

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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**SHARAM KOHAN,**

**Index No.: 1014185/11**

**Plaintiff,**

**-against-**

**BEHZAD NEHMADI, a/k/a BEN NEHMADI, BITA  
NEHMADI, KOHAN HOLDING LLC, KOMADI  
LLC, REPUBLIC BETHEL LLC,**

**Defendants.**

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**NOTICE OF ENTRY**

PLEASE TAKE NOTICE that annexed hereto is a true and accurate copy of the transcript containing the Decision and Order of Honorable Jeffrey K. Oing, J.S.C. signed November 9, 2015 and entered on November 12, 2015.

Dated: New York, New York  
November 11, 2015

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*Attorneys for Defendants*  
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NEHMADI, KOHAN HOLDING LLC, KOMADI  
LLC, REPUBLIC BETHEL LLC

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TO:

**(via e-file)**

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 48

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SHARAM KOHAN,

Plaintiff,

- against -

Index No.  
104185/11  
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BEHZAD NEHMADI, a/k/a BEN NEHMADI, BITA  
NEHMADI, KOHAN HOLDING LLC, KOMADI LLC  
and REPUBLIC BETHEL LLC,

Defendants.  
-----X

November 6, 2015  
60 Centre Street  
New York, New York

*CRLR 4401  
Decision/Order*

B E F O R E: HONORABLE JEFFREY K. OING, JSC

A P P E A R A N C E S:

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Donna Evans - Official Court Reporter

## Proceedings

1  
2 THE COURT: The Court has before it the  
3 matter of Kohan versus Nehmadi, index number  
4 104186/2011.

5 Yesterday afternoon at the close of  
6 plaintiff's case defendant moved, pursuant to 4401 of  
7 the CPLR, to dismiss the case or seeking a directed  
8 verdict of dismissing the case set forth -- defendants  
9 set forth their arguments, counsel for the defendants  
10 set forth their arguments as to why the defendant  
11 thinks the case should be dismissed at the end of  
12 plaintiff's case.

13 Plaintiff's counsel provided opposition to  
14 the motion, and after having the evening to think about  
15 it and reviewing the transcripts, the testimony and the  
16 evidence, I've come to my decision, and this is my  
17 decision with respect to the motion to dismiss.

18 First things first. There are three causes  
19 of action that are being asserted in this case here.  
20 The first is the constructive trust. Second is for an  
21 accounting. And the third is for damages. After  
22 hearing the testimony and looking at the evidence that  
23 was presented at court, all these causes of action --  
24 the two causes of action, accounting and damages, flow  
25 into the constructive trust. The constructive trust is  
26 the key to this complaint in this regard, and I believe

## Proceedings

1  
2 the constructive trust with respect to the accounting  
3 and damages, they are all subsumed within the  
4 constructive trust, because these three or the first  
5 two are equitable claims being sought here.

6 Having said that, before I get into the basis  
7 for my decision here, there is no dispute, having heard  
8 the evidence here over the course of the several days  
9 of trial, there is no dispute that it involved the  
10 Bethel property in Bethel, New York, and there was  
11 approximately about, I would say, 300 plus acres that  
12 were involved. And that there is also no dispute that  
13 three LLCs were formed.

14 One was the Bethel LLC in which the  
15 defendants owned a hundred percent; the Kohan LLC,  
16 which the plaintiff owned a hundred percent; and the  
17 Komadi LLC, which was owned by both plaintiff and  
18 defendant 50/50; these LLCs were all created by the  
19 defendant. No dispute there. Defendant took care of  
20 all of that.

21 With respect to the Bethel property, the  
22 Bethel LLC got approximately 200 acres, 200 some odd  
23 acres. The Komadi LLC got approximately 50 some acres.  
24 And then the Kohan LLC got approximately 82 acres,  
25 around that range. The numbers were kind of moving  
26 around, but that's the ballpark of where the acreage

## Proceedings

1  
2 lies.

3 Also, there is no dispute there's \$490,000  
4 plaintiff put down or gave to the defendant at the  
5 relevant period, \$490,000. His claim, the plaintiff,  
6 claims that the \$490,000 was for the purchase of his  
7 interest in the Bethel property and his argument is  
8 that he was promised two-thirds of that property, of  
9 the total property.

10 If you do the math, the quick math, the Kohan  
11 LLC in which the plaintiff owned 100 percent, he  
12 doesn't have two-thirds. Even if you add the  
13 50 percent ownership of Komadi, it falls below the  
14 two-thirds interest, and plaintiff's claim is that the  
15 promise was that for the investment he made he was  
16 supposed to get two-thirds of the property.

17 So that's where the dispute lies. So that  
18 constructive trust comes in. So with the constructive  
19 trust, we all know -- well, before we get to the  
20 constructive trust -- well, we all know for a  
21 constructive trust is the formula for which the  
22 conscious of equity finds expression. When property  
23 has been acquired in such circumstances that the holder  
24 of legal title may not in good conscious retain the  
25 beneficial interest equity converts him to a trustee,  
26 and that would be the defendant here.

## Proceedings

1  
2           The purpose of the constructive trust is to  
3 prevent unjust enrichment. Generally, there are four  
4 requirements for the imposition of a constructive  
5 trust. The first is a confidential or fiduciary  
6 relationship. The second is a promise. The third is a  
7 transfer in reliance upon the promise. And the fourth  
8 is unjust enrichment.

9           A fiduciary -- so when you're looking at the  
10 fiduciary relations look at the first factor here. A  
11 fiduciary relationship is a necessary fact, specific  
12 and grounded in a higher level of trust than normally  
13 present in the marketplace, between those involved in  
14 arm's length business transactions.

15           A fiduciary relationship exists between two  
16 persons where in one of them is under a duty to act for  
17 or to give advice for the benefit of another on matters  
18 within the scope of that relationship. A fiduciary  
19 relationship may exist where one party reposes  
20 confidence in another and reasonably relies on the  
21 other's superior expertise or knowledge. An arm's  
22 length business relationship does not give rise to a  
23 fiduciary relationship.

24           First things first. Here defendant is  
25 well-versed as a real estate investor. There's no  
26 question. There's no dispute in this record that the

## Proceedings

1  
2 defendant is, shall we say, somebody who really knows  
3 the real estate market. But the plaintiff also is a  
4 sophisticated businessman. There is no dispute here  
5 that he has a jewelry business and he took off with  
6 that jewelry business. He made substantial monies in  
7 the jewelry business so he is a sophisticated  
8 businessman, also, when it comes to money and numbers.  
9 And nothing in this record compels the finding that any  
10 reliance by -- hang on a second.

11 (Pause.)

12 THE COURT: When we're talking about reliance  
13 here in terms of the fiduciary relationship, as I set  
14 forth earlier, nothing in the record compels the  
15 finding that any reliance was justifiable on the  
16 plaintiff's part or reasonable, given that various  
17 business transactions that both the plaintiff and  
18 defendant entered into over the years, starting with  
19 the Baltimore properties, the Pan Am properties, then  
20 the Eastern deal, all of which took place between 1995  
21 and 2006, when the Bethel transaction was taking place.  
22 This is so, given that plaintiff testified that  
23 defendant was refusing to give him details or documents  
24 for these transactions.

25 So that's a problem, because I saw that -- I  
26 heard that in the testimony, I saw that in the record,

## Proceedings

1  
2 so that any reliance couldn't be reasonable with  
3 respect to the Bethel property. He's already had  
4 problems in terms of dealing with the defendant with  
5 various transactions. I'm going to get a little more  
6 specific now with respect to that, but before I do  
7 that, I wanted to also put on the record here at the  
8 close of yesterday's event Mr. Castro put on the record  
9 the following commentary: Mr. Castro at page 658:

10 "What I am saying, your Honor, if you weigh  
11 credibility, here's a man who says I put \$490,000 and  
12 I'm supposed to get my proportionate share as opposed  
13 to a man who says oh, no, no. If you remember what he  
14 said, he being the defendant, at trial, when he was  
15 asked how could you sell a hundred acres for \$450,000  
16 when you paid 650 for the entire land. He said, oh,  
17 you look to steal. That's the word he used. In real  
18 estate you look to steal.

19 "Your Honor, as a fiduciary you do not steal  
20 from your friends. As a fiduciary you do not steal  
21 from your partner. And this testimony that he sold a  
22 hundred acres that have not been described anywhere,  
23 pursuant to a map that does not exist, pursuant to a  
24 walk through that could not have taken place, I submit  
25 to you, your Honor, that that testimony is totally  
26 incredible. This is the testimony of somebody who is

## Proceedings

1  
2 simply trying to cover his tracks, someone who is  
3 trying to explain why he did not file tax returns, why  
4 he didn't pay transfer taxes, because he had to make it  
5 fit, your Honor. But in trying to make it fit, I  
6 believe, your Honor, that his story falls apart.

7 "Your Honor, I appreciate your patience and I  
8 thank you very much for your consideration."

9 To put that in proper context in terms of  
10 what he, the defendant, said when he used the word  
11 steal, it wasn't with respect to the \$450,000. This is  
12 what he said in his redirect or his cross-examination  
13 on October 8, 2015, at page 182.

14 I found it necessary to correct the record or  
15 at least respond to Mr. Castro's commentary, because  
16 the word steal is a very onerous term and I didn't want  
17 it left there without responding to it.

18 At page 182

19 "Q Okay, when you signed this contract for  
20 \$650,000 what did you think the true value of the land  
21 was at the time?

22 "Mr. Castro: Objection, your Honor.

23 "The Court: overruled.

24 "A Even at that time I knew the price was over a  
25 million. I knew I was getting a steal.

26 "Q A what?

## Proceedings

1  
2 "A We call it in slang word in real estate, we  
3 are getting a steal, like we are stealing it at that  
4 price.

5 "Q Now, there then came a point in time, as you  
6 testified, that you and Mr. Kohan had communications  
7 concerning him, at least this is your story, wanting to  
8 purchase a certain amount of acres of the property that  
9 you bought, correct?

10 "A Yes.

11 "Q Let me ask you this question: Let's take the  
12 allegation perhaps that -- let's use the \$450,000  
13 figure, just for arguments sake. Let's assume Mr.--  
14 sorry, let's take the hundred acres number. That's  
15 about a third of the 300 acres, correct?

16 "A That's correct.

17 "Q If you paid 650 for the land and you were  
18 offering to give to -- offering Mr. Kohan the  
19 opportunity to purchase the land, the hundred acres of  
20 the 300 acres, wouldn't the proportionate price of  
21 \$650,000 be somewhere around 215 or 220,000 for a  
22 hundred acres?

23 "A Yes.

24 "Q Then why didn't you offer to sell the hundred  
25 acres to Mr. Kohan for 200 to \$220,000?

26 "A Great question. I spent seven years going

## Proceedings

1  
2 back and forth looking for property. I spoke to many  
3 brokers. I took days of my life looking and searching  
4 for the property for my family compound. Mr. Kohan was  
5 not involved in any of them. He hasn't gone once with  
6 me, not once, one hour, to look at this asset. He  
7 hasn't spent any time. Why would I just -- I am in the  
8 business of real estate. Why would I just buy it and  
9 give it to him for cost price? Of course I have to  
10 make a profit from it."

11 That's his response with the word steal. And  
12 after reviewing -- after his response here, when there  
13 was an opportunity to do a redirect, I don't find any  
14 of his commentary on redirect by Mr. Castro to  
15 undermine that comment.

16 Plain and simple, he was looking to make  
17 money on the deal. That's the first thing. So that  
18 undercuts the term fiduciary in that regard.

19 Turning next to other points that I have to  
20 make mention in terms of whether or not a fiduciary  
21 duty was in existence. First things first.

22 Defendant was first called to testify. He  
23 was the first witness in the case. The plaintiff was  
24 the last witness to be called in this case. Defendant  
25 testified that plaintiff is not family, he doesn't  
26 treat them as family. There's no question that this

## Proceedings

1  
2 was a long term friendship here, and it's unfortunate  
3 that the friendship is now soured tremendously because  
4 of money, but it is still only a friendship. And  
5 defendant testified, forcefully, that he's not family,  
6 he's a friend. Plaintiff reacted in a very sad manner  
7 when he heard that, but that's the reality, that's the  
8 testimony.

9 Defendant also testified he's a business  
10 person, they are both business persons, you know? And  
11 more to the point, with respect to the loans that each  
12 side gave to each other, the plaintiff loaned money to  
13 the defendant, the defendant loaned money to the  
14 plaintiff, they charged interest to each other. And  
15 the response to defendant is why did you charge  
16 interest to the plaintiff? Well, it's a business deal.  
17 I don't charge interest to family. He's not family.  
18 That was his response.

19 And in fact, the plaintiff also testified  
20 when he was on the stand, same thing, they went into  
21 business, they charged 10 percent interest. It went  
22 back and forth. There were no writings, but it was  
23 understood they were going to pay interest on the loan.  
24 That's one.

25 The second fact, defendant testified that  
26 plaintiff did not want the property in his name in the

## Proceedings

1  
2 beginning, in 1995, because he did not want his future  
3 wife, whoever that may be, to know about it. He  
4 doesn't rebut that. He instead, the plaintiff on the  
5 stand, says why would I do that? I wasn't even married  
6 at the time. Correct, he wasn't married at the time.  
7 But the testimony from the defendant was not because he  
8 was married at the time but that he wanted to keep it,  
9 whoever he was dating at the time he didn't want her to  
10 know about it. And that was a very interesting  
11 commentary because I had to highlight that.

12 The third point: Defendant testified that  
13 plaintiff did not want people to know about the money  
14 he had when he gave him \$490,000. That four checks  
15 that were given to defendant by the plaintiff were bank  
16 checks. They weren't drawn on personal accounts. It's  
17 true, as plaintiff's counsel argues, that doesn't mean  
18 anything. So they were drawn on bank checks. There  
19 were no bank accounts. But at the end of the day  
20 there's a paper trail. Yeah, there's a paper trail.  
21 But at the end of the day, I don't know how -- there  
22 was no testimony as to how the money got to the bank,  
23 because if he had accounts at these banks he could have  
24 simply, as a customer, depositor, brought in money,  
25 gave the money to the teller saying I need a bank check  
26 for this amount of cash, and as a customer or depositor

## Proceedings

1  
2 the bank would accommodate that.

3 So I didn't have any facts with regard to  
4 that, but that's normally how, perhaps, something would  
5 have been done. But that's a burden plaintiff had to  
6 satisfy, had to at least show to the Court that that's  
7 not what happened, I had the money in there, I just had  
8 them draw it on a bank check instead of drawing it out  
9 of my bank account. No testimony in that regard.

10 So it wasn't rebutted, because those checks  
11 were as good as cash. They were just -- if he had  
12 dropped -- it was made out to the defendant, but if he  
13 had dropped those checks somewhere, someone could have  
14 picked it up wrote the defendant's name and cashed the  
15 check. That's that.

16 The other point I want to make with respect  
17 to \$490,000, and this was drawn out on plaintiff's  
18 cross-examination. The Bethel property in 1995 or  
19 during the relevant period, it wasn't the only  
20 transaction going on. There were other transactions,  
21 as I mentioned earlier, very early on. There were the  
22 transactions that were happening between 1995 and 2006.  
23 There was the Baltimore properties, there was the Pan  
24 Am properties, there was the Eastern deal. Money was  
25 going back and forth and back and forth. And this  
26 corroborates defendant's testimony when he said he got

## Proceedings

1  
2 the \$490,000 he didn't know what the money was for,  
3 because he couldn't remember, because there were other  
4 transactions going on. And plaintiff testified to that  
5 during cross-examination, that there were other  
6 transactions going on at the time. He was paying  
7 money. He was giving finder's fees, management fees.  
8 So that \$490,000 is suspect with respect plaintiff has  
9 failed to demonstrate to the Court that that \$490,000  
10 was exactly used for the Bethel property, to purchase  
11 the Bethel property.

12 The fourth point. Defendant testifies that  
13 plaintiff came to his home in LA to sign documents.  
14 The plaintiff testified that he signed a document in  
15 the car. Why that's important? That's important  
16 because it would be interesting to know how much the  
17 plaintiff remembered in terms of his memory. And  
18 knowing where you signed these important documents,  
19 because his testimony was I had concerns about these  
20 documents I was signing, defendant just told me sign  
21 the documents, don't worry, I'll take care of it, sign  
22 everything.

23 But his testimony, the plaintiff's testimony  
24 on direct was that he was nervous about what was going  
25 on, he was concerned about what was going on, he had  
26 all these problems or issues. But he couldn't remember

## Proceedings

1  
2 when the Court asked him, well, if you signed the  
3 document in the car whose car was it? He said I don't  
4 remember.

5 Then I asked him how did you get there? He  
6 says I'm not sure how I got there. I said, well, were  
7 you in walking distance? Did you take mass transit?  
8 Did somebody drive you there? He couldn't remember.

9 And then he commented as an afterthought  
10 saying, I think the defendant was coming from a  
11 restaurant and I was meeting him, and that was that.

12 We had a recess of the testimony. The next  
13 day he became very clear as to how he got there. He  
14 drove there and the defendant met him by driving back  
15 from somewhere, so the two cars met up at the house.  
16 He got out -- well ostensibly, it seems, but he  
17 didn't -- plaintiff wasn't clear about it, that he got  
18 into a car. So when he says he got into a car, he must  
19 have gotten out of his car, got into defendant's car to  
20 sign the documents.

21 Why that's important? It's important because  
22 it goes to the issue of memory. He couldn't remember.  
23 But after recess he did remember. Those things are --  
24 that's something that the Court is cognizant of, so  
25 that a lot of the issues here depends on his memory. I  
26 haven't gotten to the credibility part yet, I'm talking

## Proceedings

1  
2 about his memory or questioning his memory about what  
3 was going on. That's the fourth point.

4 The fifth point: Plaintiff testifies that he  
5 only got conflicts in waiver and a single document from  
6 Barbara Garigliano from the Garigliano law firm. He  
7 also testified that he had an encounter, at least  
8 commentary with Susan Whalen, another lawyer from that  
9 law firm. Those two individuals were key witnesses  
10 because a lot -- a critical portion of this trial was  
11 what documents did the defendant get and what was told  
12 to him with respect to those documents, the deeds, the  
13 transfer forms, the real estate transfer forms, the  
14 real estate transfer taxes. Everything centered on  
15 what the law firm knew because the law firm represented  
16 both the plaintiff and the defendant in this  
17 transaction.

18 It was -- everything was focused on that.  
19 Plaintiff talked about it, testified to it, saying that  
20 they didn't give me anything. The law firm when I  
21 called said, no, you have to talk to the defendant, the  
22 defendant has everything. Everything rode on that  
23 testimony.

24 Well, it would have been simple enough to  
25 have, although defendant listed Barbara on their  
26 witness list, it would have been important to have

## Proceedings

1  
2 plaintiff in his case, to prove his case, to call  
3 Barbara to the stand, or at least to call Susan Whalen  
4 to the stand. Those are missing witnesses.

5 So I'm going to charge, or at least find that  
6 the failure of plaintiff to call those two key  
7 witnesses with regard to the documents he did or did  
8 not receive with regard to what kind of information or  
9 advice he did or did not get, I'm going to find that  
10 the failure to call these two witnesses, I have to find  
11 against him on that because it's a missing witness.  
12 That I believe that if he had called them, it more  
13 likely than not those witnesses would not support  
14 plaintiff's testimony. So the failure to call those  
15 two key witnesses is going to be chargeable against the  
16 plaintiff, and I'm going to -- that's going to take  
17 away from his case in that regard.

18 Turning to the sixth commentary. Plaintiff  
19 also testified that there was some employee at  
20 defendant's office named Jasmine.

21 Oh, talking about the lawyers, there is also  
22 nothing in the record to indicate that the plaintiff  
23 sought to compel their testimony in court by way of  
24 subpoena or otherwise, and they were not going to  
25 cooperate. That's another reason they didn't attempt  
26 to call them. I don't have in the record any EBT of

## Proceedings

1  
2 the lawyers that any attempt was made to get EBTs.  
3 That's also a problem.

4 Turning now to the sixth point. Plaintiff  
5 testified there was a person called Jasmine at  
6 defendant's office who provided him clandestinely,  
7 without defendant's knowledge, critical documents with  
8 respect to the deeds. Again, if that's the case that  
9 Jasmine was there and he spoke with her, he needed to  
10 bring her into the courthouse because, again,  
11 everything centered on the documents that he got and  
12 that when he got them, because his claim was he didn't  
13 get them until after the fact, after he tried very  
14 hard, and in this regard that Jasmine gave it to him  
15 because she felt bad for him, that she believed that  
16 the defendant was, in his words, a crook, stealing  
17 money or taking money from everybody, all that kind of  
18 information.

19 It would have been nice to have Jasmine in  
20 front of me for at least some corroboration of  
21 plaintiff's testimony that he got those documents from  
22 Jasmine, didn't get it from the lawyer. This whole  
23 record here, in terms of how he got the documents, the  
24 assessment that I got is that the stories were  
25 changing. I could not keep track of how he got the  
26 documents because there was too many ways of how he got

## Proceedings

1  
2 the documents.

3 This record is replete with there were  
4 documents, but in terms of how and when plaintiff got  
5 them, I found him evasive, I found him going all over  
6 the place, I found his memory not clear. I couldn't  
7 keep track of the stories. There's only one truth. If  
8 you stick with it, you're fine. But when you're coming  
9 up with different versions of how you got documents and  
10 you don't have people come in and corroborate that  
11 testimony, that's not going very well. So that's the  
12 sixth point.

13 The seventh point. The defendant testified  
14 that plaintiff did not want the property in his name  
15 for tax purposes. And when plaintiff wanted it, the  
16 tax treatment was not good for defendants, so defendant  
17 said hold off on transferring because the tax laws have  
18 changed.

19 The plaintiff, however, testified in response  
20 to that that he wanted the property but did not -- he  
21 wanted the property but he didn't rebut that tax  
22 treatment at the end of the day. He didn't rebut it  
23 sufficiently. He kept going back and forth in terms of  
24 his stories about the tax. It was almost as if he was  
25 saying defendant was uncooperative, mostly  
26 uncooperative, but with respect to the tax treatments

## Proceedings

1  
2 it wasn't clear, is the word he was going with that.

3 I'll get to the tax treatment in a second  
4 because I have that later on.

5 Most importantly and most damaging, I  
6 believe, is the various inconsistencies between his  
7 EBT, his trial testimony and his affidavit. I'm only  
8 going to focus on his EBT and his trial testimony  
9 because the affidavits, putting them aside, those are  
10 written statements, they could be explained,  
11 explainable, in some regards.

12 For this Court EBT testimony and trial  
13 testimony are critical. And this is with regard --  
14 talking about the EBT testimony. It's inexplicable his  
15 trial testimony will contradict his EBT testimony for  
16 two things:

17 One, he hadn't testified on direct yet when  
18 Mr. Castro raised the argument that his EBT testimony  
19 should be precluded because the plaintiff never got the  
20 EBT testimony from the defendant to review pursuant to  
21 the CPLR. So at that point, rather than preclude the  
22 use of the EBT testimony, I gave the plaintiff the  
23 opportunity to review the transcript, because the  
24 purpose of the CPLRs, I forget the exact number, is to  
25 insure accuracy of the EBT, for the witness to look  
26 over the EBT and make sure it's accurate in terms of

## Proceedings

1  
2 what was put down.

3 Plaintiff had ample opportunity, two weeks to  
4 look. I did not get an application when we got back  
5 two weeks later for additional time, except that we did  
6 the best we could under the circumstances. All right.  
7 The EBT is only about -- just so we have it for the  
8 record, 300 pages long. Not micro print,  
9 straightforward.

10 It's his testimony, plaintiff's testimony, so  
11 he can review it very quickly, it's not reviewing  
12 someone else's testimony. That's number one.

13 Number two -- so he hasn't testified yet. He  
14 had an opportunity to review his EBT. And then what  
15 happened then was that at trial questions were being  
16 propounded to the plaintiff on cross-examination, and  
17 he was coming up with his testimony, at least the  
18 defense counsel was pointing out later on, there were  
19 inconsistencies between his trial testimony and EBT  
20 testimony, which I found to be curious, given he had an  
21 opportunity to review the EBT testimony and he could  
22 have -- he knew how he answered, but it is what it is  
23 at this point.

24 Having looked over my notes, there were at  
25 least 15 inconsistencies between his EBT and his trial  
26 testimony. And let's go through three of them. Simple

## Proceedings

1  
2 enough.

3           The first is plaintiff testified that he did  
4 not get a lawyer from 2005 to 2012, when the Bethel  
5 transaction was heating up, because he was too busy  
6 with his jewelry business. His EBT testimony at page  
7 116 and 117. He says he sold the business in 2002 to  
8 his family and he tried to explain it when he was  
9 confronted with that contradiction, that he was still  
10 involved in the business, sold the business to his  
11 family, but he was still involved going to trade shows,  
12 trying to reduce the inventory, taking care of all the  
13 other matters as a result of his selling of the  
14 business.

15           The problem with that, no corroborating  
16 documentary, proof of that. He just testified to that.  
17 So that -- without corroborating testimony, and also  
18 the fact that I've already found his memory is not as  
19 clear as it could be, that's something that I couldn't  
20 agree with or at least could not find in his favor,  
21 that he was still involved to the point where he was so  
22 busy he couldn't hire his own lawyer.

23           The second inconsistency, the map,  
24 Defendant's HH, plaintiff testified he got it from  
25 Jasmine. That's where Jasmine's testimony would have  
26 been very important. Putting that aside, at his EBT

## Proceedings

1  
2 testimony, page 270, he says I don't recall how I got  
3 it. So that he was very forceful in Court saying that  
4 Jasmine was helping him because Jasmine believed that  
5 he was being harmed by the defendant, and he was  
6 forcefully testifying that Jasmine is the one who gave  
7 me those documents, that's how I got those documents,  
8 to explain how he provided those documents in his  
9 responses to discovery and how I have the documents and  
10 the record here for trial. That he was forcefully,  
11 continually forcefully saying that Jasmine got it. Yet  
12 his EBT testimony that took place February 28, 2014, I  
13 don't recall how I got it. The third inconsistency.

14 Plaintiff never offered to pay taxes on the  
15 Komadi LLC because defendant would take care of it.  
16 That's his trial testimony. But at page 256 to 258 of  
17 his EBT this is what he testified to.

18 "Q From the date that Komadi was created, and  
19 that's the company that you and Mr. Nehmadi owned  
20 50/50?

21 "A Yeah.

22 "Q Did you ever offer to pay half of the taxes  
23 associated with the property that was owned by Komadi?

24 "A No.

25 "Q Why not?

26 "A Because the dispute almost we had or we

## Proceedings

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2 didn't know exactly what was going on, he says this was  
3 yours, you paid for it, and that was it basically.

4 "Q Well, sir, you said the dispute started in  
5 2010, right?

6 "A Yes, but not on that particular one, on the  
7 different property, and everything we had it together  
8 it kind of --

9 "Q Why didn't you have a dispute on the property  
10 that was owned by Komadi?

11 "A (No verbal response.)

12 "Q Why didn't you have a dispute with regard to  
13 the property that was owned by Komadi?

14 "A I said other problems with the other  
15 different property we had.

16 "Q So here's my question again. Why didn't you  
17 offer to pay 50 percent of the taxes that were due in  
18 2007, 2008 and 2009 on the property that was owned by  
19 Komadi?

20 "A Okay. I did not offer him because,  
21 basically, he would have add up and every year,  
22 basically, we were counting whatever he owed me money  
23 wise I owe him. That's the way we were doing it.  
24 Maybe a year or two years he would have added up and  
25 just bring it, this is the amount, why Mr. Nehmadi  
26 didn't ask me to pay."

## Proceedings

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2           That's his answer. So that it wasn't as if  
3 he wasn't paying, it was interesting, according to  
4 plaintiff's testimony, it was later on you add up all  
5 the expenses, give him a bill, he pays for that.  
6 That's important because when you go to the term of  
7 constructive trust, one of the issues for constructive  
8 trust is transferring reliance upon a promise.

9           Well, there couldn't be a transfer in  
10 reliance for a promise if you're paying expenses. So  
11 that at the way you're looking at it, even if there was  
12 a promise to transfer the two-thirds of the property,  
13 at the end of the day the plaintiff is paying expenses  
14 for it, so that there's no promise to transfer  
15 outright, you're putting expenses in, this is a  
16 transaction straight up, there's no fiduciary  
17 relationship going on at this point for constructive  
18 trust to even happen. So that's the point.

19           So those are the three instances out of the  
20 15. I could go on for another 12 instances in terms of  
21 the contradiction here, but I don't need to do that.  
22 The trial transcript is what it is.

23           Having and considering all of that testimony,  
24 all that evidence, my finding is that, number one, the  
25 plaintiff's memory is suspect. I can't understand, or  
26 at least I can't find that his memory is good enough

## Proceedings

1  
2 for me to believe that everything he testified to is  
3 accurate, particularly in view of the way he answers  
4 some questions, particularly in the way I believe he  
5 was evasive, particularly with direct and  
6 cross-examination questions he couldn't answer, but he  
7 had to explain his answer.

8 And in that regard, the opportunity was there  
9 to redirect his testimony after the cross, after the  
10 very intense cross. I found that plaintiff's counsel  
11 did not do that, did not redirect with respect to  
12 those, at least, 15 inconsistencies. It was on  
13 redirect much time was spent on other issues that I  
14 found to be not relevant. I just needed to hear what  
15 he had to say, and I kept reminding the plaintiff when  
16 he was on the stand that your counsel will redirect  
17 your testimony, you don't need to explain what was  
18 happening in terms of those inconsistencies. That  
19 wasn't done. So number one, his memory is faulty.

20 Number two, with respect to the various  
21 versions going back and forth, it's hard for me to say  
22 that I find him credible. It was at this point, and I  
23 keep mentioning it, there's only one truth. If you  
24 start having various versions of a fact you cannot keep  
25 track of the facts that have been said, then you have a  
26 problem.

## Proceedings

1  
2           When defendant got on the stand he was the  
3 first one on the stand, plaintiff was here, he heard  
4 his testimony. The defendant testified  
5 straightforward, one direction. Mr. Castro confronted  
6 him with his EBT testimony, he was unshakable, because  
7 his testimony at trial did not contradict or was  
8 different from his EBT testimony. It wasn't pointed  
9 out to the extent, or to the incredible extent the  
10 defense counsel pointed out plaintiff's testimony.

11           So I found his testimony to be not credible.  
12 Something happened. Without a doubt I think something  
13 happened. But not according to what the plaintiff's  
14 version was that was going on.

15           So for that matter, I found under those  
16 circumstances that there is no fiduciary duty owed, the  
17 defendant owed to the plaintiff. They were doing a  
18 host of business transactions, real estate transactions  
19 in which case, wherein the plaintiff was having  
20 continual problems with the defendant's cooperation, so  
21 that any reliance that the plaintiff may have had with  
22 respect to defendant's ability -- with respect to the  
23 defendant's duty to take care of plaintiff was  
24 unreasonable because he was having problems from the  
25 get-go. Particularly in one instance where I believe  
26 it was the Pan Am properties where it was sold to him

## Proceedings

1  
2 over value, in terms of him getting 50 percent  
3 interest, these were all business deals.

4 Also the point is, and I have to make this  
5 one last mention, defendant testified that everything  
6 went south, the relationship, when plaintiff insisted  
7 on becoming defendant's partner, wanting to partner up  
8 with him, and defendant rebuffed those overtures, said  
9 I don't want to be your partner, I don't want to go  
10 into business with you. That's it. And that was where  
11 it went south.

12 I also think the relationship went further  
13 south when plaintiff's spouse went to defendant's home  
14 and told the defendant and his wife to leave LA, they  
15 didn't belong in Los Angeles. I think at that point,  
16 that's when the relationship really went south between  
17 the parties. Okay?

18 So under all those circumstances, I find that  
19 there is no fiduciary duty that plaintiff has failed to  
20 establish as a matter of law, a fiduciary duty. I find  
21 this was nothing more than business transactions being  
22 taken care of.

23 I also find that the two-thirds property that  
24 he was promised, there was no -- there is no testimony  
25 sufficient at all for me to find that there was ever a  
26 two-thirds promise, or promise that the plaintiff was

## Proceedings

1  
2 going to get two-thirds of the property. That wasn't  
3 the case.

4 So with respect to that, my finding is that  
5 plaintiff has failed to establish prima facie as a  
6 matter of law. Given the testimony that I have in  
7 front of me right now I'm compelled to find against him  
8 and to grant the defendant's motion to dismiss and  
9 award the defendant a directed verdict, because at the  
10 end of the day, it's just not there. His memory is not  
11 good. His credibility is questionable. And at the end  
12 of the day there was no promise of two-thirds of the  
13 property. This was a straight up business transaction.

14 Other businesses were being undertaken by the  
15 plaintiff with the defendant at the time. Relationship  
16 went sour at the end of the day because he didn't  
17 want -- defendant didn't want to partner up with the  
18 plaintiff and plaintiff's spouse told defendant and his  
19 wife to get out of town. So under those circumstances  
20 the motion is granted. The action is dismissed. I'm  
21 directing a verdict in favor of defendant and against  
22 plaintiff. And the three causes of action are hereby  
23 dismissed.

24 That's my decision.

25 MR. NOVIKOFF: Thank you, your Honor.

26 THE COURT: Counsel, you're moving party,

Proceedings

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please order the transcript.

MR. CASTRO: Your Honor, I would note my objection.

THE COURT: I know you object for the record.

I also want to say for the record trial counsel were incredibly excellent in trying the case. They have their cases, they had their positions, but I have to tell you respectfully they respected each other, they respected the Court.

In the courtroom we do battle, but that's okay. But the whole point I make, I make that point that I've never -- I've tried many cases, this is the first case that was truly enjoyable where counsel respected everybody and respected the Court. You know what, that goes a long way, I appreciate that. And I wanted to say that for the record.

See you on the next go round.

MR. NOVIKOFF: Thank you, your Honor.

(Whereupon, the proceedings were concluded.)

\* \* \*

The foregoing is hereby certified to be a true and accurate transcript of the proceedings.

Date: 11/9/15  
Index No. 104186/2011  
Mtn-Seq. No.

SO ORDERED



Hon. Jeffrey K. Oing

Donna Evans - Official Court Reporter



Donna Evans  
Senior Court Reporter