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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 56
-----X
RITA MARIA SANCHEZ DE HERNANDEZ, ET AL.,

Plaintiff,

- against -

Index No.
601518/06

BANK OF NOVA SCOTIA a/k/a SCOTIABANK,

Defendant.

-----X
60 Centre Street
New York, New York 10007
November 13, 2008

B E F O R E:

HONORABLE RICHARD B. LOWE, III,
Justice

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

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JENNIFER L. MURRAY, ESQ.

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M O R N I N G S E S S I O N

THE CLERK: Step up on Hernandez.

THE COURT: This is your motion.

MR. FRANKEL: It is, your Honor.

May I proceed?

THE COURT: Yes.

MR. FRANKEL: This is a motion for leave to amend our complaint. We're seeking to add one claim under Mexican law which is for unjust enrichment. The motion, we believe, should be granted for two reasons: one is we've never had an opportunity to plead our claim under Mexican law; and two, there's no prejudice to ScotiaBank for us being allowed to amend our complaint.

THE COURT: I thought we already addressed this.

MR. FRANKEL: Well, the last time we were here about a month ago -- I'm not sure what you mean by "this."

THE COURT: The unjust enrichment claim in the first decision that the Court rendered, I thought we addressed this issue.

MR. FRANKEL: Well, the argument they've made in the reply is the one you just mentioned, your Honor. Here's --

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THE COURT: Go ahead.

MR. FRANKEL: There is no question, your Honor, as we put in our reply, there's no question there's a sentence in your order that speaks to unjust enrichment.

THE COURT: There's not a sentence, it's a page and a half that deals with this.

MR. FRANKEL: Well, the argument on unjust enrichment, I think, as a claim, your Honor, is more narrow than that, but you're right, there's an extensive discussion of constructive trust.

THE COURT: You did have a claim for unjust enrichment.

MR. FRANKEL: Pardon?

THE COURT: You did have a claim for unjust enrichment.

MR. FRANKEL: We have never asserted such a claim. If you look at our complaint there's no mention of unjust enrichment. If you look at their motion to dismiss, 38 pages, there's no mention of unjust enrichment. That's why we want a full chance to present that claim to your Honor and have it fully vetted. They did not move to dismiss on unjust enrichment because we hadn't pleaded unjust enrichment; we had pled a constructive trust claim and

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2 that's how this unjust enrichment kind of got into the
3 discussion.

4 THE COURT: I don't understand this. I mean
5 without pleading this 30 page decision that I
6 previously rendered -- you're asserting that you never
7 previously asserted a cause of action for unjust
8 enrichment?

9 MR. FRANKEL: It's true.

10 THE COURT: And I devote a page and a half
11 to that issue and the issue of unjust enrichment under
12 Mexican law. Why would I do that if you had not pled
13 it?

14 MR. FRANKEL: Well, I --

15 THE COURT: Go ahead.

16 MR. FRANKEL: I don't know why, your Honor,
17 why you did it. We're not here to debate that.

18 THE COURT: Let me ask you this. Stand up.
19 Is it your recollection or assertion that
20 the plaintiff has already pled unjust enrichment and I
21 ruled on it?

22 MR. GRAHAM: Your Honor plainly ruled on it
23 and I think I can explain why.

24 THE COURT: Okay.

25 MR. GRAHAM: Plaintiffs pled constructive
26 trust, an element of which is having a claim for

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2 unjust enrichment. Both sides, through their Mexican
3 law experts, argue to your Honor the question of
4 whether there is an unjust enrichment claim under a
5 particular section of the Mexican federal Civil Code
6 of Mexico, Section 1882.

7 It was argued by our Mexican expert in his
8 opening declaration. The plaintiffs' Mexican expert,
9 Mr. Lorena, replied on the question of whether there
10 was an unjust enrichment claim. And when your Honor
11 rendered the opinion, your Honor said there was no
12 claim for constructive trust and then went onto say
13 based on the -- referring to the views of the two
14 experts -- that there was no claim for unjust
15 enrichment by itself, and the reason is it was an
16 element of constructive trust.

17 It was argued by both sides under Mexican
18 law that there was no such claim for unjust enrichment
19 under Mexican law and the facts pled. That's the
20 explanation of why, it was addressed by both experts
21 and the issue was joined between the two.

22 THE COURT: What confuses me is -- now I
23 understand because it is -- you didn't plead unjust
24 enrichment as a separate offense but you did plead
25 constructive trust, and one of the elements of
26 constructive trust is unjust enrichment, so then I

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2 went on to analyze what would be a cause of action
3 under Mexican law for unjust enrichment and concluded
4 that it doesn't lie.

5 So now how do you then come back here and
6 ask for the opportunity to plead unjust enrichment
7 when I've already decided that it doesn't lie? And if
8 I do allow it, I'm already committed in effect to
9 denying it. This is a waste of time.

10 MR. FRANKEL: Well, by all means we don't
11 want to waste your Honor's time. We put in our reply
12 if that's the way you looked at it, and we weren't
13 sure, that what we suggested as a remedy would be let
14 us amend, you issue an order that pertains by pleading
15 specifically on unjust enrichment and we'll move on.
16 But why are we here? I promise you we're not here to
17 waste your time.

18 THE COURT: I don't mean it that way. I'm
19 just giving you a factual determination. This isn't
20 about motives.

21 MR. FRANKEL: I'm not sure -- well, I know I
22 don't agree exactly as to how the issue came up. Let
23 me tell you how we think it came up. They filed a
24 motion to dismiss that was 38 pages long. It had
25 towards the end three claims that they wanted
26 dismissed: breach of fiduciary duty, constructive

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2 trust and conversion.

3 And the constructive trust argument, which
4 is on page 35 of their brief, makes two arguments. It
5 says nothing about unjust enrichment. It says a claim
6 for constructive trust requires as a predicate the
7 existence of a fiduciary relationship. That's the
8 first argument. And the second one is a claim for
9 constructive trust as an action obtained in equitable
10 remedy in Mexico, as a civil law jurisdiction, which
11 is not recognized. Those are the two arguments they
12 made on constructive trust, nothing about unjust
13 enrichment in their 38 page brief.

14 So then it's our turn to respond to their
15 constructive trust arguments and we address those
16 arguments. Yes, there is a fiduciary duty, Mexico
17 does have equitable issue, all of which you address in
18 your opinion.

19 In addition, though, if you remember our
20 main argument in our reply on Mexican law was Mexican
21 law and New York law are not that different in that
22 there's not really a conflict there. So what we did
23 was we said, look, there's an analogous claim to
24 constructive trust under Mexican law. They call it
25 unjust enrichment, it's in Article 1882, here are the
26 elements of that.

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2 We think it's very similar if you look at
3 what New York law is for constructive trust, it's very
4 similar. So we don't believe there's a conflict in
5 applying New York law, and all our expert did
6 basically was put in here's what the statute says and
7 he did make an argument or two as to what it meant but
8 he cited no authority. As you mention in your order,
9 neither side's expert came in and presented --

10 THE COURT: We had to do research.

11 MR. FRANKEL: Well, yeah, on this, I know
12 you had to do research. What I believe is the case
13 and why we're here is that there is authority, there's
14 Mexican Supreme Court authority that supports our
15 position. Why didn't we present it to you then?
16 Because we didn't know that you were going to be
17 ruling on whether we had stated a claim for unjust
18 enrichment since we hadn't even pled it and in their
19 motion they hadn't mentioned it.

20 We were arguing something else. We were
21 arguing the analogous --

22 THE COURT: Look, I understand that point.
23 However, my decision addresses the issue as if you had
24 pled a cause of action for unjust enrichment. So for
25 me to permit you now to amend the complaint for the
26 fifth time to assert a single cause of action -- an

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2 additional cause of action of unjust enrichment, what
3 am I going to do with my analysis that comes to the
4 conclusion that there is no such cause of action under
5 Mexican law?

6 MR. FRANKEL: You're going to say these
7 lawyers -- and certainly you can point at me -- put me
8 in a tremendous disadvantage. I had to sit up there
9 and figure out what Mexican law is without any
10 authorities.

11 Now I'm going to come to you and say now
12 that I realize that that is what we're talking about,
13 we're talking about dismissing 120 people's claims on
14 unjust enrichment, now that I know that's what we're
15 talking about, let me give you the Mexican Supreme
16 Court authority that supports our position, let
17 Mr. Graham give you whatever authority supports his
18 expert, so we can vet the issue and not have it hidden
19 in a subset of an argument where neither side
20 presented you any authority and you had to guess at
21 what Mexican law would be.

22 If we're -- it's -- I'm just guessing, as a
23 judge, trying to figure out what a foreign country's
24 law is, when it's in a different language, is a
25 tremendous task. It's hard enough when you're the
26 lawyer with the benefit of experts, but we have found

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2 Mexican Supreme Court authority and commentary that
3 Mexican lawyers say support the arguments we're making
4 and we just would like the opportunity to present them
5 to your Honor and see whether they matter to you or
6 not.

7 THE COURT: Well, number one, you're
8 couching your arguments. What you're really doing is
9 in effect making a motion to renew and reargue.
10 You're questioning my research, which is okay, and my
11 conclusion that Mexican law doesn't recognize unjust
12 enrichment. So the remedy isn't a motion to renew and
13 reargue and/or an appeal.

14 But I am denying your motion to amend and
15 submit a cause of action for unjust enrichment. But,
16 of course, you know that your breach of contract --

17 MR. FRANKEL: We do, your Honor -- and by a
18 stipulation, certain deadlines start to run from your
19 Honor's ruling. I'm not familiar enough with your
20 practice to know whether you want us to submit a
21 written order or whether your oral order on the record
22 is enough.

23 THE COURT: You'll get a gray sheet that
24 will reference the minutes. Now, you're on for a
25 pretrial. Step up.

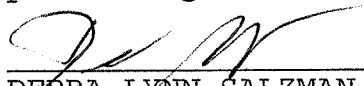
26 (Conference held off the record.)

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(Proceedings concluded.)

* * *

It is hereby certified that the foregoing is a true and accurate transcript of the proceedings.



DEBRA LYNN SALZMAN
OFFICIAL COURT REPORTER
SUPREME COURT-NEW YORK COUNTY

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