DOCKET NO. CV-11-6021869-S	:	SUPERIOR COURT
FIDELITY NATIONAL TITLE, INS. CO	:	JUDICIAL DISTRICT OF NEW HAVEN
V.	:	AT NEW HAVEN
HARLOW, ADAMS & FRIEDMAN, P.C.	:	JULY 25, 2016

MEMORANDUM OF DECISION

INTRODUCTION

This case concerns an equitable claim by the plaintiff, Fidelity National Title Insurance Company, against the defendant, Michael Calise. The procedural and factual history leading to this claim is complicated, but can be briefly described as follows. In 2006, the plaintiff provided title insurance in connection with a loan made by Fairfield County Bank (FCB) to the defendant. That loan was issued for the purpose of paying off the defendant's existing obligation to a third party, B&M Investments (B&M), for a mortgage held by B&M on the defendant's property. The loan was additionally intended to provide FCB its own first-priority mortgage on that same property. The loan proceeds were held in escrow by the defendant's attorneys, Harlow, Adams & Friedman, P.C. (Harlow Adams). When the defendant's mortgage obligation to B&M came due, however, the loan proceeds were no longer available to make the payment in full. In fulfillment of its duties to FCB as the title insurer on the loan, the plaintiff paid the balance due on the mortgage to B&M. After that payment was made, the plaintiff commenced this action.

In a one-count amended complaint, dated June 22, 2015, the plaintiff claims that its payment to B&M resulted in the unjust enrichment of the defendant to the detriment of the

plaintiff.[1] A court trial was held, beginning on March 29, 2016, and ending on March 30, 2016. At trial, the parties submitted evidence in support of their claims and the court heard testimony from the following witnesses: Stephen P. Wright, Esq., defendant's bankruptcy counsel at Harlow Adams; Michael P.A. Williams, Esq., closing attorney at Harlow Adams; George W. Adams, III, Esq., attorney at Harlow Adams; Matthew Mason, Esq., counsel to Fairfield County Bank; and Kenneth J. Aran, Senior Vice President of Fidelity National Title Group. Pursuant to court order, the parties additionally submitted posttrial briefs and proposed findings of fact and law on May 23, 2016.

FINDINGS OF FACT

Based on the record before it, the court finds the following facts by a preponderance of the evidence. The defendant owns property located at 215 Post Road West in Westport, Connecticut (the property). Prior to any involvement in this matter by the plaintiff, there was a mortgage on the property, held by B&M (B&M mortgage). The defendant defaulted on that mortgage, causing B&M to initiate foreclosure proceedings against the property. Before the foreclosure could be completed, the defendant filed for a Chapter 11 bankruptcy reorganization before the United States Bankruptcy Court for the District of Connecticut, Case No. 98-50649, causing the foreclosure proceedings to be stayed and eventually terminated.

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[1]The initial complaint named numerous additional defendants, including: Harlow Adams & Friedman, P.C., Stephen P. Wright, Michael P.A. Williams, George W. Adams, III, and James A. Nugent (the Harlow Adams defendants). The Harlow Adams defendants settled the claims against them and have since been withdrawn from this action, leaving Calise as the sole remaining defendant. As a result of the $225,000 settlement with those defendants, the plaintiff has reduced its claimed damages against Calise from $781, 211.20 to $556,211.20.

Stephen P. Wright, a bankruptcy attorney with Harlow Adams, served as counsel for the defendant in the bankruptcy proceedings. As part of the bankruptcy proceedings, the defendant sought to pay and discharge certain creditors, including B&M's $1.631 million mortgage on the property. In furtherance of those aims, the defendant made arrangements with FCB for a commercial loan in the amount of $2,500,000. Michael P.A. Williams, Esq., an attorney with Harlow Adams, served as counsel for the defendant in the loan transaction. The loan was ultimately approved and a commitment letter was issued and executed by the defendant on September 14, 2006. The commitment letter delineated the terms and conditions of the loan and the scope of the defendant's obligations, which included the following: it was intended and required that the defendant execute a mortgage in favor of FCB, which was to be recorded in first priority position upon the property; the defendant was obligated to pay and discharge the mortgage in favor of B&M and secure a release thereof; and the defendant was obligated to provide and/or secure a policy of title insurance in the amount of the loan in favor of Fairfield County Bank. The closing of the loan occurred on October 4, 2006. The closing statement, prepared by Williams, identified the intended payment to B&M as a disbursement.

Commensurate with the loan transaction, Williams, also acting in his capacity as a title agent of the plaintiff, issued a loan policy of title insurance in the amount of $2,500,000, under which FCB was the named insured. The title insurance ensured that a mortgage in favor of FCB would be recorded in first priority position upon the property. Pursuant to the general custom and practice of real estate transactions of this nature, the premium for the issuance of the title insurance

was paid by the defendant, but the defendant was not an intended insured on the policy and was not named as such.

Things did not go smoothly from there. On October 4, 2006, in order to secure the release of the B&M mortgage, Williams sent a check for $1.631 million to Attorney Thomas Kanasky, counsel to B&M. By correspondence dated October 18, Kanasky, acting on behalf of B&M, rejected and returned the defendant's tender of payment. On October 19, in further attempt to secure a release and discharge of the mortgage, Wright re-sent the payment to Kanasky, who, on October 24, again rejected and returned the tender. The defendant was made aware of it, and that in lieu of accepting payment, B&M intended to pursue efforts to secure title to the property.

As a result of B&M's actions, as of October 24, 2006, the defendant was unable to secure the discharge and a release of the B&M mortgage, and the mortgage in favor of FCB was not in first priority position. This failure created a defect in the title insurance policy issued by the plaintiff in favor of FCB. Regardless, neither the plaintiff nor FCB were notified of these circumstances. The $1.631 million portion of the loan was placed into various trust accounts held for the benefit of the defendant by George Adams, of Harlow Adams, as trustee.

This turn of events was not without consequences in the defendant's still-ongoing bankruptcy. Over the next three years, proceedings were held in the bankruptcy action to resolve the dispute as to whether B&M was obligated to accept the tender of $1.631 million in payment of the defendant's debt and, further, whether the rejection of the payment resulted in a forfeiture pursuant to the terms of the second amended plan of reorganization, which had been filed on behalf of the defendant. Ultimately, it was determined by the bankruptcy court that B&M was entitled to

receive and obligated to accept the $1.631 million tender in discharge and release of its mortgage on the property.[2]

Thereafter, on December 11, 2009, B&M demanded payment. No payment, however, was to be had. Prior to that demand, and based on Wright's advice, Harlow Adams reached the conclusion that B&M's rejection of tender resulted in a waiver of the defendant's obligations, such that the loan proceeds in trust inured to the defendant. This was decided despite the defendant's and Harlow Adams's knowledge that (1) $1.631 million of the FCB loan had been designated for the purpose of paying the B&M mortgage and securing FCB a first priority mortgage on the property, and (2) that the bankruptcy court, on August 18, 2006, had entered an order that confirmed the defendant's reorganization plan and ruled that B&M was a secured creditor under the plan. *In re Calise*, United States Bankruptcy Court, Docket No. 98-50649 (Bankr. D. Conn., November 4, 2008) (2008 WL 4829843). Nevertheless, acting on that conclusion, the loan proceeds of the trust accounts held for the benefit of the defendant were released to him during the period prior to B&M's demand. The defendant then utilized the loan proceeds to pay debts of creditors for which the defendant was obliged, including legal fees owed to Harlow Adams, renovation and construction costs for the property, and monthly mortgage expenses due to FCB, as well as to purchase other real estate.

On December 22, 2009, B&M was notified that its demand for payment was rejected, causing B&M to seek redress in bankruptcy court. In a decision dated June 18, 2010, it was

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[2]See *In re Calise*, United States Bankruptcy Court, Docket No. 98-50649 (Bankr. D. Conn., November 4, 2008) (2008 WL 4829843), aff'd, 354 Fed. App'x 510 (2d Cir. 2009).

adjudicated that the defendant was obligated to pay the sum of $1.631 million so as to discharge the B&M mortgage. *In re Calise*, United States Bankruptcy Court, Docket No. 98-50649 (Bankr. D. Conn., June 18, 2010) (2010 WL 2521074).

On August 26, 2010, FCB, having previously become aware that its mortgage was not in first priority position on the property, notified the plaintiff of a potential claim under the title insurance by reason of the failure of the defendant to discharge and secure a release of the B&M mortgage. This was the plaintiff's first notice that a mortgage in favor of FCB had not been recorded as required by the title insurance, and the plaintiff commenced investigation and administration of its insured's potential claim.

Meanwhile, the defendant and Harlow Adams negotiated an agreement to pay, discharge, and release the B&M mortgage, the terms of which were filed as a stipulation and order in the bankruptcy court. Pursuant to the terms thereof, the defendant was obligated to make a payment of $600,000 on the mortgage by January 21, 2011. The defendant made that payment, as well as a $25,000 payment by March 30, 2011, leaving a balance of $1,075,000 on the B&M mortgage. The balance was due on April 30, 2011. Time was of the essence with respect to this payment and the failure to make payment was defined as an act of default. In the event of default, B&M was entitled to a stipulated judgment by which a judgment of foreclosure would enter against the defendant in the amount of $4,362,744.11 and the defendant would lose title to the property.

Ultimately, the defendant was unable to pay the balance due on April 30, 2011. When the plaintiff received notice of this, the plaintiff determined that it was obligated, pursuant to the terms and conditions of FCB's title insurance, to make or contribute to the final balance due to B&M and to place FCB in first priority position on the property. Alternatively, in the event of default by the

defendant, the plaintiff would have been obligated to make a payment to FCB of $2.5 million, the full amount of the loan, and FCB would not have been able to acquire a first-priority mortgage on the property.

After further negotiation with the defendant and Harlow Adams, the plaintiff agreed to contribute $781,211.20 to the final payment due to B&M, leaving a balance of $300,000. The $300,000 balance was paid by and through counsel for the defendant, of which $150,000 was from a return of legal fees from Harlow Adams to the defendant and $150,000 was from a loan arranged by Attorney Adams through a family relative.

To facilitate contribution by the plaintiff, the defendant executed a limited agency agreement whereby he appointed the plaintiff as his agent for the purpose of making the payment to B&M. The $781,211.20 portion of the final payment was made by the plaintiff through a wire transfer to B&M's counsel. Upon receipt of the final payment, a release of the B&M mortgage was secured and recorded upon the land records for the Town of Westport. As a result of the final payment and release of the B&M mortgage, a mortgage in favor of FCB was put in first priority position upon the property. Moreover, the payment and release of the B&M mortgage discharged all obligations of the defendant to B&M and further relieved him of obligations under the stipulation and order entered into the bankruptcy proceedings. Finally, as a result of the plaintiff's payment and the release of the B&M mortgage, the defendant retained his ownership interest in the property.

DISCUSSION

The plaintiff's claim against the defendant sounds in unjust enrichment. In support of its claim, the plaintiff argues that its contribution towards the balance of the B&M mortgage, though

made out of obligation to FCB, its insured, served to confer a benefit upon the defendant by freeing him of his obligations to B&M and enabling him to retain title to the property. The plaintiff further contends that the defendant has unjustly not paid for the benefit received, and that the payment was made to the plaintiff's detriment. In opposition, the defendant argues that he did not receive or wrongfully retain any direct benefit from the plaintiff.

I

"The equitable remedy of unjust enrichment may be invoked when justice requires that a party be compensated for property or services rendered under a contract, and no [legal] remedy is available by an action on the contract. . . . As an equitable right, unjust enrichment is based on the principle that in a given situation, it is contrary to equity and good conscience for the defendant to retain a benefit [that] has come to him at the expense of the plaintiff. . . . All the facts of each case must be examined to determine whether the circumstances render it just or unjust, equitable or inequitable, conscionable or unconscionable, to apply the doctrine. . . . Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Citation omitted; internal quotation marks omitted.) *Nation Electrical Contracting, LLC* v. *St. Dimitrie Romanian Orthodox Church*, 144 Conn. App. 808, 815, 74 A.3d 474 (2013).

"A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . It is not necessary, in order to create an obligation to make restitution or to compensate, that the party unjustly enriched should have

been guilty of any tortious or fraudulent act. The question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled?" (Citations omitted.) *Connecticut National Bank* v. *Chapman*, 153 Conn. 393, 399, 216 A.2d 814 (1966).

The factual and legal issues underlying each element of unjust enrichment are closely linked and, in large part, overlapping. First, with respect to the plaintiff's payment to B&M, the alleged benefit to the defendant, and the means by which the defendant acquired it, resembles the situation before the Supreme Court in *Connecticut National Bank* v. *Chapman*, supra, 153 Conn 398. In that case, a mistake by the plaintiff-bank in processing a mortgage led to the defendants, the Nielsens, acquiring title to property without being subject to what the bank had intended to be a first priority mortgage on the property.[3] Id., 396-97.

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[3]The details of how this came to occur are complicated but are worth describing. In 1958, the Nielsens, owners of certain real property in Norwalk, mortgaged that property to the bank to secure a demand note for $19,000 (mortgage 1). *Connecticut National Bank* v. *Chapman*, supra, 153 Conn 395. Thereafter in 1960, the Nielsens sold the premises to the Chapmans, who assumed and agreed to pay mortgage 1, and who gave the Nielsens a second mortgage for $10,500 (Nielsen mortgage), specifically subject to mortgage 1. Id. The Chapmans became delinquent in the payment of property taxes and defaulted on payments of mortgage 1. Id., 396. To meet their debts, the Chapmans applied to the bank for an additional loan of $2000, to be secured by a mortgage in the amount of $19,500 (mortgage 2). Id. The bank requested a local attorney to search the title to the premises, draw and record all papers legally required to secure a $19,500 first-priority mortgage note on the premises and to arrange the closing. Id. The attorney closed mortgage 2 and delivered a release of mortgage 1. The release of mortgage 1 and the recording of mortgage 2 took place on the same day. Id. Although the bank had knowledge of the existence of the Nielsen mortgage, the closing attorney did not, and so the Nielsen mortgage remained in place. As a result, mortgage 2 was not a first-priority mortgage, as had been intended by the bank.

In 1962, the Chapmans went into default on mortgage 2, and the bank commenced a foreclosure action. *Connecticut National Bank* v. *Chapman*, supra, 153 Conn 396. The bank then became aware of the Nielsen mortgage, which it had negligently overlooked when releasing mortgage 1. Id. Thus, the bank amended the foreclose action to include the Nielsens and sought to reinstate and foreclose mortgage 1. Id. The Nielsens, in turn, filed a counterclaim and the Nielsen mortgage was foreclosed in their favor. Id., 397. As a result, title to the property vested in the Nielsens, "subject, however, to being divested by any further order or decree of this Court as might finally settle and determine, in favor of the [bank], the issues in this action between the

In the ensuing legal action, judgment was eventually made in favor of the bank's priority, and the Nielsens appealed. Our Supreme Court affirmed, noting that the bank's error that led to the Nielsen's taking title to the property, though negligent, was an innocent mistake. *Connecticut National Bank* v. *Chapman*, supra, 153 Conn 398. Critically, the court recognized that the Nielsen's taking of title to the property constituted a benefit that came at the expense of the bank, explaining that "[t]o deny relief to the [bank] would result in the unjust enrichment of the Nielsens through an unexpected and undeserved windfall." Id., 399. Although the Nielsens, in acquiring title to the property, were not guilty of any tortious act, they nonetheless had obtained a benefit at the expense of the bank. Thus, in order to prevent their unjust enrichment at the expense of the bank, the Nielsen's title was made subject to a supplemental judgment in favor of the bank.

Similarly, the defendant in the instant matter, due to the actions of the plaintiff, benefited because his obligations under the B&M mortgage were discharged and he was permitted to retain title to the property. Moreover, the equities weigh much more strongly in favor of the instant plaintiff than in *Connecticut National Bank* v. *Chapman*, where, despite the mistake of the bank in processing the mortgages, the Nielsens were still found to be unjustly enriched by virtue of receiving title to which they were not entitled. Unlike in that case, here there is no evidence of negligence or mistake on the part of the plaintiff. To the contrary, the plaintiff acted in diligent observance of all of its obligations. It was established at trial that the plaintiff's title insurance policy insured FCB's interest in acquiring a first priority mortgage on the property as the lender, not the defendant's interest in discharging the B&M mortgage as the borrower. The FCB loan was

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[bank] and the [Nielsens] in respect to the priorities of the mortgages held by each of said parties on the mortgaged premises." Id.

insured by a title insurance policy, the premium for which was paid by the defendant. Both the loan and the title insurance policy provided that FCB was to be granted a first priority mortgage on the property once the B&M mortgage was released, leaving the defendant with title to the property. At all times, the defendant bore the obligation of paying the B&M mortgage.

In the event that the B&M mortgage was not satisfied, the defendant would have suffered severe consequences. Pursuant to the bankruptcy plan, the amount owed by the defendant to B&M would have ballooned from $1.631 million to over $4 million. As the defendant was unable to meet his obligation for even the lesser amount, it was established that a default on the mortgage would have been inevitable. Critically, upon default the defendant would have lost title to the property.

Instead, as a result of the plaintiff's payment, the B&M mortgage was satisfied and the defendant kept title to the property. Thus, the defendant's claim that he was not benefited by the plaintiff's payment is not supported by the record. It may be that, on balance, the defendant, upon the recording of the FCB mortgage on his property, did not find himself in a substantially improved position from where he stood prior to the satisfaction of the B&M mortgage. To leave it at that, however, ignores the plaintiff's indispensable efforts towards preserving the status quo. But for the plaintiff's payment to B&M, the defendant would have been forced into a substantially worse financial position and would not have had title to the property. The defendant was unquestionably benefited by the plaintiff's payment to B&M.

The court finds further support for this conclusion based on similar equities at issue in claims for equitable subrogation.[4] In those cases, our Supreme Court has been adamant that payment of an insurance policy that, in turn, resolves an individual's debt, does not absolve that individual's wrongdoing. "We see no logical reason to permit a tortfeasor to be unjustly enriched by virtue of having its debt paid by the insurance company of a party who had the foresight to obtain insurance coverage, and thus to escape all liability for its wrongdoing, simply because the insurance company was not permitted to participate in a suit against the tortfeasor in order to recover the money that it had paid to its insured but which was properly payable by the tortfeasor." *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, 236 Conn. 362, 372-73, 672 A.2d 939 (1996); see also *Wasko* v. *Manella*, 269 Conn. 527, 549, 849 A.2d 777 (2004) (tortfeasor who burned down the home of another benefitted from the insurance company's payment of his debt and was not permitted to be unjustly enriched merely because the homeowner had the foresight to purchase insurance). In the instant matter, while the existence of the title insurance policy meant that the defendant's debt would be paid and his interest in the property preserved even despite his own

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[4]The court is careful to note that this is not a subrogation claim. "[S]ubrogation allows a party who has paid a debt to step into the shoes of another . . . to assume his or her legal rights against a third party to prevent that party's unjust enrichment." (Internal quotation marks omitted.) *Fireman's Fund Ins. Co.* v. *TD Banknorth Ins. Agency, Inc.*, 309 Conn. 449, 455, 72 A.3d 36 (2013). In seeking to recover damages from the defendant, the plaintiff does not attempt to assert any of the rights or obligations of either its insured or B&M against the defendant. Rather, the plaintiff is asserting its own rights, based on the payment made by the plaintiff to B&M for the benefit of the defendant. Nevertheless, the principles underlying subrogation, which is a type of remedy available for an unjust enrichment claim, inform the equities here.

misfeasance, that does not mean that the defendant is entitled to be enriched by virtue of the plaintiff paying the defendant's debt out of obligation to the plaintiff's insured.[5]

Of course, the plaintiff must also prove that the defendant's retention of that benefit was unjust. In opposition, the defendant argues that he was not unjustly enriched by this payment because he did not solicit payment of the B&M mortgage on his behalf. "As a general rule, for the benefit to be unjust, the defendant must have solicited it. This doctrine [of unjust enrichment] is inapplicable where the payment has been made 'officiously,' i.e., where the circumstances do not justify the interference with another's affairs resulting from conferring a benefit upon him. . . . [W]here a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. . . .

"Notwithstanding the general rule, [i]f the plaintiff confers an unsolicited benefit upon the defendant who is not initially required to make restitution, it is possible that the plaintiff could still obtain restitution if the defendant meaningfully 'accepts' the benefit. . . . For example, when an unsolicited noncash benefit is subsequently realized as cash, it becomes analogous to a mistaken cash payment and amenable to restitution because the defendant is not being forced to buy a benefit he may not want but on the contrary is asked to return it." (Citations omitted; internal quotation

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[5]Related to this point is the defendant's alternative argument that he was entitled to receive that benefit because he had paid the premium for the title insurance policy. Indeed, to be unjustly enriched, the benefit received must be one for which the defendant unjustly did not pay. It is important, however, to identify what the purpose of the defendant's premium payment was, and what benefit the defendant could expect in exchange for that payment. To be sure, it was not that the defendant would be entitled to coverage by the title insurance policy. Rather, the benefit purchased was that the defendant could secure the loan from FCB. That was the only benefit to which the defendant was entitled, and it should have been the only benefit received. So when the plaintiff, out of obligation to its insured, FCB, made payment to avert default and satisfy the B&M mortgage, the defendant, despite having already received the benefit of the loan, was receiving a second benefit—one for which he had not paid and to which he was not entitled.

marks omitted.) *Schirmer* v. *Souza*, 126 Conn. App. 759, 771, 12 A.3d 1048 (2011). Thus, when a defendant, without soliciting another, receives money by mistake and spends it for his or her own purposes, the defendant has benefited. "Where . . . the recipient of money simply spends it by paying debts unrelated to the transactions in which he receives the money, or by using it for living expenses, or by purchasing consumer goods or property, it is difficult to deny that he has received a benefit in a very real sense . . . ."[6] Dobbs, Remedies (1973) § 11.9, p. 769-70.

In light of the web of obligations owed among the various parties to the mortgage, loan, and title insurance transactions, the defendant may feel that the benefit was forced upon him. In that case, while the benefit may not have been as a result of the defendant's solicitation, per se, it was undoubtedly a foreseeable consequence of the defendant's own actions. Under the doctrine of unjust enrichment, it makes no difference that the defendant who receives an unsolicited benefit did not intend to receive the benefit, but instead recognizes that a benefit wrongfully received should still be returned to the party that provided the benefit.

Finally, the record establishes that the defendant's unjust enrichment was to the plaintiff's detriment. Generally, a party that is compelled to make a payment in order to protect its own interests does not do so officiously. *Wesson, Inc.* v. *Hychko*, 205 Conn. 51, 59, 529 A.2d 714 (1987) (plaintiff paying tax obligation of another did not act officiously, when plaintiff was compelled to do so in order to protect its own interests). As discussed above, the plaintiff made

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[6]"Probably most courts have had in mind the idea that expenditure of money received by mistake often does improve the recipient's balance sheet. If he pays off debts, he no longer has the cash, but he has reduced liabilities so that his net worth is greater than it would be without the mistaken overpayment. If he buys property, he is enriched by the value of the property, even though he no longer has the money. In such a case it is easy to feel that the money mistakenly given to him still exists, but in a new form." Dobbs, Remedies (1973) § 11.9, p. 770.

a payment of $781,211.20 solely out of its obligation to FCB on the title insurance policy. As a result of this payment to B&M, the defect in title was cured, enabling FCB to acquire a first-priority mortgage on the property and the defendant to retain title to the property. In paying a substantial debt that should have been borne by the defendant, the plaintiff was injured and received no benefit of its own in exchange. See, e.g., *Restaurant Associates, Inc.* v. *Marsh*, 38 Conn. Supp. 460, 463-64, 451 A.2d 289 (1982) (liquor wholesalers were unjustly enriched by payments they received from restaurant buyers who had been ordered by state liquor commission to satisfy outstanding debts of buyer's predecessor).

Therefore, based on the foregoing, the court finds that the plaintiff has proven, by a preponderance of the evidence, that the defendant was unjustly enriched by the plaintiff's payment of the B&M mortgage.

II

In opposition to the plaintiff's claim, the defendant has raised multiple defenses, claiming that (1) the plaintiff failed to adequately mitigate its damages; (2) the payment made by the plaintiff was for the sole benefit of its insured and not that of the defendant; and (3) his actions with regards to the FCB loan proceeds were taken based on the advice of counsel and so were not unjust. The court will discuss each defense in turn.

A

First, with respect to the defendant's claim that the plaintiff failed to mitigate its damages: "We have often said in the contracts and torts contexts that the party receiving a damage award has a duty to make reasonable efforts to mitigate damages. . . . What constitutes a reasonable effort

under the circumstances of a particular case is a question of fact for the trier. . . . Furthermore, we have concluded that the breaching party bears the burden of proving that the nonbreaching party has failed to mitigate damages. . . . The defendant thus bears the burden of proving that the plaintiff failed to make reasonable efforts to mitigate the amount of damages. . . . To claim successfully that the plaintiff failed to mitigate damages, the defendant must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages which could have been avoided can be measured with reasonable certainty. . . . Nevertheless, [t]he duty to mitigate damages does not require a party to sacrifice a substantial right of his own in order to minimize a loss." (Citations omitted; internal quotation marks omitted.) *Webster Bank, N.A.* v. *GFI Groton, LLC*, 157 Conn. App. 409, 424, 116 A.3d 376 (2015).

In support of this defense, the defendant argues that the plaintiff failed to fairly or reasonably mitigate its supposed damages by allowing Harlow Adams to settle for less than a third of the total damages, despite the fact that the majority of the original defendants were associated with Harlow Adams and the majority of the original claims were directed against Harlow Adams and its members. The existence of the Harlow Adams settlement and withdrawal of the associated claims against Harlow Adams is the only evidence offered by the defendant in support of its claim.

Although a plaintiff may have colorable claims against other defendants, the plaintiff's decision not to pursue those claims, without more, does not support a finding that the plaintiff failed to mitigate its damages. For instance, in *First Federal Savings & Loan Assn. of Rochester* v. *Charter Appraisal Co.*, 247 Conn. 597, 615, 724 A.2d 497 (1999), the defendant-appraiser

claimed that a mortgagee-bank, which had suffered an injury caused by the negligent appraisal of real property, failed to adequately mitigate its damages by choosing not to pursue deficiency judgments against the borrowers. The court rejected the appraiser's argument, holding that the appraiser failed to produce evidence in support of that claim and, additionally, that the circumstances of the case did not require the bank to pursue a deficiency judgment. Id. Likewise, the plaintiff's decision to settle and withdraw the claims against the Harlow Adams defendants, without more, is not sufficient evidence to meet the defendant's burden of proving that the plaintiff failed to mitigate its damages.

Furthermore, the defendant's assertion that the plaintiff failed to mitigate its damages is belied by the record, which reflects diligent efforts by the plaintiff to reduce its exposure on the title insurance policy before making the payment of $781,211.20. "The duty to mitigate damages does not require a party to sacrifice a substantial right of his own in order to minimize a loss." *Camp* v. *Cohn*, 151 Conn. 623, 627, 201 A.2d 187 (1964). Had the plaintiff permitted the defendant to default on the B&M mortgage, the total due B&M would have skyrocketed—from $1.631 million to more than $4 million—and FCB would have been unable to secure the first priority mortgage on the property. In that scenario, the plaintiff could have been liable for $2.5 million, the full amount of the policy with FCB. In light of those potential consequences, the plaintiff's decision to make the payment had the double effect of being consistent with the plaintiff's legal obligations to its insured and also to limiting the plaintiff's possible damages under the title insurance policy by almost $1 million. Moreover, even once the plaintiff determined that the $1.631 million balance was due, it took steps to further reduce the amount it paid B&M by negotiating substantial

contributions from the defendant and Harlow Adams towards the total balance. As a result of its efforts, the plaintiff reduced its payment to B&M, and its damages, to $781,211.20.

Therefore, because the defendant has not established as a matter of fact or law that the plaintiff failed to reasonably mitigate its damages, this special defense must fail.

B

Second, the defendant argues that the payment made by the plaintiff was for the sole benefit of its insured and not that of the defendant. This issue has been discussed above, at length, and the court's earlier conclusions apply with equal force here. The defendant has failed to prove that he was not unjustly enriched by the plaintiff's payment to B&M and the court rejects the defendant's argument to the contrary.

C

Finally, the defendant maintains that his actions with regards to the FCB loan proceeds were taken based on the advice of counsel and so were not unjust. The court recognizes that the Harlow Adams attorneys, though originally named as defendants to this action, have since settled and been withdrawn as parties. It is improper to draw any inference or accord any weight to the existence of that settlement. The court notes, however, that the decisions of the Harlow Adams attorneys with respect to the loan proceeds held in escrow enabled the defendant to take possession of those proceeds and spend them for other purposes. Additionally, the defendant did so while being advised by the Harlow Adams attorneys that the loan proceeds, previously marked for the purpose of paying the B&M mortgage and securing a first-priority mortgage in favor of FCB, belonged only to him and could be spent for purposes besides the payment and satisfaction of the B&M mortgage.

Ample testimony was presented regarding the Harlow Adams attorney's advice to the defendant and the defendant's actions in reliance thereon. The effect of that advice on the defendant is relevant to the equities concerning unjust enrichment. Where, as here, funds are held in escrow, an attorney "should hold property of others with the care required of a professional fiduciary." Rule of Professional Conduct 1.15, commentary. The attorney's additional duties are further defined by the escrow agreement. *Oge* v. *People's Bank*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV-94-310165-S (June 2, 1994, *Fuller, J.*) ("The escrow holder is in the unique position of being an agent for the parties to the written contract, his powers are limited to those stated in the escrow agreement, and he cannot perform any acts not authorized by the escrow agreement.")

The escrowed loan proceeds could only be delivered to the defendant if Harlow Adams approved the disbursements. The Harlow Adams attorneys' decision to permit disbursements to the defendant at his request was based on the theory, originated by Wright and shared by Adams, that B&M's rejection of the tender was a waiver of B&M's right to payment on the mortgage. At the time B&M rejected the tender, it was appealing its status as a secured creditor under the bankruptcy plan. *In re Calise*, supra, Docket No. 98-50649 (Bankr. D. Conn., November 4, 2008). Ultimately, the Second Circuit rejected B&M's appeal, explaining that the settlement agreement entered into back in 2006, which designated B&M as a secured creditor, represented a contract between the parties and could not be undone. *In re Calise*, 354 Fed. App'x. 510, 513 (2d Cir. 2009). Thus, despite B&M's appeal of the plan, the bankruptcy court did not permit the terms of

that agreement to be changed. As a matter of law, B&M remained a secured creditor and was entitled to payments totaling $1.631 million towards the mortgage on the defendant's property. Id.

Thereafter, on December 11, 2009, B&M demanded payment of the $1.631 million, to which the defendant objected by letter dated December 22, 2009, claiming that B&M had waived its right to receive the payment under the bankruptcy plan. *In re Calise*, supra, Docket No. 98-50649 (Bankr. D. Conn., June 18, 2010). The bankruptcy court rejected that theory because the bankruptcy plan, while it was being appealed by B&M, was not final. Id. Therefore, B&M's rejection of the tender did not constitute a waiver of its right to payment as a secured creditor. Id. In turn, the court granted B&M's motion to compel and ordered the defendant to pay $1.631 million in accordance with the bankruptcy plan. Id. The defendant did not appeal the bankruptcy court's order. Indeed, Wright conceded at trial that his earlier opinion—that B&M waived its right to receive payment—was incorrect.

Nevertheless, during the period that the bankruptcy plan and B&M's rights and obligations as a secured creditor were still unconfirmed, the Harlow Adams attorneys proceeded to disburse the escrowed funds to the defendant upon his request. The defendant owed attorneys fees to Harlow Adams for its representation of the defendant in the bankruptcy action and for its securing of the FCB loan and title insurance. The defendant also owed money to numerous other third parties. Acting on the advice of his attorneys, the defendant regularly requested disbursements of the escrowed loan proceeds, which he used to pay Harlow Adams and those third parties. As a result of the defendant's conduct, the loan proceeds were exhausted prior to the deadline for tendering payment on the B&M mortgage, leading to the instant action.

The advice of the Harlow Adams attorneys was based on a discredited legal theory. Nevertheless, it was not unreasonable for the defendant to rely upon the legal advice of his attorneys. The court finds that the defendant's reliance on the advice of counsel is an appropriate equitable consideration in the determination of the defendant's liability to the plaintiff for damages. To be clear, this finding is based on the motivations of the defendant in requesting and spending the escrowed loan proceeds, and the degree to which the defendant was unjustly enriched by the plaintiff's payment to B&M. This reduction is not based on the propriety of the Harlow Adams attorney's actions or advice. Instead it reflects the fact, established at trial through the testimony of the Harlow Adams attorneys and the defendant, that the defendant's reliance on the advice was not unreasonable.

This fact does not alter the court's conclusion that the defendant was unjustly enriched. However, the court finds that the defendant's reliance on the advice of counsel was reasonable and therefore contributed to the plaintiff's damages. As such, the defendant's liability for those damages should therefore be reduced. Accordingly, the court, in exercise of its equitable powers, will reduce the defendant's liability to reflect his misplaced reliance on the advice of his attorneys.

III

Having demonstrated that the defendant was unjustly enriched, the plaintiff additionally requests an award of prejudgment interest on its proven damages pursuant to General Statutes § 37-3a (a).[7] "[T]he decision of whether to grant interest under § 37-3a is primarily an equitable

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[7]General Statutes § 37-3a (a) provides, in relevant part: "[I]nterest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . including actions to recover

determination and a matter lying within the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Sosin* v. *Sosin*, 300 Conn. 205, 227, 14 A.3d 307 (2011). "Because § 37-3a provides that interest 'may be recovered' . . . it is clear that the statute does not require an award of interest in every case in which money has been detained after it has become payable. Rather, an award of interest is discretionary." (Emphasis omitted.) Id., 228.

"It is well settled . . . that [t]he court's determination [as to whether interest should be awarded under § 37-3a] should be made in view of the demands of justice rather than through the application of any arbitrary rule. . . . Whether interest may be awarded depends on whether the money involved is payable . . . and whether the detention of the money is or is not wrongful under the circumstances." (Internal quotation marks omitted.) *Sosin* v. *Sosin*, supra, 300 Conn. 229. "Although the trial court must determine that the liable party's detention of money was wrongful in order to award interest pursuant to § 37-3a, neither this court nor the Appellate Court has held, for purposes of the statute, that the detention of money cannot be wrongful if the liable party had a good faith basis for nonpayment. Indeed, we have held to the contrary." Id. This is, "consistent with the primary purpose of § 37-3a, which is not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the use of their money." Id., 230. "[W]hen the money is not within the control of the party disputing the debt

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money loaned at a greater rate, as damages for the detention of money after it becomes payable. . . ."

and that party has not benefited from possession of the money, an award of interest pursuant to § 37-3a is beyond the trial court's discretion." Id., 235.

The plaintiff's total damages, $781,211.20, are easily calculable, and have been since the plaintiff made payment to B&M. The proportion of that loss owed by the defendant, however, was not clear at that time. Indeed, when the action commenced, there were numerous codefendants against whom the plaintiff sought to impose liability. Only once those other parties settled did the plaintiff determine the amount it would seek from the defendant: $556,211.20. This is the amount on which the plaintiff requests that the court award prejudgment interest.

The plaintiffs request that interest be calculated beginning on May 2, 2011, the date that the $781,211.20 payment was made to B&M. "To award § 37-3a interest, two components must be present. First, the claim to which the prejudgment interest attaches must be a claim for a liquidated sum of money wrongfully withheld and, second, the trier of fact must find, in its discretion, that equitable considerations warrant the payment of interest." (Internal quotation marks omitted.) *Whitney* v. *J.M. Scott Associates*, 164 Conn. App. 420, 438, --- A.3d --- (2016) (declining to award prejudgment interest where damages were uncertain at time of breach and defendants could not know amount owed until court determined damages).

The first element of the test requires that the $556,211.20 sought by the plaintiff must be a liquidated sum. "When a debtor knows precisely how much he is to pay and to whom he is to pay it, his debt is a liquidated one. . . . An amount claimed to be due is a liquidated sum when it is susceptible of being made certain in amount by mathematical calculations from factors which are or ought to be in the possession or knowledge of the party to be charged." (Internal quotation

marks omitted.) *Forster* v. *Gianopolous*, 105 Conn. App. 702, 707, 939 A.2d 1242 (2008). The plaintiff has not produced any evidence that, as of May 2, 2011, the defendant knew that he owed the precise sum of $556,211.20. Nor is there evidence that the factors underlying that total were within the knowledge of the defendant at that time. Indeed, they could not have been, because the sum of $556,211.20 was determined much later, and only after the plaintiff negotiated a $225,000 settlement with original codefendants—negotiations in which the defendant was not involved. Therefore, the plaintiff's damages are not a liquidated sum. In turn, prejudgment interest cannot attach to the plaintiff's damages, and the plaintiff's request for interest pursuant to § 37-3a is denied.

CONCLUSION

Based on the foregoing, the court finds that the plaintiff has proven, by a preponderance of the evidence, (1) that the defendant was benefitted by the plaintiff's payment to B&M; (2) that the defendant unjustly did not pay the plaintiff for that benefit, and (3) that the failure of payment was to the plaintiff's detriment.

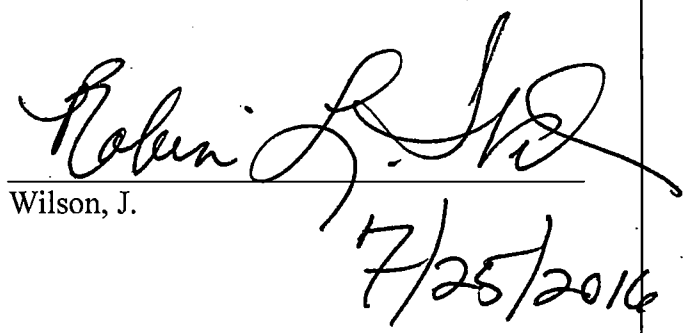
The court additionally finds that the defendant has not proven that the plaintiff failed to adequately mitigate its damages or that the payment made by the plaintiff was for the sole benefit of its insured and not that of the defendant.

The defendant's third defense, that his actions with regards to the FCB loan proceeds were taken based on the advice of counsel is persuasive. Although the defendant's reliance on the mistaken advice of counsel does not change the court's finding of unjust enrichment, the court

concludes that it is a proper equitable consideration weighing on the amount of damages owed by the defendant. Therefore, the court will reduce the claimed damages owed by the defendant.

The defendant, having been unjustly enriched, is liable to the plaintiff for its damages. Based on its weighing of the equities, the court will reduce the plaintiff's damages of $556,211.20 down to a total of $381,211.20.

The plaintiff's request for prejudgment interest pursuant to General Statutes § 37-3a is denied. Accordingly, judgment shall enter in favor of the plaintiff, National Title Insurance Company, against the defendant, Michael Calise in the total amount of $381,211.20 plus taxable costs. It is so ordered.



Wilson, J.

7/25/2016