

112 A.D.3d 475
Supreme Court, Appellate Division, First
Department, New York.

Frederick B. **WHITTEMORE**,
Plaintiff–Respondent,

v.

Edwin H. **YEO**, III, et al., Defendants,
Yeo Farms, L.L.C., Defendant–Appellant.

Dec. 12, 2013.

loan obligation undertaken by debtor, together with guarantor’s inquest testimony, established prima facie claim that debtor was unjustly enriched at guarantor’s expense when debtor defaulted on loan obligation and monies were drawn from guarantor’s personal account to cover principal owing by debtor in accordance with letters of credit, including attendant bank fees; guaranty was not shown to be grounded in any contractual agreement, but rather, due to guarantor’s then-friendship with debtor.

Cases that cite this headnote

Synopsis

Background: Guarantor of loan brought action against debtor for unjust enrichment arising when debtor defaulted on loan and monies were drawn from guarantor’s personal account to cover principal owed by debtor in connection with letters of credit. The Supreme Court, New York County, **Richard F. Braun, J.**, entered default judgment. Debtor appealed. The Supreme Court, Appellate Division, **99 A.D.3d 496, 952 N.Y.S.2d 136**, affirmed. The Supreme Court, New York County, **Ira Gammerman, J.**, also awarded guarantor damages. Debtor appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] guarantor of loan established prima facie unjust enrichment claim, and

[2] claim was timely.

Affirmed.

West Headnotes (3)

[1] **Implied and Constructive Contracts**

🔑 Unjust enrichment

Implied and Constructive Contracts

🔑 Effect of Express Contract

Guarantor of loan, through submission of documentary evidence of letters of credit drawn on its personal investment account to guaranty

[2]

Appearance

🔑 Failure to appear

Judgment

🔑 Operation and Effect of Default

Debtor’s default in appearing in unjust enrichment action waived any affirmative defenses as to timeliness of claims asserted by guarantor of loan.

Cases that cite this headnote

[3]

Limitation of Actions

🔑 Implied Contracts

Unjust enrichment claims of loan guarantor arose, and six-year “catchall” limitations period began to run, when debtor defaulted on loan obligation. **McKinney’s CPLR 213**.

Cases that cite this headnote

Attorneys and Law Firms

****16** Kasowitz Benson Torres & Friedman LLP, New York (**Olga L. Fuentes–Skinner** of counsel), for appellant.

Holm & O’Hara LLP, New York (**William P. Holm** of

counsel), for respondent.

GONZALEZ, P.J., ANDRIAS, SAXE, RICHTER, CLARK, JJ.

Opinion

*475 Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered June 1, 2012, awarding plaintiff damages, and bringing up for review an order, same court and Justice, entered June 1, 2012, which, to the extent appealed from as limited by the briefs, severed plaintiff's unjust enrichment cause of action and directed that the Clerk enter a default judgment thereupon in favor of plaintiff as against defendant Yeo Farms, L.L.C. (Yeo Farms) in the amount of \$1,182,546.00 together with interest from August 13, 2009, unanimously affirmed, with costs.

[1] Documentary evidence in the form of, inter alia, letters of credit drawn on plaintiff's personal investment account to guaranty a loan obligation undertaken by Yeo Farms, together with plaintiff's inquest testimony, established a prima facie claim that Yeo Farms was unjustly enriched, at plaintiff's expense, when Yeo Farms defaulted on its loan obligation and monies were drawn from plaintiff's personal account to cover the principal owing by Yeo Farms in accordance with the terms of the letters of credit, including attendant bank fees (see generally *Georgia Malone **17 & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 950 N.Y.S.2d 333, 973 N.E.2d 743 [2012]). The fair import of the whole of plaintiff's inquest testimony, viewed in relation to the chronology of the parties' eventual partnership regarding an unrelated investment venture, made clear that plaintiff had made the guaranty as a favor to his then friend, defendant Edwin Yeo, who was the principal of Yeo Farms. The parties' arrangement as to the guaranty was not shown to be grounded in any contractual agreement as between *476 them and, as such, plaintiff's unjust enrichment claim remained a viable cause of action (see generally *IIG Capital LLC v. Archipelago, L.L.C.*, 36 A.D.3d 401, 829 N.Y.S.2d 10 [1st Dept.2007]).

[2] [3] Yeo Farms's argument that plaintiff's unjust enrichment claim was untimely asserted is unavailing, as Yeo Farm's default in appearing in the action waived any affirmative defenses (see *Marine Midland Bank v. Worldwide Indus. Corp.*, 307 A.D.2d 221, 763 N.Y.S.2d 27 [1st Dept.2003]). In any event, even assuming Yeo Farms had timely asserted a statute of limitations defense, plaintiff's obligations on the guaranty did not accrue until Yeo Farms defaulted on the loan in May 2009, and plaintiff commenced the instant action in March 2010, well within the applicable six-year "catchall" statute of limitations for bringing an unjust enrichment claim (see generally CPLR 213; *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 965 N.Y.S.2d 475 [1st Dept.2013]; *Parrish v. Unidisc Music, Inc.*, 68 A.D.3d 566, 892 N.Y.S.2d 45 [1st Dept.2009]).

To the extent Yeo Farms argues that plaintiff had a duty to mitigate damages in relation to its seventh cause of action, Yeo Farms has failed in its burden to demonstrate plaintiff's failure to mitigate, including the extent to which damages allegedly could have been litigated (see generally *Cornell v. T.V. Development Corp.*, 17 N.Y.2d 69, 268 N.Y.S.2d 29, 215 N.E.2d 349 [1966]). In any event, the damages questioned were due pursuant to the terms of letters of credit whose sums were certain, together with attendant bank fees that were readily calculable pursuant to the participating bank's letter of credit fee terms (see generally CPLR 3215[a]; *Reynolds Sec. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568, 572, 406 N.Y.S.2d 743, 378 N.E.2d 106 [1978]).

We have considered Yeo Farms's remaining arguments and find them unavailing.

All Citations

112 A.D.3d 475, 977 N.Y.S.2d 15, 2013 N.Y. Slip Op. 08338