

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, FIRST DEPARTMENT**

Eighteen Holding Corp. v. Drizin

268 A.D.2d 371, 701 N.Y.S.2d 427 (1st Dep't 2000) · Decided January 25, 2000

OPINION

PER CURIAM.

—Judgment, Supreme Court, New York County (Barry Cozier, J.), entered May 4, 1999, which, upon a prior order of the same court and Justice, granting plaintiff's motion for summary judgment with respect to its causes for money had and received, unjust enrichment and conversion, awarded plaintiff the sum of \$264,473.92, plus costs and disbursements and interest at the statutory rate of nine percent, unanimously affirmed, with costs.

The parties formed a partnership for the purpose of acquiring certain mortgages and, by the terms of their partnership agreement, each partner was to receive a share of the proceeds from the disposition of the mortgages proportionate to the partner's interest in the partnership. Defendants, in opposing plaintiff's motion for summary judgment, failed to adduce proof in evidentiary form sufficient to raise an issue of fact with respect to their contention, plainly at odds with the terms of the partnership agreement, that plaintiff, a partner, was entitled only to reimbursement of its contribution to the purchase of the mortgages.

Defendants' submissions amounted to no more than unsubstantiated allegations and, as such, failed to warrant denial of plaintiff's summary judgment motion (see, *Zuckerman v City of New York*, 49 NY2d 557). The award of pre-judgment interest pursuant to CPLR 5001 at the statutory rate of nine percent was proper. This was an action at law, not one in which an accounting of the partnership was required; the proceeds of a discrete transaction were held in one account and a specified share of the funds was owed plaintiff (see, *Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 115, quoting *Kriegsman v Kraus, Ostreicher & Co.*, 126 AD2d 489, 490).

Moreover, even if plaintiff's action had been equitable, the IAS Court's award of prejudgment interest would nonetheless have been proper in light of the circumstance that defendants wrongly withheld plaintiff's money (see, *Aurnou v Greenspan*, 161 AD2d 438, 439-440, amended on other grounds 164 AD2d 794). Concur—Sullivan, J. P., Tom, Mazzaelli, Wallach and Rubin, JJ.