

At an IAS Comm Part 19 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 24<sup>th</sup> day of January, 2007

P R E S E N T:

HON. CAROLYN E. DEMAREST,  
Justice.

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NUSRAT SHABBIR, et ano,

Plaintiff(s),

- against -

Index No. 4342/06

TASAWAR HUSSAIN, et.al.,

Defendant(s).

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The following papers numbered 1 to read on this motion:

|   | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion/Order to Show Cause/<br>Petition/Cross Motion and<br>Affidavits (Affirmations) Annexed _____ | 1 - 5                  |
| Opposing Affidavits (Affirmations) _____  | 6 - 7                  |
| Reply Affidavits (Affirmations) _____   | 8                      |
| _____ Affidavit (Affirmation) _____   | _____                  |
| Other Papers _____  | _____                  |

Upon the foregoing papers, defendant 1223 Coney Island Ave. Realty Corp. (Realty Corp.) moves for an order granting it summary judgment against plaintiffs Nusrat Shabbir and Talat Rauf. Plaintiffs move for an order: (1) pursuant to CPLR 1003, granting leave to add Nomi Beig as a defendant; and (2) granting them leave to amend

their complaint and to serve a supplemental and amended complaint upon defendants.<sup>1</sup>

### ***Facts and Procedural Background***

Plaintiffs commenced this action against Tasawar Hussain and Bandhan Catering Hall, Inc. (Bandhan), seeking to recover damages premised upon claims of breach of contract, fraud and unjust enrichment.

In 2000, Hussain was the sole officer, director and shareholder of Bandhan. On August 15, 2000, Realty Corp. leased the premises located at 1223 Coney Island in Brooklyn to Hussain for the operation of Bandhan. Thereafter, Hussain failed to pay rent, to provide insurance and otherwise defaulted on the lease. Realty Corp. accordingly commenced an eviction proceeding.

On December 21, 2004, Shabbir entered into a Shareholder Agreement with Hussain pursuant to which Shabbir agreed to purchase twenty percent of all outstanding shares of Bandhan for \$150,000. Shabbir then rendered improvement services valued at

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<sup>1</sup> Realty Corp.'s request for the imposition of sanctions in the amount of \$10,000 against plaintiffs for the cost incurred by it in defending the action, as raised in the body of its moving affidavit, is not properly before the court and will not be addressed herein, since it is not raised in a motion or cross motion (*see generally* CPLR 2214 and 2215; *Chun v North American Mort. Co.*, 285 AD2d 42 [2001] [the court was without jurisdiction to grant the relief afforded to defendants where there was an absence of a notice of cross motion or any other notice to plaintiff that she would be required to respond to a motion to dismiss]; *Bauer v Facilities Dev.*, 210 AD2d 992 [1994] [affidavits submitted in opposition to defendants' motions were insufficient to constitute a cross motion]; *Guggenheim v Guggenheim*, 109 AD2d 1012 [1985] [it is not sufficient to demand relief in opposing affidavits or memoranda; an outright notice is required, to avoid any surprise at all to the original movant]; *Braver v Nassau County Office of Administrative Servs.*, 67 Misc 2d 120 [1971] [an affidavit in opposition to a motion is not sufficient to constitute a cross motion]).

\$50,000, for a total investment of \$200,000. At the time that this agreement was executed, Shabbir contends that Hussain failed to disclose that he was indebted to Realty Corp. for over \$100,000 in back rent and other expenses.

On April 8, 2005, Realty Corp. entered into a stipulation with Hussain pursuant to which he was permitted to re-enter the premises upon payment of \$282,957.35 (the Stipulation). In accordance with the Stipulation, Hussain paid Realty Corp. \$125,959.40 and legal fees in the amount of \$18,000.

On April 21, 2005, Hussain and Rauf entered into a Shareholder Agreement pursuant to which Rauf agreed to purchase 40% of all outstanding shares of Bandhan for \$160,000. Pursuant thereto, Hussain accepted full responsibility for the debt of \$182,957.35 owed to Realty Corp. and agreed that if he was evicted from the premises, he would refund the full purchase price to Rauf. Rauf avers that at the time that the agreement was executed, Hussain misrepresented that he agreed to repay the debt owed to Realty Corp.

When Hussain thereafter failed to make further payments as required pursuant to the Stipulation, he was removed from the premises in August 2005. At approximately the same time, Bandhan ceased all operations. In March 2006, Realty Corp. entered into a lease with the current tenant.

By order dated July 12, 2006, plaintiffs were granted leave to add Realty Corp. as a defendant, without opposition, and were denied leave to add Takbeer Enterprises, Inc.

(Takbeer), without prejudice.

By supplemental summons and complaint dated July 31, 2006, plaintiffs added a cause of action in which they allege that \$140,359.40 of the money that they paid to Hussain pursuant to the Shareholder Agreement that each executed was paid directly to Realty Corp. to reduce the debt owed to it by Hussain. Plaintiffs further aver that the new tenant in the premises is resuming the renovation work commenced by Hussain and is accordingly reaping the benefit of the money that plaintiffs invested in the premises. Plaintiffs accordingly seek to have a trust impressed upon the premises for their benefit, a deed executed conveying title to them and an order restraining Realty Corp. from mortgaging or otherwise encumbering the premises. Plaintiffs also seek recover against Realty Corp. on the ground of unjust enrichment.

### ***Realty Corp.'s Demand for Summary Judgment***

#### ***The Parties' Contentions***

In support of its demand for summary judgment, Realty Corp. argues that its only connection to the instant dispute is that it was the landlord of a prior tenant, Hussain. Hence, it had no relationship with plaintiffs that would entitle them to any relief as against it.

In opposition to the motion, plaintiffs argue that since \$125,959.40 of the money that they tendered to Hussain was paid directly to Realty Corp. and another \$14,400 was paid directly to Realty Corp.'s attorneys, Realty Corp. was aware of their relationship

with Hussain and was unjustly enriched by their investment in the premises. Plaintiffs further argue that since no discovery has yet been conducted and Hussain and Bandhan have not yet answered their supplemental summons and amended complaint, an order dismissing the action as against Realty Corp. would be premature.

### ***Constructive Trust***

#### ***The Law***

“A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee” (*Simonds v Simonds*, 45 NY2d 233, 241 [1978], quoting *Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386 [1919]). “[T]he constructive trust doctrine is broad in scope and such trusts ‘will be erected whenever necessary to satisfy the demands of justice’” (*Levy v Moran*, 270 AD2d 314, 315 [2000], quoting *Latham v Father Divine*, 299 NY 22, 26-27 [1949], *reh denied* 299 NY 599 [1949]). “A constructive trust may be imposed in favor of one who transfers property in reliance on a promise originating in a confidential relationship where the transfer results in the unjust enrichment of the holder” (*Rogers v Rogers*, 63 NY2d 582, 585-586 [1984], citing *Sharp v Kosmalski*, 40 NY2d 119 [1976]). To establish a constructive trust, a party must prove: (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment (*see Simonds*, 45 NY2d at

241-242; *Sharp*, 40 NY2d at 121).

### ***Discussion***

Herein, plaintiffs demand for the imposition of a constructive trust must fail. More significantly, plaintiffs fail to establish that they had a fiduciary relationship with Realty Corp. Further, plaintiffs fail to establish that they transferred money to Hussain in reliance upon a promise made to them by Realty Corp. In this regard, plaintiffs do not allege that they had any relationship or dealings at all with Realty Corp. or that Realty Corp. even knew of their involvement in Hussain's business.

In so holding, the Court also notes that Realty Corp. contends that it was not unjustly enriched by the payments received from Hussain, since the money paid represented rent due under the lease. In addition, the premises were vacant for a period of time after Hussain was evicted.

### ***Unjust Enrichment***

#### ***The Law***

It is well established that “[t]o prevail on a claim of unjust enrichment, ‘a party must show that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’” (*Cruz v McAneney*, 31 AD3d 54, 59 [2006], quoting *Citibank v Walker*, 12 AD3d 480, 481 [2004], quoting *Paramount Film Distrib. v State of New York*, 30 NY2d 415, 421 [1977]). “Notably, it is the plaintiff’s burden to ‘demonstrate that

services were performed *for the defendant* resulting in [the latter's] unjust enrichment', and the mere fact that the plaintiff's activities bestowed a benefit on the defendant is insufficient to establish a cause of action for unjust enrichment" (*Clark v Daby*, 300 AD2d 732, 732 [2002], *lv denied* 100 NY2d 503 [2003], citing *Kagan v K-Tel Entertainment*, 172 AD2d 375, 376 [1991] [emphasis in original]; *Wiener v Lazard Frères & Co.*, 241 AD2d 114, 120 [1998]). "[I]f services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery" (*Heller v Kurz*, 228 AD2d 263, 264 [1996], quoting *Kagan*, 172 AD2d at 376, citing *Citrin v Columbia Broadcasting*, 29 AD2d 740 [1968]).

Of particular relevance in resolving the instant dispute is the case *Outrigger Construction Company, Inc. v Bank Leumi Trust Company of New York* (240 AD2d 382 [1997]). Therein, plaintiff contractor entered into a contract with Nostrand Avenue Development Corp. (Nostrand), the owner of the subject property, for the construction of a building. When Nostrand failed to make the payments due under the contract, the contractor sued Bank Leumi Trust, which provided a construction loan to the owner, and against the subsequent owner of the property. In reversing the denial of defendants' motion for summary judgment, the court held that:

"The plaintiff may not recover against the bank and [the subsequent owner] for its improvements to the subject property on the theory of unjust enrichment. To recover under a theory of quasi contract, the plaintiff must be able to prove that performance was rendered for the defendants resulting in their unjust enrichment. It is not enough to show

that the defendants consented to the improvements or received a benefit from the plaintiff's activities (*see, Metropolitan Elec. Mfg. Co. v Herbert Constr. Co.*, 183 AD2d 758; *Kagan v K-Tel Entertainment*, 172 AD2d 375). Since the plaintiff only contracted with Nostrand, and there was no proof in the record that the defendants assumed an obligation to pay the plaintiff, the cause of action based on unjust enrichment should have been dismissed.”

*Accord, Yellowstone Indus. v Vinco Marine Mgmt.*, 305 AD2d 587, 587-588 [2003]; *Amana Elevation v Ydrohoos-Aquarius*, 244 AD2d 371 [1997], app. den. 91 NY2d 806 [1998].(it was not sufficient to show that the defendant landlord consented to the improvements provided by plaintiff to its tenant or received a benefit from plaintiff’s activities to establish a cause of action for unjust enrichment where there was no proof that the landlord assumed an obligation to pay for the goods and services provided by plaintiff]).

Similarly, the Appellate Division, Second Department, has held that “[b]ecause the plaintiff was not in privity with the defendants, the plaintiff cannot maintain an action against them to recover damages for unjust enrichment” (*Sperry v Crompton Corp.*, 26 AD3d 488 [2006], *lv granted* 7 NY3d 706 [2006]; *accord Hampton Living v Carlton on the Park*, 286 AD2d 664, 664-665 [2001] [the County of Nassau, as the owner of the subject property, was correctly granted summary judgment against plaintiffs on their claims of breach of contract and unjust enrichment where the contractor hired to renovate the property by defendant lessee subsequently refused to pay the amount due under the contract, since plaintiffs could not assert a contractual cause of action against the County

absent privity]).

***Discussion***

Applying the above general principles of law to the facts of this case, Realty Corp. is entitled to summary judgment dismissing the cause of action sounding in unjust enrichment. In the first instance, Realty Corp. is not a party to the Shareholder Agreements that plaintiffs premise their action upon and plaintiffs were not parties to Realty Corp.'s lease with Hussain. Hence, it is undisputed that there is no privity between plaintiffs and Realty Corp. Similarly, plaintiffs do not allege that they had any dealings with Realty Corp., or that Realty Corp. even knew that the money tendered by Hussain to Realty Corp. to satisfy his obligation under the Stipulation came from plaintiffs. In this regard, the Court notes that Hussain tendered bank checks that made no reference to Realty Corp. Further, as discussed above, Realty Corp. denies that it was unjustly enriched by plaintiffs' payments to it. Thus, since plaintiffs contracted only with Hussain and there was no proof in the record that Realty Corp. assumed any obligation to the plaintiff, summary judgment dismissing the cause of action based on unjust enrichment is granted.

### ***Plaintiffs' Claim that an Award of Summary Judgment is Premature***

#### ***The Law***

“Mere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis, pursuant to CPLR 3212(f), for postponing a decision on a summary judgment motion” (*Jones v Surrey Coop. Apts.*, 263 AD2d 33, 38 [1999], quoting *Kennerly v Campbell Chain Co.*, 133 AD2d 669, 670 [1987]). Accordingly, denial of a motion for summary judgment is unwarranted where discovery is incomplete in the absence of proof of an outstanding discovery demand which, if complied with, might reveal information exclusively within the knowledge of the party opposing the motion upon which the motion could successfully be opposed (*see e.g. Rivas v 525 Bldg. Co.*, 293 AD2d 733, 735 [2002]).

#### ***Discussion***

Herein, plaintiffs' contention that the motion was premature is without merit, as their mere speculation that further discovery would reveal facts supporting their causes of action was insufficient to postpone determination of the motion (*Hampton Living*, 286 AD2d at 664-665, citing *Romeo v City of New York*, 261 AD2d 379 [1999]).

### ***Plaintiffs' Demand to Add Beig as a Defendant***

#### ***The Parties' Contentions***

In support of its motion, plaintiffs argue that after the commencement of the action, they learned that Beig is the current tenant of the premises as well as the GC in the

renovation and remodeling work being done. Plaintiffs thus aver that Beig has been unjustly enriched by plaintiffs' investment in the premises and that, as such, complete relief cannot be awarded unless Beig is joined as a party defendant. Plaintiffs accordingly seek leave to further amend their complaint to assert such a cause of action.

Beig does not submit any papers in opposition to the motion.

### ***The Law***

“As to the . . . motion seeking to add a party defendant, leave to amend a pleading should generally be freely granted, but the party seeking amendment has the burden of establishing the merit of the proposal. Leave to amend a complaint should be denied where the claim is palpably insufficient” (*Manhattan Real Estate Equities Group v Pine Equity N.Y.*, 27 AD3d 323, 323 [2006], citing *Bencivenga & Co. v Phylfe*, 210 AD2d 22 [1994]; accord *Prudential Wykagyl/Rittenberg Realty v Calabria-Maher*, 1 AD3d 422, 423 [2003] [the court properly denied plaintiff's cross motion for leave to amend the complaint to add a party defendant since an amendment which is devoid of merit and whose insufficiency or lack of merit is clear and free from doubt will not be permitted]; *Ogilvie v McDonald's*, 294 AD2d 550, 551 [2002] [the court erred in granting plaintiffs' motion to add a defendant since the proposed amendment was palpably insufficient as a matter of law or was totally devoid of merit]).

### ***Discussion***

Plaintiffs' motion must be denied. In so holding, the Court notes that in opposition

to plaintiffs' prior motion to add Takbeer as a defendant, Beig submitted an affidavit in which he alleged that Takbeer is not the tenant of the premises, but is instead a contractor performing work there, and that Takbeer had no contract with plaintiffs, so that it cannot be held responsible for any claims asserted by them.<sup>2</sup> Plaintiffs do not refute this allegation by alleging that they had any dealings with either Beig or Takbeer. It therefore is not disputed that there is no privity as between plaintiffs and Beig that could support a claim for unjust enrichment.

Accordingly, for the reasons discussed above in dismissing the cause of action sounding in unjust enrichment as against Realty Corp., plaintiffs' proposed cause of action sounding in unjust enrichment as against Beig is patently lacking in merit.

### ***Conclusion***

Realty Corp.'s motion for summary judgment is granted and the action is dismissed as against them. The remaining causes of action shall be severed and shall continue. Plaintiffs' motion to add Beig as a defendant and to so amend their complaint

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<sup>2</sup> Copies of the earlier notice of motion and Beig's affidavit are annexed to Realty Corp.'s motion.

is denied.

The remaining parties shall appear for conference in Room 756 of 360 Adams Street, Brooklyn, on February 28, 2007 at 2:30 p.m.

The foregoing constitutes the order and decision of this court.

E N T E R,

J. S. C.