
New York Supreme Court
Appellate Division—Second Department

EFRAT GAM and SLIM'S BAGLES & BIALYS, INC.,

Docket Nos.:
2019-07603
2020-09262

Plaintiffs-Appellants-Respondents,

– against –

JOSEPH DVIR,

Defendant-Respondent-Appellant.

**SUPPLEMENTAL BRIEF FOR DEFENDANT-
RESPONDENT-APPELLANT**

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

EFRAT GAM and SLIM'S BAGLES & BIALYS, INC.,

Plaintiffs-Appellants-Respondents,

-against-

JOSEPH DVIR,

Defendant-Respondent-Appellant.

Preliminary Statement

This is an appeal from a judgment entered December 9, 2020, in Supreme Court, Queens County. The judgment was in favor of plaintiff-appellant-respondent Slim's Bagles & Bialys, Inc. (Slim's), on a cause of action for unjust enrichment following a jury verdict for \$141,099.00. The judgment also incorporated Supreme Court's determinations removing defendant-respondent-appellant Joseph Dvir (Dvir) as a corporate officer of Slim's and awarding

plaintiff-appellant-respondent Efrat Gam (Gam) legal fees and disbursements amounting to \$126,845.00 and \$2,955.09, respectively.

Gam and Dvir were equal partners in plaintiff-appellant-respondent Slim's. Gam and Slim's sued Dvir for unjust enrichment, breach of fiduciary duty individually (on behalf of Gam) and derivatively (on behalf of Slim's), and conversion, claiming that Dvir had taken money from Slim's as disbursements and salary but did not pay to Gam the equivalent amounts to which she was entitled and had paid personal debts from Slim's funds. The lawsuit also sought an injunction, an accounting, removal of Dvir from his corporate officer position, and attorney's fees. Supreme Court dismissed the breach of fiduciary duty and conversion claims in an order dated May 22, 2019. The appeal from that order has been perfected.

After trial, the jury found for Slim's on the unjust enrichment cause. Supreme Court awarded Gam attorney's fees and granted Dvir's removal as an officer. The injunction cause of action was withdrawn by Gam and Slim's and the accounting cause was dismissed by the judge.

By order of this Court entered February 26, 2021, both appeals are being heard together based on the record on the appeal from the order entered May 22, 2019, and a supplemental record filed with this appeal. This brief will focus on the

trial proceedings and will refer to the earlier record only as necessary to provide background and to support Dvir's argument concerning the denial in part of his pretrial motion for summary judgment.

This appeal argues that Supreme Court should have granted the motion to dismiss the unjust enrichment cause of action, that the jury verdict was against the weight of the evidence, and that the removal of Dvir and attorney's fee award were abuses of discretion.

Questions Presented

1. An equitable unjust enrichment claim does not lie if there are other legal claims available. The unjust enrichment cause of action was duplicative of the breach of fiduciary and conversion causes of action and was filed more than three years after it accrued. Should it have been dismissed on summary judgment?
2. The evidence that respondent-appellant paid equal sums to himself and his equal partner was corroborated by the behavior of the parties and other related circumstances. Did appellants-respondents satisfy their burden of proof?
3. Respondent-appellant demonstrated his responsible and competent behavior as an officer for almost the entire time the corporation was in existence. Assuming that the jury verdict was proper, was it an abuse of discretion for Supreme Court to order his indefinite removal as an officer?
4. Considering that the benefits achieved on behalf of appellants-respondents were limited and grossly disproportionate to the legal fees charged, that the case presented by appellants-respondents was

uncomplicated, and that appellants-respondents relied on a frivolous legal theory, were the legal fees charged reasonable?

Statement of Facts¹

1. Introduction

Dvir and Gam have been partners in Slim's since November 1999, based on an oral agreement (Dvir: SR122-23; Gam: SR169). For the first almost seven years of its existence Gam operated the business. From August 2007 until late 2016, when she lived in Australia and then in Florida, Dvir operated the business. (Dvir: SR129; Gam: SR167, 171-73). In late 2016, a dispute between the two resulted in Gam and Slim's filing a summons and complaint against Dvir on January 24, 2017 (R232).² A "supplemental complaint" was filed in July 2017 (R28).

In both complaints, Gam and Slim's claimed that Dvir (a) unjustly enriched himself (Cause of Action One), (b) breached his fiduciary duty to Gam (Cause of Action Two), (c) breached his fiduciary duty to Slim's (Cause of Action Three), and (d) committed conversion (Cause of Action Five) (Complaint: R225-29; Supplemental Complaint: R21-25).

¹ The facts are based on the record on the summary judgment appeal ("R"); and the record filed with this brief ("SR").

² The original complaint appears in the Record as an exhibit to Dvir's motion for summary judgment (R168-81) and as an exhibit to the Gam and Slim's cross-motion for summary judgment (R220-32). References to that Complaint will cite the Gam and Slim's exhibit.

Dvir's motion for summary judgment based on the statute of limitations was granted as to the breach of fiduciary duty and conversion claims but denied with respect to the cause of action for unjust enrichment; that claim was to be decided by a jury. Left for decision by the judge were the causes of action for injunctive relief to prevent Dvir from taking any actions with respect to the business (Cause of Action Four), an accounting (Cause of Action Six), removal of Dvir from corporate office (Cause of Action Seven), and attorney's fees (Cause of Action Eight). (R4-6, 227-30, 409-10, 413-15).

Shortly before trial, Gam and Slim's withdrew the injunction cause of action (SR89). Supreme Court dismissed the cause of action for an accounting following the trial since Gam had been in charge of Slim's for "a couple of years" (SR521).

On December 5, 2019, the jury returned a verdict finding that Dvir had been unjustly enriched for a total of \$141,099 (SR514-15, 533-36). In a memorandum order dated September 22, 2020, Supreme Court ordered Dvir removed as an officer and awarded Gam legal fees and expenses (SR11). Judgment was entered on the jury verdict and memorandum order on December 9, 2020 (SR5-7).

2. Dvir's motion for summary judgment is denied insofar as it sought dismissal of the unjust enrichment cause of action but granted with respect to the breach of fiduciary duty (individual and derivative) and conversion causes of action.

Under the heading “Nature of the Case,” the original complaint alleged that Dvir locked Gam out of the business premises, refused to pay her salary or distribution income, retained Slim’s income for himself, refused to provide Gam access to business records, and diverted Slim’s assets to himself or The Sugar Café, another business of Dvir’s (R220). Under the heading “Common Facts to All Claims for Relief” (R222), the original complaint alleged that Dvir billed expenses to Slim’s that were attributable to the Sugar Café (R223), stopped payments to Gam in November 2016 and “locked Gam out of the business premises” (R223), “refused to pay Gam salary or business income distribution,” retained Slim’s income for himself, refused Gam access to business records, paid no money to Gam since October 2016 but instead “retained all monies for himself” (R224), and billed Slim’s for expenses attributable to Sugar Café (R223).³ The supplemental complaint was identical to the original complaint, including the heading “Common Facts to All Claims for Relief” (R15-28) except that it additionally alleged that Dvir diverted assets to Getting Hungry [another Dvir business] as well as to Sugar

³ The jury rejected this claim (SR536).

Café (R18);⁴ that he “without authorization ... paid himself more than \$216,289 in the years 2010-2013” and “used company funds to pay his personal credit card, \$69,543.61 in the years 2010-2017” (R19); and that he “interfered with Plaintiff and the Corporations’ [sic] ability to obtain full and timely accurate information and intentionally and fraudulently concealed the details and nature of certain transactions,” which alleged conduct gave rise to an estoppel claim (R19-20).

The causes of action were also alleged in identical terms in the complaint and the supplemental complaint. The unjust enrichment cause of action alleged that Dvir’s “improper, deceitful, disloyal and unlawful actions have resulted in a loss of income and profits and salary to GAM and the Corporation and have unjustly enriched DVIR” (R21, 225). The breach of fiduciary (individual) cause of action alleged that Dvir had locked Gam out of the business premises, refused her access to records, retained all the income and profits, and diverted business assets to himself or to Sugar Café (R22, 226). The breach of fiduciary duty (derivative) cause of action alleged that Dvir had “dilut[ed], divert[ed], and loot[ed]” corporate assets (R23, 226-27). The conversion cause of action alleged that Dvir “misappropriat[ed] the Corporation’s assets for his personal benefit, theft, waste and self dealing” (R25, 228). The original complaint sought \$500,000 damages on

⁴ The jury rejected this claim (SR536)

each cause of action (R225, 226, 227, 228-29); the supplemental complaint sought \$900,000 on each (R21 22, 23, 25).

While granting summary judgment on the breach of fiduciary duty and conversion causes on statute of limitations grounds,⁵ Supreme Court treated the unjust enrichment cause of action differently. In the memorandum of law in support of the summary judgment motion, incorporated by reference into the motion (R8, 11), Dvir sought dismissal on the grounds that “an unjust enrichment claim does not lie where there is an adequate remedy at law for the offending conduct, such as misappropriation or conversion” (SR53). He continued: “It is black letter law in New York that causes of action for breach of fiduciary duty that merely restate contract claims must be dismissed [and] the same principle applies to claims for fraud and unjust enrichment.” (SR54). In its denial, however, Supreme Court did not mention this ground. Instead Supreme Court recited that the motion was based “on the grounds that no question of material fact exists to deny such determination” but, Supreme Court concluded, “questions of material fact abound ...” (R5).⁶

⁵ The granting of summary judgment is the subject of the appeal by Gam and Slim’s being considered together with this appeal.

⁶ Dvir did argue that “claims relating to breach of fiduciary duty (Second and Third Causes of Action) are unsupported by any evidence and are meritless. As such, any claims for
(continued...)

3. Gam and Slim's failed to establish, by a preponderance of the evidence, that Dvir was unjustly enriched in that, as alleged in the complaint, he acted improperly, deceitfully, disloyally, and illegally, resulting in a loss of income and profits and salary to Gam and Slim's.

Gam and Dvir were equal partners in Slim's. Under their oral agreement, profits and "distributions" would be split evenly (Dvir: SR128; Gam: SR174-75). In addition, whoever operated the store would receive a \$52,000 annual salary (Dvir: SR127-28; Gam: SR171). From 1999 to 2007, while Gam operated the store, distributions were paid in checks and cash (Gam: SR174-75). When Gam moved to Australia in 2007, Dvir continued the check and cash payments to Gam. He or one of his employees gave the cash payments to Hagay Keren, a friend of Gam's, to keep for Gam. (Gam: SR176-77). Gam explained that checks created an "issue" for her due to foreign currency regulations (Gam: SR323).

At the end of 2009, Gam returned to the United States, and settled in Florida (Gam: SR167, 172). In 2010, Dvir began paying himself only by check (Dvir: SR146, 156, 375). However, he continued to give Gam distributions by check and in cash, the latter sometimes in person when she visited New York and sometimes

⁶(...continued)

Unjust Enrichment (1st Cause of Action) and/or Conversion (5th Cause of Action) are likewise without merit" However, he did not pursue the evidentiary point but went on to argue that "these claims are defective as a matter of law" because they were duplicative (SR52).

through Hagay Keren (Dvir: SR129-32, 144-46, 405-06). Gam denied the cash payments (Gam: SR166, 178-81).

From 2014 to 2016, Gam received all her payments by check (Gam: SR183-84). She raised no issue concerning any discrepancy between the payments to her in 2014-2016 and the payments to Dvir.

In an email sent November 7, 2016, Dvir notified Gam that until further notice there would be no distributions due to “lower sales as a result of demographic shift.” (Gam: SR187, 284; Dvir: SR382-83). The lawsuit was filed shortly thereafter.

When Gam reviewed Slim’s’ records just prior to filing the summons and complaint, she saw discrepancies for the period 2010-2013: checks written to Dvir but no equivalent checks to Gam and money paid to Dvir as “payroll” above and beyond what his salary should have been (Gam: SR193-94, 329-30). She estimated the difference to be “over \$200,000,” “close to \$250,000” (Gam: SR195-96). Plaintiffs’ Exhibit 1 was the list she created based on her review of the records of the payments made to her and to Dvir during 2010-2013 (Gam: SR204, 210-12; SR537).⁷

⁷ Supreme Court ruled that “any claims for years 2010 and beyond the six-year statute of limitations ... should be barred by the statute of limitations” (SR227; R4-5). Therefore this brief (continued...)

Dvir did not dispute that the records of the corporation showed that payments to him during 2011-2013 totaled \$216,000 above what Gam received (Dvir: SR141). His position was that the difference was covered by the cash payments to Gam (Dvir: SR146, 404).

Gam also claimed that Dvir made purchases on his personal credit card and paid the credit card bills with a Slim's check, but that only some of the purchases were for supplies for Slim's. However she admitted that she had no proof that some of the payments were for supplies Dvir bought for other restaurants. (Gam: SR197-98, 414-15, 421-22). Dvir agreed that he had used his credit card to purchase supplies for Slim's and other restaurants, but that the Slim's checks did not cover the entire credit card bills but only the Slim's purchases, as he noted on the statements (Dvir: SR81, 93, 327-28). Copies of the credit card statements, with Dvir's annotations showing how much of each credit card bill was paid for by each of the restaurants he was running were introduced as Exhibit C (SR570). In fact, Dvir had provided those records to Gam after she filed the lawsuit (Dvir: SR151, 387).

⁷(...continued)
will not discuss claims made about what happened in 2010.

Plaintiffs' case was that Dvir unjustly enriched himself in two ways. In his opening, plaintiffs' counsel said the evidence would prove that for a period of time Dvir, rather than divide profits equally between himself and Gam, paid himself \$234,000 "over and above that which was paid to [Gam] by check" and that Dvir "paid his personal credit cards of more than \$69,000 allegedly from purchases through the store" (SR114-15). This theme was repeated in the summation: "We have claims for wrongful payments to Mr. Dvir for the years 2011 to 2013. We also claim credit card payments were improperly made to his personal credit card from 2012 to 2016. There is nothing else before you." (SR472, 278).

The jury found that Dvir was unjustly enriched for excess salary and distributions in the amount of \$141,099, but rejected the claim that he was unjustly enriched for wrongful credit card reimbursements (SR533-36). Dvir's motion to set aside the verdict as against the weight of the evidence was denied (SR516-17).

Following trial, both sides submitted memoranda of law. As relevant to this appeal, Dvir argued that an award of attorneys fees should not be based on the time spent in pursuing a claim concerning Gam's "unsubstantiated allegations" concerning Dvir's concealment of corporate records and his charging expenses for other businesses to the corporation (SR598-99), and in filing motions that resulted in no relief (SR669). He also argued that removal of Dvir as an officer was

“unwarranted and improper” (SR672-73). Gam and Slim’s presented their arguments for removal of Dvir as an officer since his “theft is the embodiment of willful misconduct” (SR576-77) and for legal fees and expenses in spite of the dismissal of “several causes of action” since the legal work “was performed in support of all of Plaintiffs’ claims,” including “a great deal of effort ... devoted to address Defendant’s advancement of a baseless defense for his theft” (SR578-79). The complete facts concerning these proceedings are found in Points III and IV, below.

Argument

Point I

Because there was an adequate remedy in tort law for the equitable claims made in the unjust enrichment cause of action and the cause was filed more than three years after it accrued, the cause of action should have been dismissed.

A. The unjust enrichment cause sounded in equity and did not lie where there were other legal causes of action available.

The facts upon which the unjust enrichment claim is based establish that it is an equitable claim for which there is an adequate remedy at law. Therefore it should have been dismissed.

The elements of unjust enrichment are that (1) another party was enriched (2) at the plaintiff’s expense and (3) it is against equity and good conscience to

permit the other party to retain the benefits. E. J. Brooks Company v. Cambridge Security Seals, 31 N.Y.3d 441, 455 (2018); see, also, Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 790 (2012). These elements spell out an equitable claim for relief, that equity will not permit the offending party to keep its gains. Indeed, the supplemental complaint characterizes the unjust enrichment claim as one sounding in equity: “Equity Demands Restitution” (R21, ¶46).

Further, unjust enrichment is a “narrow” doctrine and not a “catchall cause of action to be used when others fail.” E. J. Brooks, 31 N.Y.3d at 455. Unjust enrichment does not lie unless there is an inadequate remedy at law and the facts do not make out a contract breach or recognizable tort. Boyle v. Kelly, 42 N.Y.2d 88, 94 (1977). In this case, the factual allegations made out two tort claims.

The factual allegations of each of the substantive causes of action were identical, as explicitly stated by Gam and Slim’s, who set them forth under the heading titled “Common Facts to All Claims” (R17, 222). And as the case was presented to the jury, the factual underpinnings of the unjust enrichment claim were equally applicable to the breach of fiduciary duty and conversion claims.

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct.”

[Greenberg v. Wiesel](#), 186 A.D.3d. 1336, 1338 (2d Dept. 2020). The unjust enrichment claim that Dvir was supposed to divide the profits equally with his partner but instead paid himself hundreds of thousands of dollars above what he paid to Gam easily fits the breach of fiduciary relationship elements: Dvir was a partner in the corporation, that is, a fiduciary; Dvir allegedly committed misconduct by taking money to which he was not entitled; and the corporation was damaged by excess money being paid to Dvir.

A cause of action for conversion is established by showing “legal ownership or an immediate superior right of possession to a specific identifiable thing” and “that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff’s rights.” [Berkovits v. Berkovits](#), 190 AD3d 911, 917 (2d Dept. 2021). As did the breach of fiduciary duty cause, the conversion cause covered the same ground as the unjust enrichment cause: Dvir took money that belonged to Slim’s, depriving Slim’s of its superior right to the money.

Supreme Court appears to have misunderstood the basis for Dvir’s summary judgment motion with respect to the unjust enrichment cause of action. As noted, Dvir’s position was that the unjust enrichment claim could not be brought where there was an adequate legal remedy. Supreme Court did not rule on that doctrine, instead characterizing the argument as one asserting that “no question of material

fact exists to deny such determination.” (R5). As explained above, Dvir was correct that the unjust enrichment claim could not be sustained where other possible claims were available to remedy the wrong and, in fact, were invoked,⁸ and Supreme Court should have granted summary judgment dismissing the claim. See, [Boyle](#), 42 N.Y.2d at 94.

B. The unjust enrichment claim must be dismissed since it was filed more than three years after it arose.

In any case the unjust enrichment claim must be dismissed since it was filed more than three years after it arose.

In deciding Dvir’s summary judgment motion Supreme Court denied relief on “the actions for declarative relief and for injunctive relief,” finding that these causes were controlled by the statute of limitations for unjust enrichment since “the action for declaratory relief was essentially brought in the form of a cause of action alleging unjust enrichment” and further finding that the unjust enrichment cause had a six-year statute of limitations. In support, the court cited [CPLR 213\(1\)](#), which provides a six-year statute of limitations where “no limitation is specifically prescribed by law.” (R5). Supreme Court was incorrect.

⁸ It is true that these causes of action are no longer available since Supreme Court ruled that they were barred by the three-year statute of limitations. But appellant-respondents’ own carelessness in not timely filing should not redound to their benefit.

The six-year statute of limitations does apply to an unjust enrichment claim where the underlying claim is based on fraud or a contract,. [Loeuis v. Grushin](#), 126 A.D.3d 761, 763-64 (2d Dept. 2015) (fraud); [Matter of Equitable Life Assurance Soc. v. Branch](#), 32 A.D.2d 959, 960 (2d Dept. 1969) (contract). After Dvir moved for summary judgment based on the statute of limitations, Gam and Slim’s sought to avoid dismissal by filing a supplemental complaint that contained assertions of fraud applicable to all causes of action. Supreme Court correctly rejected this ploy, finding that fraud had not been adequately pleaded and, therefore, “the causes of action seeking monetary damages for breach of fiduciary duty are controlled” by [CPLR 214\(4\)](#)’s three-year statute of limitations. It also found that the conversion cause of action was also governed by the three-year statute of limitations set forth in [CPLR 214\(3\)](#), and dismissed it. (R4-5).

The same analysis applies to the unjust enrichment cause of action. Stripped of the inadequately pleaded fraud allegations, that cause of action sought monetary damages only, so [CPLR 214\(4\)](#)’s three-year statute of limitations applies. [Ingrami v. Rovner](#), 45 A.D.3d 806, 808 (2d Dept. 2020). In fact, monetary damages were sought by all substantive causes of action – unjust enrichment, breach of fiduciary duty, and conversion, and they should have been treated identically with respect to the statute of limitations.

Applying a six-year statute of limitations to the unjust enrichment cause of action, which is only a different label placed on the same factual allegations that underlay the breach of fiduciary and conversion causes of action, would allow Gam and Slim's to avoid the consequences of filing their law suit too late. See, e.g., [Bandler v. DeYonker](#), 174 A.D.3d 461, 462 (1st Dept. 2019), holding that an unjust enrichment claim flowing from the same conduct as a tortious interference claim is governed by the latter's statute of limitations; [Maya NY, LLC v. Hagler](#), 106 A.D.3d 583, 585 (1st Dept. 2013), holding that where the unjust enrichment and breach of contract claims "are based upon the same facts and pleaded in the alternative," the same statute of limitations applies; [Knobel v. Shaw](#), 90 A.D.3d 493, 495 (1st Dept. 2011) (same with respect to unjust enrichment and money had and received claims). Cf. [Benedict v. Whitman Breed Abbott & Morgan](#), 77 A.D.3d 867, 869 (2d Dept. 2010); [Gold Sun Shipping Ltd. v. Ionian Transport Inc.](#), 245 A.D.2d 420 (2d Dept. 1997); [MRI Broadway Rental v. United States Min. Prods. Co.](#), 242 A.D.2d 440, 444 (1st Dept. 1997).

Applying the three-year statute of limitations here, the unjust enrichment claim should be dismissed.⁹

⁹ The dismissal of the cause of action results in the vacatur of the orders removing Dvir as an officer and awarding attorney's fees.

Point II

That respondent-appellant enriched himself to the detriment of the corporation was wholly inconsistent with the acknowledged behavior of the parties. The jury verdict was against the weight of the evidence.

Counsel for Gam and Slim's began his summation by arguing that the case was simple: "Either you believe the plaintiff or the defendant" (SR470). He was right — in a way. The jury's job was to decide what was true: did Dvir continue to send Gam cash payments when he changed to paying himself by check as he testified or did he not. But that question is not best answered by deciding who told the truth on the witness stand. Instead it is best answered by examining the behavior of each at a time when neither was preparing a self-interested story for litigation.

Most of the underlying facts are undisputed. From 1999 until 2009, Dvir and Gam were paid salaries depending on their roles in the corporation and also an equal share of profits and distributions. At first, the non-salary payments were made in cash. From late 2013 until late 2016, all payments, salary and non-salary, were made by check.

Gam has never disputed that she received non-salary payments equal to what Dvir received in 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008,

2009, 2014, 2015, and 2016.¹⁰ The dispute involves only how the non-salary payments were handled between when Gam returned to the United States from Australia until late 2013.

Dvir testified that he continued making additional payments to Gam in cash when he began paying the additional payments to himself by check and recorded the additional check payments to himself in the Slim's general ledger as well as on the Slim's tax returns. Gam denied the cash payments.

There is no evidence directly corroborating either position – that Dvir gave Gam her share of the additional payments in cash in 2011, 2012, and 2013, or he didn't – although Gam's credibility is questionable. Her claims that Dvir used corporate money to pay for purchases made for other stores were, by her own admission, supported by no evidence at all, yet she was more than willing to continue to make them throughout the litigation. But it is the behavior of the parties that is most telling and it fully corroborates Dvir's testimony since it is wholly inconsistent with the scenario Gam and Slim's proffered.

Dvir and Gam agreed that Dvir's additional payments from 2011 to 2013 were recorded in the books and check stubs of the corporation. It makes no sense for Dvir to pay himself the additional payments from 2011 to 2013, but not pay

¹⁰ See footnote 7 above

Gam equivalent amounts when the financial records of the corporation would quickly reveal the misconduct.

Gam's attempt to explain this by claiming Dvir had hidden those records floundered on her own testimony. Although the complaint, which Gam verified, asserted that Dvir had concealed business records from her (R15, 19, 22) and she repeated that claim at trial (Gam: SR307-08), the bulk of her trial testimony, reluctant though it appeared at times, was that she could always have obtained the information directly from the bank or from the accountant but didn't ask. In fact she admitted she got some of the records during the time she was in Australia, and Dvir didn't prevent her from seeing any records, whether from the bank or the accountant, until December 2016 (Gam: SR292-94, 306, 308-09, 313-14). And even then, when she sent the accountant an email request for records in late 2016, the records she sought were forthcoming immediately (Gam: SR289-91; R161). Apparently unwilling to give up her attack in spite of the evidence, Gam persisted, accusing Dvir of hiding the check payments to "vendors and things of that sort" "in plain sight" (Gam: SR318) and hiding information about his salary and compensation even though that information was disclosed on the corporate tax returns (Gam: SR320).

Apart from the corporate records, Gam was surely aware that she had received additional distributions for years, including when she was in Australia. It is makes no sense (a) that Gam would not raise any questions contemporaneously when, according to her, she stopped receiving the additional payments, (b) that when Gam started receiving the additional payments by check in 2014 she would not ask why she hadn't received the additional payments in earlier years, and (c) that Gam would only start asking to see the financial records when she was told in November 2016 that the additional payments would stop for both of them due to business conditions. Much more logical and believable is that Gam did not ask questions about missing payments because she was still receiving them, only became upset with Dvir when he stopped the additional payments, and responded by attacking Dvir in a lawsuit.

It also makes no sense from Dvir's point of view that he would send Gam additional payments equal to his in 2007, 2008, and 2009, and in 2014, 2015, and 2016, but choose not to send her additional payments in 2011, 2012, and 2013.¹¹ Why would he deal honestly with Gam when she was out of the country or out of the state, decide to cheat her for a few years, then revert to treating her fairly?

¹¹ See fn. 7 above.

The only evidence supporting Gam's claim is that the corporate records showed payments to Dvir during a three-year period but no equivalent payments to her. Dvir's explanation -- that Gam was paid in cash -- is consistent with the course of action for the previous years. It is also consistent with Gam's failure to raise any question about missing payments until business conditions forced Dvir to stop the additional payments and consistent with Dvir's failure to take any steps to hide his own payments. The jury verdict was against the weight of the evidence and should be reversed.¹²

Point III

Because Dvir has been sanctioned, and his removal is not necessary to prevent future harm to Slim's, Supreme Court abused its discretion in ordering him removed indefinitely from office.

Even assuming that Dvir was unjustly enriched, Supreme Court abused its discretion in removing him from corporate office for an indefinite period of time. Supreme Court failed to weigh the effect on Dvir measured against the potential harm to Slim's should Dvir remain an officer. Where the evidence showed that by and large Dvir acted in the best interests of the corporation while he was managing Slim's, removal was inappropriate.

¹² Reversal of the verdict results in dismissal of the cause of action and vacatur of the order removing Dvir as an officer and awarding attorney's fees.

In ordering Dvir's removal as an officer, Supreme Court cited [Business Corporation Law \(BCL\) §716\(c\)](#), authorizing an action for the removal of an officer by the votes of 10% of the outstanding shares. There is precious little case law concerning how this statute should be applied.

Appellate counsel has found only two New York cases that even mention [BCL §716\(c\)](#). [Martin-Trigona v. Capital Cities](#), 145Misc.2d 405, 407 (Sup.Ct. N.Y.Co. 1989), cited [BCL §716\(c\)](#) to rule that the lawsuit did not satisfy the requirement that an action for removal be brought by the owner of 10% of the shares. The other, [Kotlyar v. Khiebopros](#), 44 Misc.3d 1219(A), 997 N.Y.S.2d 99 (Sup.Ct. Kings Co. 2014), mentioned [BCL §716\(c\)](#) in a discussion about the relationship among [BCL §§626, 706, and 716](#). Neither is helpful on the question of when or for how long removal should be ordered.

The only case cited by Supreme Court to support Dvir's removal was [Matter of Kemp & Beatley](#), 64 N.Y.2d 63 (1984) (SR11). That case, discussing [BCL §1104-a](#), which governs corporate dissolutions, has nothing to do with when removal of an officer is appropriate. The passage cited by Supreme Court came in the course of a discussion of the operation of that statute, where the Court of Appeals explained that shareholders of a public corporation have interests in maintaining the existence of a corporation different from those of shareholders in

a close corporation. [Kemp & Beatley](#), 64 N.Y.2d at 71. Supreme Court did not explain how that case was relevant to its decision-making process. Neither [Matter of Kemp v. Beatley](#) nor the two Supreme Court cases cited above provides guidance in determining when the equitable remedy of removal of a corporate officer should be applied.

As a general matter, the New York courts have recognized that the decision to provide equitable relief does not flow automatically from the existence of some violation but must be the result of the exercise of discretion. In [Cuomo v. Greenberg](#), 21 N.Y.3d 439 (2013), the Court of Appeals dealt with whether the Attorney General was barred from receiving equitable relief because of a related SEC settlement. The merits of the dispute are not relevant. What is relevant is the court's recognition that whether to grant the equitable remedy sought by the Attorney General was a matter for the lower court's discretion (21 N.Y.2d at 448):

There is no doubt room for argument about whether the lifetime bans that the Attorney General proposes would be a justifiable exercise of a court's discretion; but that question, as well as the availability of any other equitable relief that the Attorney General may seek, must be decided by the lower courts in the first instance.

This Court too has recognized that whether or not to grant equitable relief is a matter of discretion. For example, in [McGinnis v. Cowhey](#), 24 A.D.3d 629, 629 (2d Dept. 2005), an action for specific performance involving the sale of real

property, this Court ruled that “(t)he determination of whether to grant the equitable remedy of specific performance lies within the discretion of the court and the right to such relief is not automatic.” And in [Warm v. State, 308 A.D.2d 534, 536 \(2d Dept. 2003\)](#) (internal quotation marks omitted), this Court approved the trial court’s denial of a permanent injunction based on equitable considerations even where the defendant had committed a wrong:

While equitable relief can be a proper remedy to prevent repeated or continuing trespasses even where damages are slight and nominal, equity may withhold the use of such discretionary authority if warranted by the circumstances.

Similarly, in this case the equitable relief of removal of Dvir as an officer need not follow his misconduct when it is not needed to prevent repeated or continuing wrongs and the damage has been reversed.

Gam and Slim’s argued to Supreme Court that Dvir should be removed because his conduct “was an intentional act, involving bad faith, breach of honesty and moral turpitude, affecting the official fidelity by a business partner, officer, director and employee of Slim’s Bagels. Defendant acted with an intent to wrongly deprive Plaintiffs of money rightfully belonging to Slim’s Bagels.” (SR577). This piling on of synonymous adjectives and nouns adds nothing to the verdict. As a result of the verdict, Dvir has been sanctioned by the requirement that he return

the fruits of his conduct. But Gam and Slim's provided no evidence that if Dvir continues as an officer of the corporation he will in any way continue to harm them. Indeed, his track record shows the opposite.

The corporation began operations in 1999 and Supreme Court's decision was made in September 2020. Over the course of the some twenty years that Dvir was an officer, he was found to have engaged in a single course of misconduct that lasted for about three years (assuming of course the jury verdict was correct). Apart from that, Dvir was not shown to have acted in anything but the corporation's best interests. Significantly Dvir ended that course of conduct of his own volition and not because his conduct was discovered, and he continued as officer and operator of the business for another three years prior to the litigation with no claim that he committed misconduct during that time. The idea that Dvir presents a present danger to the corporation requiring his removal is unwarranted.

Gam and Slim's asserted to Supreme Court that Dvir "should not now be permitted to benefit from misconduct by continuing as a decision maker for the business and a corporate officer" (SR576). The only benefit Dvir obtained from his "misconduct" was a sum of money which he has been ordered to return. Further, Gam and Slim's have identified no connection between that misconduct

and any role Dvir may play now as a decision maker (equal in authority with Gam) for the business.

Under these circumstances, the penalty of indefinite removal is simply punitive. And it will cause great hardship to Dvir. As the Court of Appeals pointed out, the co-owner of a close corporation may have participated in the corporation as a principal source of income. [Kemp v. Beatley](#), 64 N.Y.2d at 71. That is the case here.

The benefit to the corporation of Dvir's removal is *de minimis*. The money judgment will make the corporation whole and Gam and Slim's have failed to show any potential harm to the corporation should Dvir be restored as an officer. On the other hand, the prejudice to Dvir, who will continue to lose a principal source of income for the indefinite future, is severe. At most, a proper exercise of discretion would have been to remove Dvir as an officer for a limited period of time. If this Court deems the sanction to be appropriate, then his removal from September 2020 until the appeal is decided, a period almost certain to exceed one year, is enough.

Point IV

The attorney's fee award covered legal work that had no factual or legal basis. The award should be appropriately reduced.

In support of his request for attorney's fees counsel for Gam and Slim's relied on a court-generated "Appearance Detail" (SR589), a court-generated "Document List" that listed 433 documents filed in the course of the Supreme Court proceedings, some of which were prepared by him (SR591), and a court-generated "Motion Detail" that listed 15 motions, some of which were filed by him (SR610). Dvir does not dispute that a lot of time was spent by plaintiffs' counsel in preparing papers. What is missing from the claim for fees is any connection established between the paperwork and the needs of the litigation.¹³

Counsel's post-trial memorandum argued that the fee request was reasonable "[g]iven the outcome, the nature and breadth of the legal services rendered, [and] Plaintiffs' counsel's many years of experience." (SR578). The outcome, an award of \$141,000 to the corporation, half of which belongs to Dvir since he is a 50% stockholder, does not on its face justify a fee of \$130,000,

¹³ Supreme Court reduced the fee request by \$1775 for opposition to a motion to compel billing records "which were improperly withheld by plaintiff" and \$1785 for opposition to a "contempt motion directed to a non-party" (SR12).

almost the amount of the entire award. And the reference to the “nature and breadth of the legal services” raises further questions.

Counsel claims that “a great deal of effort was devoted to address Defendant’s advancement of a baseless defense for his theft - the so-called ‘cash equivalency payment’” (SR578). He provides no details concerning the nature of that effort. But a review of the trial transcript indicates that the “baseless defense” was addressed by nothing more than Gam’s denial that she received any cash during the period in question. Preparing and presenting that defense could not have taken very much time. Even the amount of Dvir’s “theft” was based on Gam’s own review of the corporate checkbook and other documents and not any examination or analysis of the records by counsel. An examination of the itemized bills attached to counsel’s “Affirmation of Legal Services” reveals only one entry that could be construed as referring to an analysis of the corporation’s finances. On July 14, 2017, counsel reviewed “client’s tax returns,” among other things (SR622). But only .8 of an hour was spent on all that day’s activities. Further, the itemized disbursements (SR641) reveal no payments to a forensic accountant or similar expert.

Counsel also discounts the significance of the fact that “several” causes of action were dismissed since the legal work “was performed in support of all of

Plaintiffs' claims and in opposition to all of Defendant's defenses not just one or two here or there." (SR579). There were only four substantive causes of action and three were dismissed. And it is not clear what counsel means by "all of Defendant's defenses not just one or two here or there." The legal work performed in opposition to Dvir's statute of limitations defense consisted of a futile attempt to avoid the statute by filing and justifying a supplemental complaint containing fraud allegations. There was no basis for the fraud claim, and Supreme Court recognized it for what it was in dismissing three of the four substantive causes of action, a transparent and baseless attempt to avoid the statute of limitations (R4-5; see Respondent's Brief filed on the interlocutory appeal, Point One). Otherwise, the defense consisted of Dvir's denials of the plaintiffs' claims and some exhibits that supported his denials.

Counsel does not attempt to justify the legal work spent in proffering and supporting the claim that Dvir stole corporate money when he paid bills for other corporations with money from Slim's. That claim was demonstrably false from the beginning and properly rejected by the jury. At trial Dvir successfully defended against that claim with the careful records he kept showing that he allocated the business expenses he charged on his personal credit card to the appropriate corporation. Gam admitted at trial that she had no proof of her claim (Gam:

SR197-98, 421-22, 424-45); she had made the same admissions even earlier in a pretrial deposition (Gam: SR414-15). In fact, it appears that after he was sued for the credit card payments Dvir showed Gam how he had separated the expenses attributable to Slim's from the others on the credit card bills (Dvir: SR387). Since one must assume counsel interviewed his client before pursuing this claim, counsel must have known how insubstantial the basis for it was. Nevertheless, counsel persisted in the false claim.

Counsel also relied on a claim that Dvir did not "come forward with any record" as to his legal fees, which counsel speculated would be greater (SR579). It is hard to imagine how this assertion justifies counsel's fees.

It is true that [BCL §626\(e\)](#) authorizes attorney's fees to a plaintiff who receives "anything" (SR579), but the statute specifies that the fees be "reasonable." The fees in this case were not reasonable and, if the judgment is affirmed, the attorney's fee award should be reduced.

Conclusion

Because the unjust enrichment cause of action was duplicative of the breach of fiduciary duty and conversion causes, and carried their three-year statute of limitations, it should be dismissed. Because the verdict was against the weight of the evidence, it should be vacated and the unjust enrichment cause of action dismissed. Because the indefinite removal of Dvir as an officer was an abuse of discretion, this Court should modify it to the period served as of the Court's decision, assuming the verdict is upheld and dismissal of the unjust enrichment cause of action denied. Because the attorney's fees award was unjustified by the evidence presented, it should be reduced, assuming the verdict is upheld and dismissal of the unjust enrichment cause of action denied.

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Respectfully submitted,



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