the failure of the Court to specifically mention any particular piece of evidence in this Decision and Order does not mean that item has not been considered by the Court. As the trier of fact, it is the Court's obligation to review all admitted evidence, but that duty does not mean that all admitted evidence is necessarily accepted at face value.

The Court has carefully observed and listened to the witnesses during the trial and has evaluated all evidence in light of its relevance, materiality, credibility, importance, weight, and, where applicable, permissible inferences have been considered. The evidence has been viewed in light of the appropriate legal authority and interpretive case decisions. The Court recognizes the importance of the instant Decision and Order to each of the parties. The Court notes that Plaintiff and Defendant were represented by very capable counsel throughout the proceedings and during the trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A party's right to indemnifctaion may arise from a contract or may be implied "based upon the law's notion of what is fair and proper as between the parties." [*Mas v. Two Bridges Assoc*, 75 NY2d 680, 690 (1990)]. "Implied indemnification is based in simple fairness

and seeks to avoid unjust enrichment by 'recogniz[ing] that a person who, in whole or in part, has discharged a duty which is owed by him, but which as between himself and another should have been discharged by the other, is entitled to indemnity." [*McDermott v. City of New York*, 50 NY2d 211, 217 (1980)]. Further, the right to indemnify "springs from a contract express or implied and full, not partial reimbursement is sought." [*McDermott*, 50 NY2d at 216]. In a circumstance in which an unfairness would arise from the assumption by a third party of another's debt or obligation, "a contract to reimburse or indemnify is implied by law." [*State v. Stewart Ice Cream, Co., Inc.*, 64 NY2d 83, 88 (1984)].

The existence of an implied contract in which the parties have reached an agreement can be inferred by the parties actions and the circumstances surrounding the factions. [*Spencer Trask Software and Information Services, LLC v Rpost Intern, Ltd.*, 383 Fsupp 2d 428 (S.D.N.Y. 2003)]. In other words, a contract cannot be "implied in fact" in a circumstance in which the facts are inconsistent with the existence of the contract. [*Tjoa v. Julia Butterfield Memorial Hospital*, 205 AD2d 526 (2d Dept 1994)]. More clearly stated, "[a]n implied-in-fact contract arises in the absence of an express agreement, and is based on the conduct of the parties from which a fact finder may infer existence and terms of contract." [*AEB & Assocs. Design Group, Inc., v. Tonla Corp.*, 853 FSupp 724, 731 (S.D.N.Y. 1994)]. Therefore, the determination of whether the conduct of a party creates an implied contract is a question of fact, which must be determined by looking at the facts of the specificcase. [*Today, Inc. v. Westwood One, Inc.*, 684 FSupp 68, 71 (S.D.N.Y. 1988)]. In making the determination, the court must look at whether the party to be charged has conducted themself in such a way that their agreement may be inferred. [*Miller v. Schloss*, 218 NY400, 407 (1916)].

In order to demonstrate that a defendant is liable to a plaintiff for promissory estoppel three elements must be demonstrated: (1) a clear and unambigious promise, (2) a reasonable and foreseeable reliance by the party to whom the promise is made and (3) an injury sustained by the party asserting the estoppel by reason of his/her reliance. [Ripple's of

Clearview, Inc. v. Le Havre Associates, 88 AD2d 120, 122-123 (2d Dept 1982); *Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.*, 804 F.2d 787 (2d Cir 1986); *King & Son v. DeSantis Const. No. 2 Corp.*, 413 NYS2d 78 (Sup. Ct NY Cty 1977); *Agress v. Clarkstown Central School District,* 69 AD2d 769, 771 (2d Dept 2010); *Gurreri v. Associates Ins. Co.*, 248 AD2d 356 (2d Dept 1998)].

Finally, to demonstrate unjust enrichment, the plaintiff must show that the defendant (1) was enriched, (2) the enrichment was at the Plaintiff's expense and (3) that it is against equity and good conscience to permit the defendant to retain what is being sought. [*GFRE, Inc. v. U.S. Bank, N.A.*, 130 AD3d 569, 570 (2d Dept 2015); *Mobarak v. Mowad*, 117 AD3d 998, 1001 (2d Dept 2014); *Citibank, N.A. v. Walker*, 12 AD3d 480, 481 (2d Dept 2004); *Whitman Realty Group, Inc. v. Galano*, 41 AD3d 590, 592-593 (2d Dept 2007)]. The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. [*Paramount Film Distrib. Corp. v. State of New York*, 30 NY2d 415, 421 (1972)]. "A conclusion that one has been unjustly enriched is essentially a legal inference drawn from the circumstances surrounding the transfer of property and the relationship of the parties." [*Sharp v. Kosmalski*, 40 NY2d 119, 123 (1976)]. In making a determination regarding unjust enrichment the court must apply the principles of equity. [Id]. Further, a person may be unjustly enriched not only in a circumstance where money or property is received, but also where the person otherwise receives a benefit - the satisfaction of a debt, or the saving of an expense or loss is considered a received benefit. [*Blue Cross of Cent. New York, Inc. v. Wheeler*, 93 AD2d 995 (4th Dept 1983); *Electric Ins. Co. v. Travelers Ins. Co.*, 124 AD2d 431, 432 (3d Dept 1986)].

Therefore, in the instant action in order for the Plaintiff to maintain a cause of action for implied indemnification, Plaintiff must demonstrate that Defendant made an oral promise to indemnify him on the line of credit loan guarantee and that Plaintiff relied upon that promise at the time of signing the guarantee agreement. Plaintiff must provide proof of

conduct and/or actions of Defendant from which this Court can infer the existence of an agreement regarding the indemnification.

The Court found the testimony of both Plaintiff and Defendant to be candid and credible. Much of the parties testimony was consistent, other than the portion regarding the indemnification agreement. The Court will note that the parties both testified that Plaintiff was responsible for arranging the line of credit at issue in this action and that they both proceeded to the bank to sign the documents needed to process the loan. However, the Court notes that the parties disagreed who brought forth the idea and need for the company to apply for a line of credit. Defendant FRIDMAN admits in his testimony that he told Plaintiff he would attempt to remove Plaintiff as a guarantor for the loan, or that he would "work out the loan." Neither party testified that the terminology "indemnify" or anything of the like was used in discussions regarding the repayment of the loan. Each party testified using vague and ambigious terminology. Plaintiff MIRAGLIA admitted that when Defendant FRIDMAN asked him to be a guarantor on the line of credit that he was concerned due to the parties friendship. Further, Plaintiff stated that he spoke with Defendant FRIDMAN to ensure that the money was paid back by Defendant, as he did not want to be responsible for the final payments. In response to Plaintiff's concerns, Plaintiff testified that Defendant FRIDMAN stated "we will make it work." [Pl. Direct, p. 59, line 13]. Plaintiff continued in his testimony stating Defendant FRIDMAN indicated that Plaintiff wouldn't have to be responsible for the debt. Again, the substance of that conversation contained no direct and concrete agreement demonstrating the Defendants intent to indemnify the Plaintiff.

The Plaintiff has based much of his argument upon the existence of an implied indemnification agreement in the letter sent from Defendant FRIDMAN to the Department of Treasury, which sought to remove Plaintiff as guarantor on the loan. In the Court's review of the letter, the Court notes that there is no language within the statements that would indicate that the Defendant's intent in sending the letter. Further, the FRIDMAN letter only indicates

that it seeks to remove Plaintiff as guarantor from the loan was based on an implied indemnification agreement. No language or statement exists in the letter that is tantamount to an indemnification agreement or refers to the existence of one. The letter instead informs the Department of Treasury regarding Plaintiff's status as solely an employee of Defendant NICS, and his lack of ability to guarantee the loan as a result. It would appear to this Court if there was an implied indemnification agreement, Defendant FRIDMAN would have stated such within the letter to the Department of Treasury, as it would be no loss to him to inform them of the alleged agreement. For the Court to find the language in the letter to support the existence of an indemnfiication agreement there would need to be more specific terminology and conversations testified to that occurred between the parties. The testimony as it stands if vague and fails to clarify the ambiguity of the situation.

First in addressing whether the testimony of the parties demonstrated the existence of an implied indemnification agreement the Court must note that the parties were not strangers. In fact, both Plaintiff and Defendant testified they were long standing friends of approximately thirty (30) years and had worked together in a prior company owned by the Defendant. Additionally, they both testified that Plaintiff was responsible for operations and financials of the Defendant business NICS. It is clear also from the testimony that Plaintiff was aware of the risks signing the guarantee on the line of credit - he knew Defendant FRIDMAN could not obtain the line of credit without his guarantee and he expressed concern that the line of credit needed to be repaid and that he was wary that he may be responsible for final payments. Nothing within the language used by Plaintiff in describing his expressions of concern to the Defendant indicate to this Court that a right to indemnity "sprung" from an express or implied contract. The facts as presented in the parties testimony and the letter from Defendant FRIDMAN to the Department of Treasury are insufficient and inconsistent to demonstrate by a preponderance of the evidence the existence of an implied indemnification agreement. Defendant FRIDMAN's conduct both in his statements to the Plaintiff and also the

terminology within the aforementioned letter and the fact that the letter was sent to the Department of Treasury fail to demonstrate Defendant's assent to an implied indemnification agreement.

As to the cause of action sounding in promissory estoppel, similarly the Court finds that the testimony of the Plaintiff and Defendant are diamterically opposed as to the existence of an indemnification agreement. The testimony of Plaintiff fails to show a clear and unambigious promise existed between Plaintiff and Defendant FRIDMAN regarding whether Plaintiff would be responsible as a guarantor or Defendant FRIDMAN intended on indemnifying Plaintiff. Specifically, the record is devoid of any clear representation made by Defendant FRIDMAN to Plaintiff that Defendant FRIDMAN would pay the entire line of credit. Additionally, there was no evidence presented by the Plaintiff at the trial that demonstrated any reliance on Defendant FRIDMAN's alleged promise of indemnification. The letter sent by Defendant FRIDMAN on Plaintiff's behalf to the Department of Treasury is vague, the substance of which can be explained by their lengthy friendship, previous business relationship/involvement and Defendant FRIDMAN's desire to shield Plaintiff from the losses of a business in which the Plaintiff was no longer involved. Nothing within the testimony or the words written in the aforementioned letter rises to the level of a clear and unambigous agreement regarding indemnification. Additionally, there was no evidence presented by Plaintiff of reliance on the alleged implied indemnification agreement. Therefore, the count sounding in promissory estoppel was not proved by Plaintiff by a preponderance of the evidence.

Finally, as to the allegations sounding in unjust enrichment, the Court again reaches the conclusion that no promise of indemnification existed. Contrary to Defendant's argument, a cause of action for unjust enrichment does not depend upon plaintiff's receipt of promise and subsequent reasonable reliance. However, evidence presented by Plaintiff in support of the unjust enrichment cause of action was deficient in demonstrating that the Defendant was enriched. Defendant FRIDMAN's testimony, which was unchallenged by Plaintiff

is that he paid $38,416.67 toward the defaulted loan more than the Plaintiff. In reality the payments of Defendant FRIDMAN were in excess of those of Plaintiff and that makes the request that Defendant FRIDMAN pay the Plaintiff's additional share inequitable on Defendant's behalf. The testimony of the parties demonstrates that Plaintiff knew what he was signing when he agreed to become a guarantor of the line of credit for Defendant NICS and that the proceeds received from the line of credit were used to benefit Plaintiff. Specifically, both Plaintiff and Defendant testified that some of the funds were used for salaries and benefits, which the Plaintiff enjoyed during his employment by Defendant NICS. Plaintiff's testimony that he expressed concern to Defendant FRIDMAN about the seriousness of the obligation to repay the line of credit is evidence of his knowledge of the ramifications of becoming a co-guarantor on the loan. Plaintiff has raised no dispute that Defendant FRIDMAN paid the loan over many years and even paid approximately $38,000 of his personal funds toward the defaulted loan, which was in excess of the amount paid by Plaintiff. The claim of unjust enrichment on Plaintiff's part appears to the Court to be a method upon which Plaintiff is seeking a further benefit under the guise of equity. Therefore, Plaintiff has failed to prove his claim of unjust enrichment by a preponderance of the evidence.

As a result of the Court's findings of fact as detailed above, the Court finds that Plaintiff has failed to sustain its burden of proving the existence of an oral promise of indemnification from the Defendant to the Plaintiff prior to the execution of the loan documents and that the Plaintiff relied upon that promise when he signed the loan documents. Specifically, the Court finds that the Plaintiff states that a promise of indemnification existed and Defendant states it did not, with no extrinsic proof by way of writings or witnesses presented by Plaintiff. In the circumstance in which the court is presented with an equal division of the weight of the evidence, and "the evidence as a matter of logical necessity is equally balanced, plaintiff has failed to meet his burden and the cause of action is not made out." [*Rinaldi & Sons v. Wells Fargo Alarm Serv.*, 39 NY2d 191, 196 (1976)]. Therefore, the Plaintiff failed to sustain his burden of proving his case by a preponderance of the evidence.

As a result of the Court's findings of fact, the Court is constrained to dismiss the Complaint in its entirety as the Plaintiff has failed to sustain its burden of establishing the existence of an implied indemnity agreement, the three elements of promissory estoppel or that the Defendant was unjustly enriched as a result of Plaintiff paying approximately $27,000 based on the guarantee agreement he signed on the defaulted loan.

Counsel for Plaintiff shall retrieve from the Part Clerk of the Court any exhibits introduced into evidence within twenty (20) days from the date of this Decision and Order.

In light of the foregoing, it is hereby

ORDERED that the Complaint is dismissed in its entirety; and it is further

ORDERED that in light of the Court's ruling, this matter is marked disposed.

The foregoing constitutes the Opinion, Decision and Order of this Court.

Dated: New City, New York
March 8, 2017

HON. THOMAS E. WALSH, II
Justice of the Supreme Court

TO:

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