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To be Argued by:
LESLIE D. CORWIN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2022-01026

JOHN GOLOBE,

Plaintiff-Respondent,

– against –

IRA ALTCHEK, as Trustee of the Emil Krause Revocable Trust,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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QUESTIONS PRESENTED

1. Can a party satisfy the hostility and open and notorious elements of adverse possession such that he acquires exclusive title and possession of property when he held only a one-half interest in the property as a co-tenant in common and was unaware for more than twenty years that he was not in exclusive possession of the property because of his own failure to conduct any reasonable investigation when he inherited his one-half interest and, as a result, he a) misrepresented to the Surrogate's Court that he was the only distributee of his Aunt's Estate, which included the property, b) concealed from his co-tenants in common for more than twenty years their one-half interest in the property as co-tenants in common, and c) during that more than twenty year time period never attempted to oust, exclude, or deny the rights of his co-tenants in common?

The lower court answered in the affirmative.

2. Has a party committed fraud when he knows he does not know whether he is the sole heir to his Aunt's Estate but is reckless in his failure to conduct any legitimate investigation to find out, and, as a result, represents to the Surrogate's Court that he is the sole heir and for more than twenty years conceals from his Uncle and his heirs/assigns, who, a reasonable investigation revealed, are also heirs to a one-half interest in the Estate, which includes a valuable piece of real property?

The lower court did not address this question.

3. Is it a breach of fiduciary duty to fraudulently conceal from a succession of co-tenants in common their one-half interest in a piece of real property, fail to account to them for that one-half interest for more than twenty years, and then bring an action to obtain sole ownership of the property by adverse possession and, thereby, deprive them of their one-half interest as a co-tenant(s) in common for your own personal benefit?

The lower court did not address this question.

PRELIMINARY STATEMENT

The Trial Court's Order dated February 28, 2022 (R-6) (the "Order"), determining that the Emil Krause Revocable Trust (the "Trust") is no longer a co-tenant in common with a one-half interest in the real property located at 265 West 30th Street, New York, New York, designated as Lot 5, Block 780 on the tax map of New York County (the "Premises) because the Plaintiff-Appellant John Golobe ("Golobe" or "Plaintiff") acquired exclusive ownership of the Premises by adverse possession should be reversed. This Court should declare the Trust a co-tenant in common of the Premises with a one-half interest therein, and remand Altchek's Counterclaims for fraud and breach of fiduciary duty for trial.

Plaintiff-Appellee did not (and cannot) prove by clear and convincing evidence the requisite hostility and open and notorious elements of adverse possession. Specifically, it is impossible for Plaintiff to prove that his possession of the Premises has been adverse to the interest of the Trust[1] and its predecessors in interest for the twenty (20) year statutory period for adverse possession in a co-tenancy because it is undisputed that he has known of the co-tenancy for less than five years.[2] Contrary to the holdings of the Trial Court, hostility cannot be inferred

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[1] The Trust's interest is represented in this action by Defendant-Appellant Ira Altchek ("Altchek" or "Defendant-Appellant), in his capacity as Successor Trustee of the Trust.

[2] It is also worth noting that this case is *sui generis* under New York law because it is conceded that both co-tenants in common were unaware of their shared interest in the Premises from 1992 until 2018, at the earliest, which makes this case unique and distinguishable. There is no legal

and notice to a co-tenant cannot be presumed. Not one of the New York cases cited by the Trial Court addresses a situation where, as here, both co-tenants were unaware of their shared interest in real property for the statutory period.

Moreover, the result reached by the Trial Court below, which ignored a draft Settlement Agreement proposed by Plaintiff's counsel specifically acknowledging Plaintiff and Altchek as co-tenants of the Premises, and endorsed a) Plaintiff's fraudulent acquisition of exclusive possession of the Premises, and b) Plaintiff's fraudulent concealment of the Trust's (and its predecessors in interest) one-half interest in the Premises as a co-tenant in common and withholding of its profits from the Premises for nearly twenty-five (25) years, should not be affirmed. The Trial Court has created a precedent which could permit future co-heirs to swindle estranged family members out of their interests in real property. All an heir would have to do is bury his/her head in the sand and neglect to do any reasonable investigation of potential co-heirs during the statutory period for adverse possession so no joint interest is discovered. Such an inequitable result in interpreting an "unclear statute" should not be sanctioned by this Court.

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precedent under New York law of which we are aware in which both co-tenants were unaware of their shared interest in real property for the statutory period, and one co-tenant was then awarded the entire property by adverse possession.

NATURE OF THE CASE AND RELEVANT FACTS

Plaintiff's Aunt Dorothy Golobe ("Dorothy") died intestate on February 24, 1992. (R-50, ¶ 4; R-67) Dorothy was survived by her two brothers, Yale Golobe ("Yale") and Zangwill Golobe ("Zangwill"), who became co-distributees of her entire Estate. (R-50, ¶ 4; R-65.) Dorothy's Estate included the Premises. (R-50, ¶¶ 2-3.) Accordingly, Yale and Zangwill each inherited a one-half interest in the Premises as co-tenants in common. (R-56, ¶ 36, R-65.)

Nevertheless, Plaintiff, Zangwill's son, who petitioned the Surrogate's Court of the County of New York to become the Administrator of his Aunt Dorothy's Estate, represented to the Surrogate's Court on several occasions that his father was Dorothy's sole distributee. (R-51, ¶¶ 6-7; R-54, ¶ 26; R-85 – R-88; R-96.) Plaintiff made this representation despite knowing that he did not actually know whether his Uncle Yale had survived his Aunt Dorothy, and without doing any reasonable investigation into Yale's whereabouts. (R-53, ¶¶ 19-20; R-108, pp. 31:9 – 31:12.) Indeed, Plaintiff admittedly based his conjecture on a) the fact that Yale was older than Dorothy, and b) the testimony of his father Zangwill's long-time friend, Harold Kozupsky ("Kozupsky"), that Yale died six or seven years before Dorothy. (R-53, ¶ 19; R-54, ¶¶ 22- 23; R-71, p. 4:11-12; R-89 – R-90; R-108, pp. 30:6 – 31:8.) Based on Plaintiff's and Kozupsky's misrepresentations, the

Surrogate's Court determined that Zangwill was Dorothy's sole distributee. (R-54, ¶ 24; R-68 – R-72.)

On September 30, 1992, Plaintiff acquired Zangwill's one-half interest in the Premises as a co-tenant in common when Zangwill renounced his interest in Dorothy's Estate. (R-54, ¶¶ 25-26; R-78; R-83 – R-84; R-98 – R-99.) Plaintiff took physical possession of the Premises in or around October 1992, and has maintained it since then. (R-55, ¶¶ 30-31.)

Yale survived Dorothy and died on January 4, 1993. (R-51, ¶ 8; R-65.) When Yale died, his one-half interest in the Premises as a co-tenant in common passed through his heirs and assigns, and ultimately went to Emil Krause, who left his Estate to the Trust. (R-56 – R-57, ¶¶ 36-39; R-65; R-234.) In 2000, Altchek distributed all known assets of the Trust following the death of Emil Krause. (R-57, ¶ 41; R-274 – R-275, pp. 17:21 – 18:1.)

Plaintiff did not learn until at least 2018, when he sought to sell the Premises and a title search was run on the property, that Yale had survived Dorothy and inherited a one-half interest in Dorothy's Estate (including the Premises), such that Plaintiff held only a one-half interest in the Premises as a co-tenant in common, and was not the sole and exclusive owner of the Premises. (R-57 – R-58, ¶¶ 43-44; R-137, pp. 147:7 – 148:8; R-208 – R-211; R-230 – R-236; R-302 – R-303.)

Yale and his successors in interest, including the Trust, did not learn of their one-half interest in the Premises until Plaintiff's then-attorney, Kevin J. Farrelly ("Farrelly"), contacted Altchek in March 2019 to advise him of the Trust's interest in the Premises. (R-58, ¶ 47; R-303.)

In January 2020, Farrelly indicated to Altchek's then-attorney that a court order would be necessary to clear title to the Premises after Plaintiff's real estate agent discovered the Trust's one-half interest in the Premises. (R-58 – R-59, ¶¶ 49-50, R-304.) Farrelly also indicated in January, 2020 that he had been working with Plaintiff to prepare an accounting with respect to the Premises for Altchek, and that Plaintiff intended to share the proceeds of the sale of the Premises with the Trust. (R-59 – R-60, ¶¶ 54-55, R-304 – R-305.)

In May 2020, Plaintiff's cousin, Lois Linden ("Linden") to whom he had given his Power of Attorney with respect to the Premises, also acknowledged that the Premises could not be sold without Altchek's (as the Trust's representative) consent. (R-60, ¶¶ 56-57; R-216 – R-218; R-226 – R-228; R-308.) At the end of May 2020, Linden sent Altchek marketing materials for the Premises, which valued the Premises at $2.3 million. (R-61, ¶ 64; R-326 – R-328.) Thus it is clear that when Plaintiff and his representatives learned of the Trust's interest in the Premises, they acquiesced in the joint ownership and sought to address it. At one point, Altchek and Linden were even negotiating a Settlement Agreement which

contained a statement that Plaintiff and the Trust each owned a "50% undivided interest in" the Premises. (R-589, ¶ 13; R-61, ¶¶ 60-61; R-311.)

In September, 2020, however, Plaintiff retained new counsel, and, for the first time, repudiated the Trust's interest in the Premises. (R-589, ¶ 12; R-590.) Specifically, on September 8, 2020, Plaintiff's current counsel, John Brickman of McLaughlin & Stern, LLP, sent Altchek an email advising that he was "preparing papers in a lawsuit, seeking a judgment that John Golobe is the 100% owner of the premises." (R-590.)

On October 30, 2020, Plaintiff initiated this Action to seek a declaration that he is the sole and exclusive owner by adverse possession of the Premises "in fee simple absolute, and that the defendant has no proper or valid claim thereto." (R-26, ¶ 1; R-30, ¶ 26.) Most significantly, during his deposition in connection with this Action, Plaintiff testified that he had never even seen the Complaint before and was unaware that he was the one who initiated the Action. (R-62, ¶¶ 66-67; R-107, p. 26:14-22; R-147, p. 188:3-4.)[3]

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[3] Prior to the commencement of the action, Plaintiff had two strokes – one in the year 2000, and another in 2018. (R-56, ¶¶ 33, 35; R-103, p. 10:16-18; R-140, pp. 159:20 - 161:9.) Plaintiff was also hospitalized during portions of 2018 and 2019, and when not hospitalized, he had 24-hour live in care. (R-56, ¶ 35; R-140, pp. 159:20 – 161:9.) Plaintiff acknowledged that he was not "fully conscious of what was happening," "in that time period." (R-56, ¶ 35; R-140, pp. 159:20 – 160:12.) Thus, it is unclear whether Plaintiff a) had or has the capacity to pursue the claim of adverse possession he pursues in this action, or b) intended or intends to establish himself as the sole owner of the Premises, to the detriment of his estranged family members. The fact that the Trial Court completely ignored the inconsistent and undisputed actions taken by Farrelly and Linden on Plaintiff's behalf prior to Plaintiff's retention of his present counsel, is significant.

Altchek filed an Answer and Counterclaims seeking 1) a declaration that "the Trust is an owner of one half of the Estate of Dorothy Golobe including, but not limited to, the Premises as a cotenant in common," and 2) equitable relief and monetary damages for Plaintiff's fraud and breaches of fiduciary duty to the Trust and its predecessors in interest, his co-tenants in common in the Premises, with respect to the Premises. (R-31 – R-43.)

After discovery was completed, both Parties moved for summary judgment. Plaintiff moved for summary judgment on his claim seeking a declaration that he is the sole and exclusive owner of the Premises, and seeking dismissal of Altchek's Counterclaims for 1) a declaration that the Trust is a one-half owner of the Premises as a co-tenant in common and is entitled to one-half of the remainder of Dorothy's Estate, 2) fraud, and 3) breach of fiduciary duty. Altchek's Motion for Summary Judgment sought the dismissal of Plaintiff's claim seeking a declaration that he is the sole and exclusive owner of the Premises. The Court granted Plaintiff's Motion for Summary Judgment, declaring Plaintiff "the sole and exclusive owner of the [Premises] in fee simple absolute and that defendant Ira Altchek, as Trustee of the Emil Krause Revocable Trust, has no proper or valid claim thereto," and dismissed Altchek's Counterclaims for fraud and breach of fiduciary duty without providing any factual basis or legal reasoning, simply

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Farrelly's and Linden's actions (discussed above) taken on Plaintiff's behalf clearly recognized and acquiesced in the Trust's interest in the Premises.

stating that "defendant failed to raise any triable issues as to any fraud or breach of fiduciary duty." (R-6 (Order).)

Defendant noticed his Appeal of the Order on March 7, 2022. (R-3 – R-4.)

ARGUMENT

I. STANDARD OF REVIEW ON APPEAL

This Court should review both Parties' Motions for Summary Judgment *de novo*. *Rothouse v. Ass'n of Lake Mohegan Park Prop. Owners, Inc.*, 15 A.D.2d 739, 739 (1st Dep't 1962) (the Appellate Division, First Department is "free to resolve *de novo* the question of whether summary judgment should be granted"); *see also Duane Reade, Inc. v. Cardtronics, LP*, 54 A.D.3d 137, 140 (1st Dep't 2008). "[O]n a summary judgment motion issue-finding, rather than issue-determination, is the key to the procedure." *Moyer v. Briggs*, 47 A.D.2d 64, 66 (1st Dep't 1975) (internal quotation marks and citations omitted); *Daniels v. Judelson*, 215 A.D.2d 623, 624 (2d Dep't 1995) (denying summary judgment after finding an issue of fact on a claim of adverse possession). "Where there is any significant doubt whether there is a material triable issue of fact or where the material issue of fact is 'arguable', summary judgment must be denied." *Moyer*, 47 A.D.2d at 66-67 (citation omitted).

Here, there are, at a minimum, issues of fact with respect to whether Plaintiff has acquired exclusive possession of the Premises by adverse possession,

Plaintiff's fraudulent conduct, and Plaintiff's breaches of fiduciary duty to the Trust and its predecessors in interest. As a result, the Trial Court's Order should be reversed; the Court should declare the Trust a co-tenant in common of the Premises with a one-half interest therein; and the Court should remand Altchek's Counterclaims for fraud and breach of fiduciary duty for trial.

II. THE TRIAL COURT'S DETERMINATION THAT PLAINTIFF IS THE SOLE AND EXCLUSIVE OWNER OF THE PREMISES BY ADVERSE POSSESSION WAS ERRONEOUS AND NOT SUPPORTED BY THE EVIDENCE

There is at least an issue of fact with respect to Plaintiff's acquisition of the entire Premises by adverse possession so the Trial Court's Order should be reversed. It is well-established New York law that "the acquisition of title by adverse possession is not favored," and that the elements of adverse possession "must be proven by clear and convincing evidence." *Estate of Becker v. Murtagh*, 19 N.Y.3d 75, 81 (2012). Thus, it is baffling, in light of the overwhelming evidence submitted by Altchek in support of his argument that the Trust maintains a one-half interest in the Premises as a co-tenant in common, that the Trial Court declared the Plaintiff the sole and exclusive owner of the Premises by adverse possession.

A. Adverse Possession under New York Law

In order to establish a claim of adverse possession, Plaintiff must prove that his occupation of the Premises was "(1) hostile and under a claim of right (i.e., a

reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period." *Estate of Becker*, 19 N.Y.3d at 81 (citations omitted). Similarly, RPAPL § 501, which was revised in 2008, provides that an adverse possessor will gain title to the property by adverse possession by showing that his possession "has been adverse, under claim of right, open and notorious, continuous, exclusive, and actual." RPAPL § 501(2). "A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be." RPAPL § 501(3).

Applying these basic tenets of the law of adverse possession, New York courts have found that, "[w]hen the entry upon land has been by permission or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner." *Schwarz v. Trs. of Freeholders & Commonalty of Town of Huntington*, 85 A.D.3d 1008, 1009 (2d Dep't 2011) (quoting *Hinkley v. State of New York*, 234 N.Y. 309, 316 (1922)). "In other words, '[w]hen . . . permission can be implied from the beginning, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner.'" *Id.* (citations omitted; omission in original). "The character of the possession depends on the intention with which

entry is made and occupation continued. There is no disseisin until there is occupation with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession." *Hinkley*, 234 N.Y. at 317. "The object of the statute defining the acts essential to constitute an adverse possession is that the real owner may, by unequivocal acts of the usurper, have notice of the hostile claim and be thereby called upon to assert his legal title." *Monnot v. Muphy*, 207 N.Y. 240, 245 (1913); *Hinkley*, 234 N.Y. at 317.

In addition, "[w]here parties hold property as tenants in common, [RPAPL] § 541 creates a statutory presumption that a tenant in common in possession holds the property for the benefit of the cotenant." *Russo Realty Corp. v. Orlando*, 30 A.D.3d 499, 500 (2d Dep't 2006); *see also Loveless Family Tr. v. Koenig*, 77 A.D.3d 1447, 1448 (4th Dep't 2010). The Court of Appeals has explained that this measure of "extra protection" from the "inherent danger" of adverse possession is afforded to tenants-in-common, who each have "an equal right to possess and enjoy all or any portion of the property as if the sole owner," because an "unsuspecting nonpossessory cotenant" would not have "reason even to protest the purportedly adverse possession" of their co-tenant in common in possession. *Myers v. Bartholomew*, 91 N.Y.2d 630, 632-33 (1998).

"Because of this presumption, a tenant-in-common seeking to assert a successful claim of adverse possession is required to show more than mere

possession; the cotenant must also commit acts constituting ouster." *Id.* at 633 (citations omitted). "Actual ouster usually requires a possessing cotenant to expressly communicate an intention to exclude or to deny the rights of cotenants." *Fini v. Marini*, 164 A.D.3d 1218, 1220 (2d Dep't 2018). Accordingly, "exclusive possession by a cotenant, alone, is not the equivalent of an ouster, nor, for that matter, does it conclusively establish adverse possession." *Russo Realty Corp.*, 30 A.D.3d at 500. "An ouster will not be deemed to have occurred unless the possessory cotenant, either through words or actions, unequivocally expresses to the nonpossessory cotenant that the property is being adversely possessed." *Lindine v. Iasenza*, 130 A.D.3d 1329, 1330 (3d Dep't 2015) (citations omitted); *see also Russo Realty Corp.*, 30 A.D.3d at 500-01 ("Adverse possession requires obvious and overt acts by the person holding possession that are openly hostile to the nonpossessory owner's rights") (citation omitted); *Kraker v. Roll*, 100 A.D.2d 424, 434 (2d Dep't 1984) ("repudiation may exist absent vocal or written expression, but only by dint of 'unequivocal acts, so open and public, that notice may be presumed of the assault upon his title, and the invasion of his rights'") (citation omitted); *Perez v. Perez*, 228 A.D.2d 161, 163 (1st Dep't 1996).

"Absent ouster, a cotenant may begin to hold adversely only after 10 years of exclusive possession. RPAPL 541's statutory presumption, therefore, effectively requires 20 years – or two consecutive 10-year periods – of exclusive

possession before a cotenant may be said to have adversely possessed a property owned by tenants-in-common." *Myers*, 91 N.Y.2d at 634-35.

Moreover, the expiration of the statutory period "merely triggers the possibility of adverse possession; it does not establish it." *Trevisano v. Giordano*, 202 A.D.2d 1071, 1071 (4th Dep't 1994); *see also In re Estate of Kelley*, 140 Misc. 2d 876, 879 (Sur. Ct. Monroe Co. 1988).

B. The Evidence Overwhelmingly shows that Plaintiff's Possession of the Premises Has Not Been Hostile and Under Claim of Right

Plaintiff did not come close to submitting clear and convincing evidence to prove that his possession of the Premises has been hostile and under claim of right. He must have proven both in order to have succeeded on a claim of adverse possession. Dan M. Blumenthal, Supplementary Practice Commentaries, McKinney's Cons. Laws of N.Y., RPAPL § 501 (2020) ("'[h]ostility' remains the initial element of proof for a claim under this section") (citation omitted); *see also Diaz v. Mai Jin Yang*, 148 A.D.3d 672, 673-74 (2d Dep't 2017) (following the 2008 amendments to the adverse possession statutes, a party must still establish by clear and convincing evidence that its use of the property was hostile and under a claim of right).

As set forth above, for possession of property to be hostile, the possessor must enter upon the property with "intention to claim title," *Hinkley*, 234 N.Y. at 317, in a manner adverse to the true owner, such that "the real owner may, by

unequivocal acts of the usurper, have notice of the hostile claim and be thereby called upon to assert his legal title." *Monnot*, 207 N.Y. at 245; *Hinkley*, 234 N.Y. at 317. Hostility is even more difficult to prove with respect to property that is held by co-tenants in common because, 1) of the statutory presumption that "a tenant in common in possession holds the property for the benefit of the cotenant," *Russo Realty Corp.*, 30 A.D.3d at 500, 2) the presumption lasts not ten (10), but twenty (20) years, *Myers*, 91 N.Y.2d at 634-35, and 3) the expiration of the statutory period does not establish adverse possession, it merely triggers the possibility of it. *Trevisano*, 202 A.D.2d at 1071; *see also Estate of Kelley*, 140 Misc. 2d at 879.

Accordingly, in order to succeed on his claim of adverse possession, the Plaintiff had to prove that he took possession of the Premises with intent to claim exclusive title (as opposed to taking possession with the belief that he was already the exclusive owner of title), and then maintained hostile possession for more than twenty years. Plaintiff did not (and cannot) prove such hostile intent or possession because, as he admits, he did not even know until 2018 (at the earliest) that he jointly held the property as a co-tenant in common and was not the sole possessor. Indeed, Plaintiff concedes that at the time of Dorothy's death in 1992, neither he nor his father, Zangwill, knew that Yale was still alive and that he and his co-tenant in common were both unaware of their shared interest in the Premises from

1992 until 2018, at the earliest. (R-57, ¶¶ 42-43; R-58, ¶¶ 47-48; R-108, pp. 30:6 – 31:20; R-139, p. 156:14-17; R-269 – R-270, pp. 12:9 – 13:12.)

Plaintiff further concedes that it was not until at least 2018, when he sought to sell the Premises and had a title search run, that he first discovered that when he received his interest in the Premises from his father as a co-tenant in common, it was only a one-half interest, and he was not the sole owner of the entire Premises. (R-57, ¶ 43; R-230 – R-236; R-208 – R-211; R-302 – R-303; R-137, pp. 147:7 – 148:8.) Specifically, from the 2018 title search, Plaintiff learned that his uncle Yale survived Dorothy and, as a result, inherited one-half of Dorothy's assets, including a one-half interest in the Premises as a co-tenant in common. (R-57 – R-58, ¶ 44; R-208 – R-211; R-303.)

Furthermore, even after he learned that he had not been in exclusive possession of the Premises, the Plaintiff acknowledged the Trust's interest in the Premises and requested Altchek's acquiescence in its sale, rather than declaring exclusive possession or intent. For example, in a letter dated March 4, 2019, Kevin J. Farrelly, an attorney representing the Plaintiff, informed Altchek that the Trust had an interest in the Premises. (R-58, ¶ 47; R-302 – R-303.) Farrelly wrote a letter to Altchek stating that when the Plaintiff was attempting to sell the Premises, he "recently learned that, as a result of several estate proceedings over many years, Emil Krause may have inherited an ownership interest in [the

Premises].” (R-58, ¶ 47; R-303). Farrelly further stated that he understood that Altchek had been appointed the “personal representative” of Mr. Krause’s estate, which Estate was payable to the Trust, and requested that Altchek or his attorney contact him to discuss the matter. (R-58, ¶ 47; R-303.) Farrelly’s March 2019 letter was also the first time Altchek (or any heir or beneficiary of Yale’s one-half interest in Dorothy’s Estate) learned of the Trust’s one-half interest in the Premises as a co-tenant in common. (R-58, ¶ 48; R-269 – R-270, pp. 12:9 – 13:12.)

Then, in a letter from Farrelly on January 27, 2020, Plaintiff indicated to Altchek’s counsel that Plaintiff was having trouble getting title insurance on the Premises, which he needed in order to sell it, because the Title Company was requiring a court order determining the owners of the Premises. (R-58, ¶ 49; R-304.) Indeed, Plaintiff admitted during his deposition that in 2018, he learned that he “wouldn’t be able to . . . present a title to the property . . . because it was jointly held by . . . someone else on the other side of the family.” (R-139, pp. 155:15 – 156:2.)

Plaintiff’s counsel Farrelly also acknowledged in the January 27, 2020 letter that a real estate agent Plaintiff engaged to sell the Premises had also conducted research and discovered that the Trust owned an interest in the Premises. (R-59, ¶ 50; R-304.) Farrelly then requested that Altchek sign a sales agreement, which would authorize the real estate agent, Ed Strickradt of Halstead, to continue

marketing the Premises. (R-59, ¶ 50; R-304.) The proposed agreement contained a representation that the two signatories, Plaintiff and Altchek, in his capacity as Successor Trustee of the Trust, were the co-owners of the Premises. (R-59, ¶ 53; R-306 – R-307.)

Also in the same January 27, 2020 letter, Plaintiff's counsel Farrelly indicated to Altchek's counsel that he was in the process of preparing an accounting with respect to the Premises, as previously requested by Altchek's counsel, and that he would forward the accounting when completed. (R-59, ¶ 54; R-304 – R-305.) Plaintiff's counsel also stated in the letter that he hoped to discuss with Altchek's counsel "how, after a closing, the parties will share the proceeds of the sale [of the Premises]." (R-60, ¶ 55; R-305.)

Then, on May 12, 2020, Lois Linden ("Linden"), to whom it is undisputed Plaintiff had given his Power of Attorney with respect to the Premises, (R-60, ¶ 56; R-219 – R-225), reached out to Altchek. (R-60, ¶ 56; R-226 – R-228.) Linden also conceded joint ownership and stated that the Plaintiff was "eager to sell" the Premises, but it "cannot be done until we have your signature on the sales agreement." (R-60, ¶ 56; R-228.) Linden also stated: "[s]elling the property would be in our mutual interest but we need your signature on the sales agreement, in order to proceed. . . . I am reaching out to you with the hope that you and I can

work together to get the property sold and the monies into escrow." (R-60, ¶ 56; R-228.)

On May 13, 2020, Linden sent Altchek another email, which indicated that they had spoken on the phone and that she understood that Altchek was eager to understand the Premises and obtain an accounting with respect to it. (R-60, ¶ 57; R-308 – R-309.) Linden stated they were "in agreement that we need to move forward on the sale of the property." (R-60, ¶ 57; R-308.)

On May 14, 2020, Linden forwarded to Altchek a draft Agreement (the "Draft Agreement") pursuant to which the Plaintiff and Altchek were to agree to, among other things, share the proceeds of the sale of the Property. (R-60, ¶ 58; R-310 – R-325.) The Draft Agreement acknowledged that Plaintiff and Altchek, in his capacity as [Successor] Trustee of the Trust, each owned a "50% undivided interest in" the Premises. (R-60, ¶ 59; R-311.) The Draft Agreement also acknowledged that "Golobe was unaware of the [Successor] Trustee's interest in the Property until he was so informed by a title company when he attempted to sell the Property." (R-61, ¶ 60; R-312.) The Draft Agreement acknowledged that Altchek was unaware of "his . . . interest in the Property until he was so informed by Golobe's attorney." (R-61, ¶ 61; R-312.)

The Draft Agreement acknowledged that all rental incomes, net sales proceeds and other revenues generated by the Premises would be deposited in an

escrow account maintained by counsel, and would be distributed from time to time as agreed upon. (R-61, ¶ 62; R-315.) The Draft Agreement acknowledged that within 60 days of its execution, Plaintiff would provide the Trust with "an accounting detailing his receipts and disbursements and other transactions and surplus monies retained by him personally," together with income tax returns "in which the income, expenses, profits and losses generated by the [Premises] were reported," a list of tenants and rent roll, and copies of all leases for the rented spaces in the Premises since Plaintiff's "initial acquisition of control of the [Premises]." (R-61, ¶ 63; R-317.)

Then, on May 20, 2020, Linden sent to Altchek the Halstead marketing materials for the Premises, which valued the Premises at the time at $2.3 million.[4] (R-61, ¶ 64; R-326 – R-328.)

By reason of the foregoing, it is crystal clear that Plaintiff never entered upon the Premises with hostile intent, and cannot be found to have possessed the requisite hostile intent until 2018, at the earliest. How could he have, when Plaintiff has admitted that he had no knowledge until 2018 (at the earliest) that there was even an issue?

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[4] It is expected that the value of the Premises has increased since May 2020 as it "is within the proposed Penn Station Redevelopment Area." (R-328; *see also* Matthew Haag and Patrick Mcgeehan, *With Cuomo Gone, Hochul Revises Plan for Penn Station*, N.Y. Times (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/nyregion/penn-station-nyc-hochul.html (indicating the Governor's plan to move forward with the $7 billion reconstruction of Penn Station and the surrounding area).)

As the Court (Renwick, J.) in *Blanchard v. Blanchard* stated, "the offer to settle or compromise any claim plaintiff may have had against the subject property is relevant to the issue of hostility. Evidence of such conduct or words on the part of the possessor after the prescriptive period has run, although not dispositive on the claim of adverse possession, has been found probative of the character of his or her possession." *Blanchard v. Blanchard*, 4 Misc. 3d 1027(A), 2004 WL 2187604, at *3 (Sup. Ct. Bronx Co. 2004) (citing *Van Valkenburgh v. Lutz*, 304 N.Y. 95, 99 (1952) (hostility was lacking where, "defendant had the opportunity to declare his hostility and assert his rights against the true owner, [but] he voluntarily chose to concede that the plaintiffs' legal title conferred actual ownership entitling them to the possession of these and other premises")). Justice Renwick further explained that if the claimant negotiated to purchase his co-owner's interests, "then his possession arguably would not have been 'hostile' because it would have been under an acknowledgment that [the co-owner] had an interest in the subject property." *Id.*

Nevertheless, despite acknowledging *Blanchard*, the Trial Court completely ignored the Parties' negotiations with respect to the Premises and the Plaintiff's repeated acknowledgments of the Parties' joint interest in the Premises as co-tenants in common. (*See* R-12 – R-15, pp. 6:4 – 9:15.) That was clear error.

The Second Department's decision in *Gonzalez v. Gonzalez* is also informative here. There, the Appellate Division found that a woman still held a one-half interest in her formal marital dwelling, which she held as a co-tenant in common with her husband following their divorce. *Gonzalez v. Gonzalez*, 236 A.D.2d 589, 590 (2d Dep't 1997). The court reasoned that her ex-husband's possession of the property was not "openly hostile" to her rights despite the fact that he lived in the home with his new wife for years until his death. *Id.* Similarly, here, the Plaintiff's possession of the Premises has not been openly hostile to the rights of heirs and beneficiaries of Yale's interest in the Premises. It could not have been – Plaintiff was not even aware of their interest in the Premises!

Plaintiff's allegations that he has exclusively maintained the Premises since 1992 do not compel a different result. "Paying mortgage and taxes or maintenance expenses, and providing for upkeep of the property, do not constitute acts sufficient to establish a claim of right for purposes of adverse possession as against a cotenant." *Russo Realty Corp.*, 30 A.D.3d at 501 (citing *Perez*, 228 A.D.2d at 163); *see also Loveless Family Tr.*, 77 A.D.3d at 1449 ("The contention of defendant that he exclusively possessed the property and paid all of the expenses related to the property for a period in excess of 20 years is of no moment, inasmuch as exclusive possession and the payment of maintenance expenses by a cotenant are insufficient to establish a claim of right for purposes of adverse

possession as against a cotenant") (citations omitted); *and see Lindine*, 130 A.D.3d at 1331. Moreover, there is no case law which suggests that Plaintiff's degree of management of the Premises changes this conclusion.

1. New York Case Law Holding that Hostility May Be Found Even if Possession is Inadvertent or by Mistake is Inapplicable Here

The line of Appellate Division, Second Department cases which hold that "hostility may be found even though the possession occurred inadvertently or by mistake," *see Katona v. Low*, 226 A.D.2d 433, 434 (2d Dep't 1996), do not apply here. These case are not instructive for one simple reason – Plaintiff's possession of the Premises was not inadvertent or by mistake, but very much intentional. The issue here, which is different from the issues addressed by the courts in *Katona* and *Greenberg v. Sutter*, another Second Department case Plaintiff cites to support the proposition that an inadvertent mistake can lead to adverse possession,[5] is that Plaintiff did not know that his ownership of the Premises was only partial. New

[5] In *Katona*, plaintiff, the adverse possessor, "entered upon real property under the misapprehension that the parcel was part of his land, and cultivated the parcel by planting a hedgerow, rose bushes, and a rock garden, a use consistent with the nature and character of the parcel." *Katona*, 226 A.D.2d at 434. In *Greenberg*, the adverse possessor claimed ownership of a strip of land between her property and her neighbor's property, which the defendant (Sutter) purchased from third-party defendant Walcutt, who stated that she lived in the house for 30 years and had no knowledge that Greenberg's fence intruded on her property. *Greenberg v. Sutter*, 173 Misc. 2d 774, 775 (Sup. Ct. Nassau Co. 1997). Recognizing that the adverse possession likely occurred by mistake, on appeal in *Greenberg* the Second Department cited to its decision in *Katona* to find for the adverse possessor. *Greenberg v. Sutter*, 257 A.D.2d 646, 646-47 (2d Dep't 1999) (citing *Katona*, 226 A.D.2d at 433).

York law is clear that this mistake does not equate to hostility sufficient to support a finding of adverse possession.

Rather, as discussed above, where, as here, one co-tenant is in physical possession of the jointly held property, there is a statutory presumption that "a tenant in common in possession holds the property for the benefit of the cotenant." *Russo Realty Corp.*, 30 A.D.3d at 500; *see also Loveless Family Tr.*, 77 A.D.3d at 1448 (the default is that in "a tenancy-in-common, each cotenant has an equal right to possess and enjoy all or any portion of the property as if the sole owner") (quoting *Myers*, 91 N.Y.2d at 632-33). Accordingly, where Plaintiff exclusively occupied the Premises from 1992 until 2018 without the knowledge that he jointly held the Premises as a co-tenant in common, New York law presumes that Plaintiff's actual possession and occupation of the Premises was not hostile or adverse to Yale's (and his heirs'/beneficiaries') interest.

Where, as here, there are simply no precedential New York cases that discuss this particular situation, where neither co-tenant was aware of the co-tenancy throughout the statutory period, the Court must look to the purpose behind the adverse possession laws in New York to make its determination. Here, that requires an acknowledgment of the presumption in favor of the co-tenant's holding property for the benefit of his co-tenant, rather than to its exclusion.

2. Hostility Cannot Be Presumed or Inferred Because Plaintiff Cannot Prove that His Possession Has Been Open and Notorious for Twenty Years

Although in certain cases the element of hostility may be presumed or inferred, *see, e.g.*, *United Pickle Prods. Corp. v. Prayer Temple Cmty. Church*, 43 A.D.3d 307, 309 (1st Dep't 2007), such a presumption is not appropriate here because in addition to the element of hostility, Plaintiff cannot prove that his possession has been open and notorious for the statutory period of twenty years. *See supra* at Section 2C.

Hostility cannot, as the Trial Court suggests, simply be inferred "unless prior to vesting…there is an admission that valid claim to title lies with someone else." (R-20 – R-21, pp. 14:22 – 15:5.) Indeed, even the cases the Trial Court cites to support this proposition state that hostility may only be inferred where all of the other elements of adverse possession are established. *See Vaccaro v. Town of Islip*, 181 A.D.3d 751, 752 (2d Dep't 2020), *lv. app. denied*, 37 N.Y.3d 903 (2021); *Midgley v. Phillips*, 143 A.D.3d 788, 790 (2d Dep't 2016); *Galli v. Galli*, 117 A.D.3d 679, 680-81 (2d Dep't 2014).

3. Plaintiff's Claim of Adverse Possession Also Fails Because He Cannot Prove that He Had a Reasonable Claim of Right to the Premises Because He Did Not Have a Reasonable Basis for His Belief that He Was the Exclusive Owner of the Premises

Plaintiff cannot prove that he had a reasonable claim of right to the Premises because any belief that he may have held that he was the sole heir to Dorothy's

Estate, including the Premises, was simply not reasonable. RPAPL § 501(3) defines a "claim of right" as "a reasonable basis for belief that the property belongs to the adverse possessor or property owner, as the case may be." RPAPL § 501(3). Any belief Plaintiff held that he was the sole heir to Dorothy's Estate was a direct result of Plaintiff's own decision to bury his head in the sand rather than conduct any meaningful investigation into whether Dorothy had any other heirs and was, therefore, not "reasonable."

Indeed, any belief Plaintiff had that he was the sole heir to Dorothy's Estate was based on unsubstantiated speculation or the testimony of a non-family member, not upon any investigation Plaintiff or his father (or anyone at their behest) conducted. Plaintiff acknowledged as much when he testified during his deposition that he personally did not "have any knowledge of where [Yale] was or when he had died," but simply "had to assume that since [Dorothy] was – since [Yale] was 11 years older than [Dorothy], that he – and she had died at the age of 86 or something, that he would – that he had died, because of the age difference." (R-53, ¶ 19 (quoting R-108, pp. 30:6 – 31:8).) Plaintiff also testified that prior to 2019, he did not do anything to confirm that Yale predeceased Dorothy. (R-53, ¶ 20 (citing R-108, pp. 31:9-12).) Plaintiff does not recall his father, Zangwill, ever doing anything either to confirm whether Yale predeceased Dorothy. (R-53, ¶ 21 (citing R-108, p. 31:13-20).) Speculation based upon one's relatives' relative

ages cannot support a reasonable belief that Yale predeceased Dorothy such that Plaintiff became the exclusive owner of the Premises when Dorothy died.

Plaintiff also apparently relied upon the testimony of his father Zangwill's friend, Harold Kozupsky, who falsely testified that Yale had died in June 1985, and thus predeceased Dorothy such that Zangwill was the sole heir to Dorothy's Estate, including the Premises. (R-334, ¶ 5.) Plaintiff's unquestioning reliance on a family friend, who was affiliated with the family through Plaintiff's father, Zangwill, who Plaintiff admits did not know whether Yale predeceased Dorothy, (*see* R-53, ¶ 21 (citing R-108, p. 31:13-20)), was certainly not reasonable.[6]

Finally, Plaintiff's belief that he was Dorothy's sole heir is not substantiated by his supposed placement of an advertisement announcing Dorothy's death in Newsday Long Island to which no one responded. (*See* R-334, ¶ 4.) Plaintiff could not specify a date on which he placed any such advertisement in Newsday Long Island, (*see* R-334, ¶ 4), and never produced the actual advertisement (or even a copy or invoice) in connection with this Action. Plaintiff also did not seek to prove that Yale or any of his heirs or beneficiaries would have had an opportunity to even see the Long Island publication. In fact, the evidence shows that, assuming Plaintiff actually placed the advertisement, it is unlikely that Yale

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[6] Indeed, it is now clear that Harold Kozupsky, an attorney admitted to practice before the courts of the State of New York, lied to the Surrogate's Court under oath when he testified that Yale predeceased Dorothy.

(or his heirs/beneficiaries) would have seen the publication in Newsday Long Island (assuming that it was published prior to his death, which there is no proof of), because Yale died at least 100 miles away from Long Island in Orange County, New York and there is no proof that his heirs or beneficiaries lived on Long Island. (R-65.)

Plaintiff's attorney in connection with the Administration of Dorothy's Estate, Roy Kozupsky, the son of Zangwill's friend Harold Kozupsky, also testified that when he is involved in the administration of an estate, if the heirs are unknown,[7] his "normal[]" practice is to "check probate files, death certificates, yellow pages, Social Security; if it warranted and the client would pay for it, an heirship search." (R-52, ¶ 17; R-182, p. 15:11-19.) Roy Kozupsky does not, however, recall conducting any investigation into Dorothy's heirs or Yale's whereabouts in connection with the Administration of Dorothy's Estate. (R-52, ¶ 18, R-182 – R-183, pp. 17:10 – 19:14; R-184, 22:12 – 23:12.)

In sum, Plaintiff's utter failure to investigate whether Yale predeceased Dorothy cannot render his belief that he was Dorothy's sole heir and, thus, the

[7] If, as the Trial Court recognized was the case here, the heirs were known, (R-8, p. 2: 6-8), one would think that would have increased efforts to investigate the whereabouts of a known heir such as Yale. The Trial Court, however, erroneously seized upon the fact that Yale's whereabouts were unknown and indicated that was in some way determinative. (R-8, p. 2: 6-8.) It was not. What the Trial Court should have addressed and analyzed was whether Plaintiff had a duty to investigate and, if so, whether Plaintiff's investigation into Yale's whereabouts was reasonable.

exclusive owner of the Premises, reasonable such that he had a reasonable claim of right to the Premises for more than twenty years.

C. The Evidence shows that Plaintiff's Possession of the Premises Has Not Been Open and Notorious

Plaintiff's claim of adverse possession also fails because he cannot prove that he openly and notoriously occupied the Premises for twenty years. In order to establish that possession of property is "open and notorious," a party claiming adverse possession must prove "very obvious and overt acts which unmistakably repudiate a non-possessory owner's right by one possessing the property." *Trevisano*, 202 A.D.2d at 1071 (quoting *Estate of Kelley*, 140 Misc. 2d at 879); *see also Kraker*, 100 A.D.2d at 434.

The court in *Trevisano v. Giordano* addressed a similar set of facts and found that the defendants maintained an inherited interest in the property in dispute despite a co-tenant's continuous actual possession. Specifically, the *Trevisano* court found that the defendants proved that at the death of the plaintiffs' grandparents, title to the premises vested in their children as tenants in common. 202 A.D.2d at 1071.

Moreover, the court found that although plaintiff's parents had remained in possession for more than 10 years, "the expiration of the 10-year period merely triggers the possibility of adverse possession; it does not establish it." *Id.*; *see also Estate of Kelley*, 140 Misc. 2d at 879. The *Trevisano* court observed that adverse

possession "requires 'very obvious and overt acts which unmistakably repudiate a non-possessory owner's right by one possessing the property,'" and there was no evidence of such acts on the part of the plaintiff's parents. 202 A.D.2d at 1071 (quoting *Estate of Kelley*, 140 Misc. 2d at 879); *see also Kraker*, 100 A.D.2d at 434 (finding no repudiation of plaintiff's title or adverse possession until the property was sold to a third-party); *Estate of Kelley*, 140 Misc. 2d at 879 ("no claim of right was made by the tenant in possession until the executor attempted to sell the property without respondent's consent" where there was nothing in the record "to indicate that decedent during her lifetime did anything which would have repudiated the cotenant's rights or to indicate that her possession was hostile").

Similarly, here, the evidence clearly establishes that Plaintiff did not do anything at all to repudiate the interest of Yale's heirs or beneficiaries, including the Trust, in the Premises until 2019, if at all. There is no dispute that Zangwill and Yale jointly inherited the Premises in 1992, and that Plaintiff is now in possession of Zangwill's interest in the Premises. (*See* R-51, ¶ 5; R-54, ¶¶ 25-26. Plaintiff admits that he did not even know until 2018 (at the earliest) that he did not exclusively hold possession of the Premises. (R-57 – R-58 ¶¶ 43-44.) Additionally, the evidence establishes that Plaintiff did not inform or even seek to alert Yale's heirs or beneficiaries to the fact that they had an interest in the

Premises until 2019. (R-58, ¶¶ 47-48.) Even then, Plaintiff did not repudiate the Trust's interest in the Premises, but instead, in conjunction with his attorney Kevin Farrelly and his cousin Lois Linden, who had his Power of Attorney, specifically acknowledged Altchek's interest on behalf of the Trust and sought to work with Altchek to sell the Premises. (R-58 – R-61, ¶¶ 47-64.)

Plaintiff's execution of the administrator's deed to the Premises, obtaining a construction loan which encumbered the Premises, management and operation of the Premises from 1992 to the present, and facilitation of upgrades, renovations and capital and other improvements to the Premises, do not alter the inevitable conclusion that Plaintiff did not repudiate Yale's (or his successors in interest) interest in the Premises. These actions merely demonstrate Plaintiff's ownership and occupation of the Premises, which is not in dispute, and which, as discussed above, do not repudiate or change the Trust's one-half interest in the Premises as a co-tenant in common because of the legal presumption that a co-tenant holds property for the benefit of the other co-tenant. Moreover, as explained above, the fact that Plaintiff managed the Premises, paid for its upkeep and paid taxes for a period of more than twenty years, is not sufficient to establish Plaintiff's adverse possession.

For the foregoing reasons, Plaintiff has not (and cannot) prove by clear and convincing evidence the hostility or open and notorious elements of adverse

possession, and the Trial Court's Order determining that Plaintiff acquired full title and interest to the Premises by adverse possession was clearly erroneous and should be reversed.

III. THE TRIAL COURT'S DETERMINATION THAT THERE ARE NO TRIABLE ISSUES OF FACT WITH RESPECT TO ALTCHEK'S COUNTERCLAIM FOR FRAUD WAS CLEARLY ERRONEOUS

The Trial Court summarily dismissed Altchek's fraud Counterclaim without any analysis or explanation, and simply stated that Altchek "failed to raise any triable issues of fact as to any fraud." This determination was clearly erroneous.

In opposition to Plaintiff's Motion for Summary Judgment, Altcheck presented substantial evidence that Plaintiff fraudulently concealed from the Trust and its successors in interest (to whom Plaintiff had a fiduciary duty as a co-tenant in common) the fact that they were co-tenants in common with a one-half interest in the Premises, in part by recklessly having incorrect representations made on his behalf to the Surrogate's Court that he was the sole heir to his Aunt, which Plaintiff had reason to know were not true, and the Trust and its successors in interest relied upon Plaintiff's concealment by not asserting their rights with respect to their one-half interest in the Premises as co-tenant(s) in common sooner. As a direct result of Plaintiff's fraudulent concealment, the Trust and its successors in interest have not received the benefits of the Premises for nearly thirty years, and have been required to fight to maintain their one-half ownership in the

Premises as a co-tenant in common in this lawsuit. Altchek's Counterclaim for fraud should be reinstated and remanded for trial.

A. Legal Standard for Altchek's Fraud Counterclaim

"To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation." *P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep't 2003) (citation omitted).

"A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so." *Id.* (citation omitted). "There is a duty to disclose . . . when nondisclosure would lead the person to whom it was or should have been made to forego action that might otherwise have been taken for the protection of that person." *Strasser v. Prudential Sec., Inc.*, 218 A.D.2d 526, 527 (1st Dep't 1995) (internal quotation marks and citation omitted). As "in any action based upon fraud, 'the circumstances constituting the wrong shall be stated in detail.'" *P.T. Bank Cent. Asia*, 301 A.D.2d at 376 (quoting CPLR § 3016(b)).

"Issues of fact preclude summary dismissal" of fraud claims. *30-32 W. 31st St. LLC v. Heena Hotel*, 193 A.D.3d 401, 401 (1st Dep't 2021); *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 204 A.D.2d 218, 218-19 (1st Dep't 1994), *aff'd*, 86 N.Y.2d 112 (1995).

Altchek presented sufficient evidence to create an issue of fact with respect to each element of his Counterclaim for fraud.

B. Altchek Presented Evidence Sufficient to Create an Issue of Fact With Respect to the Reasonable Reliance Element of the Fraud Counterclaim

1. As a Co-Tenant in Common Plaintiff Had a Duty to Disclose Their One-Half Interest in the Premises and to Account to Yale and His Successors for That Interest

Plaintiff had a duty to disclose information relevant to the Premises to Yale (and his heirs and/or beneficiaries, including the Trust) because he had a fiduciary duty to them. "As tenants in common, the parties have a quasi-trust or fiduciary relation with regard to the property they commonly hold . . . ." *Pichler v. Jackson*, 157 A.D.3d 450, 450 (1st Dep't 2018); *see also Snyder v. Puente De Brooklyn Realty Corp.*, 297 A.D.2d 432, 435 (3d Dep't 2002) ("fiduciary relationship exists between cotenants"). There can be no dispute that as a co-tenant in common, Plaintiff had a duty to disclose information regarding the Premises, including Yale's one-half interest therein, to Yale and his heirs and/or beneficiaries, and

failed to do so. Moreover, Plaintiff had a duty to account to Yale and his successors in interest for their one-half interest in the Premises, and never did.

2. There are, at a Minimum, Issues of Fact with Respect to the Trust's Reasonable Reliance on Plaintiff's Fraudulent Concealment

With respect to the reliance element of the Counterclaim for Fraud, Altchek alleges and presented evidence to show the Trust's (and its predecessors in interest's) direct reliance to its detriment upon Plaintiff's fraudulent concealment of the Trust's interest in the Premises.

Altchek's allegations of fraud include, *inter alia*, that Plaintiff "knowingly participated in a fraudulent scheme to conceal from the Surrogate's Court and Yale Golobe (and his heirs and/or beneficiaries) the fact that . . . [they] were entitled to . . . half of [Dorothy's] Estate, including a one half interest in the Premises as a cotenant in common." (R-40, ¶ 67.) Altchek further alleged in his Counterclaim that he "relied on Plaintiff's active concealment when administering the Trust upon the death of Emil Krause, and did not pursue Emil Krause's rightful ownership of [a one-half interest in Dorothy's Estate] including, but not limited to, the one half interest in the Premises as a cotenant in common, on behalf of the Trust." (R-40, ¶ 69.) Thus, Altchek alleged that Yale and his heirs and/or beneficiaries, including the Trust (through Altchek), directly relied upon Plaintiff's fraudulent concealment of information regarding the Premises.

Altchek anticipates presenting additional proof during trial through, among other things, Plaintiff's testimony, but Altchek demonstrated proof of these allegations to the Trial Court which was at least sufficient to create issues of fact in connection with his fraud Counterclaim.

With respect to the allegation that Plaintiff participated in a scheme to conceal from the Surrogate's Court and the Trust (and its predecessors in interest) its one-half interest in the Premises as a co-tenant in common, Altchek presented evidence that Plaintiff knew that he did not know whether his Uncle Yale had predeceased his Aunt Dorothy, but consciously made a decision not to properly investigate the matter, which inured to his benefit. Specifically, Plaintiff testified during his deposition that he personally did not "have any knowledge of where [Yale] was or when he had died," but simply "had to assume that since [Dorothy] was – since [Yale] was 11 years older than [Dorothy], that he – and she had died at the age of 86 or something, that he would – that he had died, because of the age difference." (R-53 ¶ 19 (quoting R-108, pp. 30:6 – 31:8).) Plaintiff also testified that prior to 2019, he did not do anything to confirm that Yale predeceased Dorothy. (R-53 ¶ 20 (citing R-108, pp. 31:9 – 31:12).) Instead, he conveniently relied on a) the fact that Yale was older than Dorothy, and b) the testimony of his father Zangwill's long-time friend, Harold Kozupsky, that Yale died six or seven

years before Dorothy. (R-53, ¶ 19; R-54 ¶¶ 22-23; R-71, p. 4:11-12; R-89 – R-90; R-108, pp. 30:6 – 31:8.)

Plaintiff also does not recall his father, Zangwill, ever doing anything to confirm whether Yale predeceased Dorothy. (R-53, ¶ 21 (citing R-108, p. 31:13-20).) Thus, Altchek presented evidence of Plaintiff's admission that his belief that Yale was not alive when Dorothy passed was merely speculation – he knew he did not know whether Yale predeceased Dorothy or whether he was the sole owner of the Premises – and that he did not investigate, but worked with and relied upon others who were, at best, misinformed. The evidence also established that Plaintiff's failure to investigate and his misrepresentations to the Surrogate's Court were what permitted him to retain the Premises and the remainder of Dorothy's property for himself.

With respect to the allegation that he relied upon Plaintiff's concealment of the Trust's interest in the Premises when he was administering the Trust and did not pursue the Trust's one-half interest in the Premises as a co-tenant in common sooner, Altchek presented his own sworn statements that, in his "capacity as the Successor Trustee of the Trust, [he] distributed all known assets under the Trust following Emil Krause's death." (R-588, ¶ 6.) And, further, that he "did not learn until March 2019 . . . that the Trust has an interest in the 'Premises,'" (R-588, ¶ 7), but when he learned of the Trust's interest in the Premises, he "hired counsel to

investigate the extent of the Trust's interest and Plaintiff's dealings with respect to the Premises." (R-588, ¶ 9.)

At a minimum, this evidence was sufficient to present issues of fact with respect to the reliance element of Altchek's fraud Counterclaim for trial.

a) Any Argument that Altchek Cannot Prove that He Relied upon Misrepresentations to the Surrogate's Court Is a Straw Man and Should Be Disregarded

Plaintiff will likely argue that Altchek's fraud Counterclaim should be dismissed because Altchek has not alleged and cannot prove that he reasonably relied on Plaintiff's misrepresentations to the Surrogate's Court during the administration of Dorothy's Estate, and that under New York law, such third party reliance does not support a claim for fraud. This argument is a straw man and should be disregarded. As discussed above, Altchek alleged the Trust's direct reliance upon Plaintiff's fraudulent concealment. As a result, *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817 (2016), which analyzes third-party reliance in the context of a fraud claim and upon which Plaintiff's entire argument to the Trial Court that Altchek cannot prove the reliance element of fraud is based, does not apply here.

Instead, *John Blair Commc'ns, Inc. v. Reliance Capital Grp., L.P.* and its progeny are instructive. In *John Blair*, this court held that "a party who commits intentional fraud is liable to any person who is intended to rely upon the

misrepresentation or omission and who does in fact so rely to his detriment." 57 A.D.2d 490, 492 (1st Dep't 1990). This concept has been extended to those who "stand in the shoes" of their predecessors, such as Altchek (on behalf of the Trust).

For example, in *State of N.Y. Workers' Comp. Bd. v. Madden*, the court held that "[a]s the successor [in interest to a trust], plaintiff stands in the shoes of the trust, but, like an assignee, does not obtain any greater rights than those originally possessed." 119 A.D.3d 1022, 1024 (3d Dep't 2014); *see also State of N.Y. Workers' Comp. Bd. v. Wang*, 147 A.D.3d 104, 110 (3d Dep't 2017). In other words, "the gravamen of the claim is that defendants breached contractual and fiduciary duties that were owed, not to third parties, but to the trust – and, by extension, to the plaintiff." *Madden*, 119 A.D.3d at 1024. "Thus, plaintiff's claims against defendants arising from its role as successor in interest are direct . . . ." *Id.* Accordingly, in *Madden*, the court sustained a fraud claim brought by the successor in interest, finding that it was timely because the defendant continually made misrepresentations well into the six-year statutory period. *Id.* at 1027-28.

There can be no dispute that Yale's heirs and/or heirs/beneficiaries, including Altchek, as the Successor Trustee to the Trust, are "successors in interest" to Yale and, thus, directly relied upon Plaintiff's fraudulent concealment at the time of the administration of Dorothy's Estate, and continued to rely on his fraudulent concealment through and including, at least 2018. Indeed, Plaintiff does

not dispute that the Trust is a successor in interest to Yale's one-half interest in the Premises as a co-tenant in common.[8] (*See* R-56, ¶ 32 ("[n]either Yale nor any of his heirs/successors in interest ever took physical possession of the Premises").)

Accordingly, Altchek adequately alleged and presented sufficient evidence of direct reliance by the Trust and its predecessors in interest on Plaintiff's fraudulent concealment of information relating to the Premises, including their one-half interest as a co-tenant in common, to create an issue of fact. The Trial Court, however, completely ignored such evidence in issuing its Order.

3. Altchek Adequately Plead and Will Prove Scienter

Altchek demonstrated sufficient evidence to at least create an issue of fact with respect to Plaintiff's scienter. Specifically, Altchek presented evidence to show that Plaintiff's intentional and reckless failure to investigate whether Yale predeceased Dorothy, which he admits he did not know, permitted/caused him to fraudulently conceal from Yale and his successors in interest their one-half interest in the Premises as a co-tenant in common. This constitutes sufficient scienter to support a fraudulent concealment claim.

"The scienter element is satisfied if the misrepresentation was 'known to be untrue or recklessly made.'" *Greenway II, LLC v. Wildenstein & Co.*, No. 19 Civ.

[8] Black's Law Dictionary defines a "successor in interest" as "[s]omeone who follows another in ownership or control of property," who "retains the same rights as the original owner, with no change in substance." Black's Law Dictionary (11th ed. 2019).

4093 (JCM) (RWL), 2019 WL 11278321, at *6 (S.D.N.Y. Oct. 8, 2019) (quoting *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 119 (1969)). Thus, "[u]nder New York law, fraud 'includes pretense of knowledge when there is none and if a statement is recklessly made without knowledge or without genuine belief in its truth the statement may be actionable.'" *Id.* (quoting *Terris v. Cummiskey*, 11 A.D.2d 259, 260 (3d Dep't 1960)). As a result, "a defendant may be guilty of fraudulent misrepresentation for making a false statement without knowing it to be false, if he made it recklessly with the pretense of knowledge that it was true when in fact he knew that he had no such knowledge." *Id.* (quoting *DiRose v. PK Mgmt. Corp.*, 691 F.2d 628, 632 (2d Cir. 1982)). "To be guilty of fraud in this manner, the speaker must know that he has no knowledge on the subject concerning which he speaks." *DiRose*, 691 F.2d at 632 (citation omitted).

The evidence presented by Plaintiff clearly establishes that Plaintiff knew that he did not know whether his uncle Yale was alive when his aunt Dorothy died. Plaintiff testified during his deposition that he personally did not "have any knowledge of where [Yale] was or when he had died," but simply "had to assume that since [Dorothy] was – since [Yale] was 11 years older than [Dorothy], that he – and she had died at the age of 86 or something, that he would – that he had died, because of the age difference." (R-53 ¶ 19 (quoting R-108, pp. 30:6 – 31:8).) Plaintiff also testified that prior to 2019, he did not do anything to confirm that

Yale predeceased Dorothy. (R-53 ¶ 20 (citing R-108, pp. 31:9 – 31:12).) Plaintiff also does not recall his father, Zangwill, ever doing anything to confirm whether Yale predeceased Dorothy. (R-53 ¶ 21 (citing R-108, p. 31:13-20).)

Accordingly, Plaintiff acknowledged that his belief that Yale was not alive when Dorothy passed was merely speculation – he knew he did not know whether Yale predeceased Dorothy or whether he was the sole owner of the Premises – yet neither he nor his father, Zangwill, nor his attorney Roy Kozupsky, took any steps whatsoever to investigate so that Plaintiff could establish a legal right to retain the Premises and the remainder of Dorothy's property for himself. Certainly Plaintiff's reckless misstatements to the Surrogate's Court that his father (and subsequently he) was the sole heir to his Aunt Dorothy constitute fraudulent misrepresentation under *Greenway II* and its progeny. It necessarily follows that Plaintiff's intentional decision not to conduct a reasonable investigation regarding the heirs of Dorothy's Estate and the resulting concealment from Yale and his successors in interest of Yale's one-half interest in the Premises as a co-tenant in common constitutes the requisite scienter. At a minimum, the evidence presented by Altchek to the Trial Court created an issue of fact for trial with respect to the scienter element of fraud.

Plaintiff will likely argue that Altchek cannot prove scienter because Plaintiff held an honest or sincere belief that Yale predeceased Dorothy. The

evidence presented by Altchek, however, establishes that Plaintiff's failure to discover that Yale had survived Dorothy (and his resulting belief that he was the sole heir to Dorothy's Estate, including the Premises) was not reasonable, so any "sincere" belief held by Plaintiff that Yale had predeceased Dorothy does not provide any relief. *See Kramer v. Joseph P. Day, Inc.*, 26 N.Y.S.2d 734, 736 (Sup. Ct. N.Y. Co. 1941) ("A refusal to see the obvious, a failure to investigate the doubtful, if sufficiently gross, may furnish evidence leading to an inference of fraud, so as to impose liability for losses suffered by those who rely on the representation. In other words, heedlessness and reckless disregard of consequences may take the place of deliberate intention").

4. Altchek's Fraud Counterclaim is Timely

The six-year statute of limitations applicable to Altchek's fraud Counterclaim has not expired. Where, as here, the fraud is continuous, "the cause of action is timely in that it alleges actions occurring less than six years before the action was filed." *Madden*, 119 A.D.3d at 1027-28. Plaintiff initially concealed Yale's one-half interest in Dorothy's Estate during the administration of the Estate in 1992, but as discussed above, he continued to conceal the interest from Yale's

heirs and/or beneficiaries until at least 2018.[9] As a result, Altchek's fraud Counterclaim is timely.

Additionally, there is no way Yale and his heirs and/or beneficiaries could have discovered Plaintiff's concealment sooner, so even if a two-year discovery period applies to Altchek's fraud Counterclaim, the Counterclaim is timely. "The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was 'possessed of knowledge of facts from which [the fraud] could be reasonably inferred.'" *Sargiss v. Magarelli*, 12 N.Y.3d 527, 532 (2009) (quoting *Erbe v. Lincoln Rochester Tr. Co.*, 3 N.Y.2d 321, 326 (1957)). "Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute." *Id.* (quoting *Erbe*, 3 N.Y.2d at 326). "Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of facts." *Id.* (quoting *Trepuk v. Frank*, 44 N.Y.2d 723, 725 (1978)).

In *Sargiss*, the Court of Appeals found that there was no indication that plaintiff had knowledge of the alleged fraud more than two years before she filed

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[9] Plaintiff continues to fraudulently conceal information regarding the Premises from the Trust, and, as discussed further above, the Trust, as Yale's successor in interest, has standing to bring its fraud Counterclaim for Plaintiff's fraudulent concealment from Yale and his other heirs and/or beneficiaries as well. *See Madden*, 119 A.D.3d at 1024; *see also Wang*, 147 A.D.3d at 110.

the complaint and it was "unclear how plaintiff could have discovered the alleged fraud earlier than she did." *Id.* Similarly, here, Altchek and the Trust's predecessors in interest had no reason to discover Plaintiff's fraudulent concealment before March 2019, when it is admitted Altchek was first informed of the Trust's one-half interest in the Premises. (R-58, ¶¶ 47-48; R-269 – R-270, pp. 12:9 – 13:12; R-303.)

Plaintiff will likely argue that Yale or his heirs/beneficiaries could have discovered their interest in the Premises and his fraudulent concealment when Plaintiff allegedly published Dorothy's death in Newsday Long Island or when Plaintiff recorded his deed to the Premises in November 1992. However, Plaintiff cannot specify when he published Dorothy's death in Newsday, (*see* R-334, ¶ 4), so there is no way to know when Yale or his successors in interest could have learned of their potential interest in the Premises from Newsday. Moreover, Yale died in Orange County, New York in 1992, (R-65), which is at least 100 miles from Long Island (and there is no proof that Newsday was distributed anywhere but Long Island), approximately eleven months after Dorothy passed, and, as acknowledged by Plaintiff, was not in touch with Plaintiff or his family when he died. (*See* R-53, ¶ 19.) Thus, it is highly unlikely that Yale would have seen the alleged Newsday advertisement and/or communicated about it to his heirs and/or beneficiaries. As a result, Yale's heirs and assigns had no reason to know of their

potential interest in the Premises (or Dorothy's other property) or where to look to discover any such interest, never mind Plaintiff's concealment of information regarding the Premises.

In light of Altchek's allegations of fraud and the supporting proof presented to the Trial Court, the Order dismissing Altchek's Counterclaim for fraud should be reversed, and the fraud Counterclaim remanded for trial.

IV. THE TRIAL COURT'S DETERMINATION THAT THERE ARE NO TRIABLE ISSUES OF FACT WITH RESPECT TO ALTCHEK'S COUNTERCLAIM FOR BREACH OF FIDUCIARY DUTY WAS CLEARLY ERRONEOUS

A. Plaintiff Has Had a Fiduciary Duty to His Uncle Yale and Yale's Heirs and Beneficiaries, including the Trust, Which He Breached and Continues to Breach

The Trial Court also summarily dismissed Altchek's Counterclaim for breach of fiduciary duty without providing any factual basis or legal reasoning in the Order. Altchek's allegations and the evidence presented in opposition to Plaintiff's Motion for Summary Judgment raised issues of fact, which must be decided by the trier of fact at trial.

"To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014) (citation omitted)).

It is clear that under New York law Plaintiff had a fiduciary duty to his Uncle Yale and Yale's heirs and beneficiaries, who were Plaintiff's co-tenants in common. *Pichler*, 157 A.D.3d at 450; *see also Snyder*, 297 A.D.2d at 435 ("fiduciary relationship exists between cotenants"). It "is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989) (citing *Meinhard v. Salmon*, 249 N.Y. 458, 463-464 (1928)). This rule bars "not only blatant self-dealing," but also "avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." *Id.*

Here, Altchek presented evidence of Plaintiff's blatant self-dealing and conflict of interest. Specifically, as discussed at length above, Plaintiff breached his fiduciary duty to the Trust and its predecessors in interest by neglecting to do any investigation into whether his Aunt Dorothy had any other heirs and, as a consequence, failing to disclose to his uncle Yale (and his successors in interest) his one-half interest in the Premises as a co-tenant in common. Plaintiff's failure to investigate whether anyone else had an interest in the Premises inured to his personal benefit. For example, Plaintiff has continuously collected rent payments and profits from the Premises without sharing them with his co-tenants, who were owed a one-half share for the past nearly thirty years.

Moreover, as Altchek alleges, Plaintiff subsequently and continuously failed to account to Yale and his heirs and beneficiaries, including the Trust "for their one half interest in the Premises as a cotenant in common including, but not limited to, any rents and profits Plaintiff received since he became an owner of the Premises." (R-41 – R-42, ¶¶ 75-76.) Evidence of this includes Plaintiff's admission that he was unaware that the Trust (and its predecessors in interest) were his co-tenant in common with a one-half interest in the Premises for nearly thirty years. (R-57, ¶ 43; R-230 – R-236; R-208 – R-211; R-302 – R-303; R-137, pp. 147:7 – 148:8.) Clearly, Plaintiff was not accounting to his co-tenant in common without acknowledging its existence. Plaintiff, through various legal representatives, also indicated that he would prepare an Accounting with respect to the Premises for Altchek, (R-59, ¶ 54; R-60, ¶ 57; R-308), but never did. Instead, he kept the money for himself, retained new counsel and filed the Complaint in this Action.

Altchek also specifically alleges a fact which is evidenced by the very existence of this lawsuit and needs no further support – Plaintiff "breached his fiduciary duty to the Trust by bringing this action and seeking to wrongfully deprive the Trust of its one half interest in the Premises as a cotenant in common." (R-42, ¶ 77.) Such allegations and the supporting evidence raise issues of fact and Altchek's claim for breach of fiduciary duty should be presented to the trier of fact for determination.

B. Altchek's Breach of Fiduciary Duty Counterclaim is Not Time Barred

Altchek's breach of fiduciary duty Counterclaim is timely because the statute of limitations did not begin to run until Plaintiff openly repudiated his fiduciary obligation to the Trust (and its predecessors in interest), and such repudiation did not occur until 2020 (R-589, ¶ 12), the same year in which Altchek filed his Counterclaims on behalf of the Trust.

A six-year statute of limitations applies to Altchek's breach of fiduciary Counterclaim because, although Altchek's Counterclaim for breach of fiduciary duty sets forth a minimum monetary amount to which he is entitled, the relief he seeks is equitable in nature. *See Blumenstyk v. Singer*, No. 651018/2013, 2014 WL 3870616, at *5 (Sup. Ct. N.Y. Co. Aug. 4, 2014) ("For equitable relief, the six-year limitations period in CPLR 213(1) applies."). Specifically, Altchek alleged that Plaintiff breached his fiduciary duty to the Trust and its predecessors in interest by, *inter alia*, "failing to account to them for their one half interest in the Premises as a cotenant in common including, but not limited to, any rents and profits Plaintiff received since he became an owner of the Premises." (R-42, ¶ 76.) Then, Altchek alleged that the Trust had been damaged "in an amount . . . no less than $3 million representing its one half interest in the Premises, income from the Premises, and its one half interest in all of the other assets of the Estate of Dorothy Golobe, including those which had passed from her father, Henry Golobe." (R-42, ¶ 78.)

Moreover, in connection with his fraud Counterclaim, which overlaps with his Counterclaim for breach of fiduciary duty, Altchek seeks an Accounting of all payments relating to the Premises. (R-41, ¶ 71.)

"Claims alleging a breach of fiduciary duty do not accrue until there is either an open repudiation of the fiduciary obligation or a judicial settlement of the account." *Matter of Steinberg*, 183 A.D.3d 1067, 1070 (3d Dep't 2020) (quoting *Matter of Baird*, 58 A.D.3d 958, 959 (2009)). "Open repudiation 'requires proof of a repudiation by the fiduciary which is clear and made known to the beneficiaries.'" *Id.* at 1071 (quoting *Matter of JPMorgan Chase Bank N.A. (Roby)*, 122 A.D.3d 1274, 1276 (4th Dep't 2014)). "Where there is any doubt on the record as to the conclusive applicability of a [s]tatute of [l]imitations defense, the motion to dismiss . . . should be denied." *Id.* (quoting *Matter of Behr*, 191 A.D.2d 431, 431 (1993)).

Matter of Steinberg is informative here. There, petitioners alleged, *inter alia*, that a real estate developer and the brother or father of the petitioners who had since passed (the "decedent"), transferred petitioners' interests in several properties, which he previously gifted to them, to himself or entities of which he was a manager and member, and, in some cases, filed deeds confirming the transfer, which involved forging one petitioner's signature, and then sold the properties for less than their true value and/or failed to account to the petitioners

for the amount they were sold. *Steinberg*, 183 A.D.3d at 1068-69. Thus, petitioners alleged that the decedent breached his fiduciary duty to them by "engaging in self-dealing, entering into self-interested transactions, committing forgery, and concealing acts of his impropriety." *Id.* at 1070 (quoting petition therein).

The Appellate Division, Third Department held that the Surrogate's Court properly denied respondent's motion to dismiss the claim on the grounds that it was barred by the statute of limitations where respondent "failed to prove that, by filing the deeds, decedent made a 'clear' repudiation which was 'made known to [petitioners],' because petitioners were purportedly unaware of decedent's divestments until after his death." *Id.* at 1071. The court reasoned that "[b]ecause no open repudiation occurred . . . petitioners' breach of fiduciary duty claim did not begin to accrue until decedent's death in January 2017, when his fiduciary relationship with petitioners terminated," thus Petitioners' claim filed one year later was well within the six-year statute of limitations. *Id.* at 1071-72.

Here, Plaintiff did not openly repudiate the Trust's interest in the Premises until he threatened to file and then filed the Complaint in this action in 2020. (*See* R-590; R-26 – R-30.) As discussed at length above, Plaintiff admits that he was not even aware of the Trust's (or its predecessors in interests') interest in the Premises until 2018, at the earliest. Even when he learned of the Trust's interest in

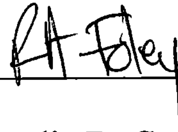
the Premises, rather than repudiating it, Plaintiff, through his then counsel and his cousin who acted with his Power of Attorney, acknowledged the Trust's interest, offered to provide an Accounting, and sought to work with Altchek to sell the Premises. As a result, Altchek's Counterclaim for breach of fiduciary duty did not accrue until 2020, when Plaintiff's present counsel threatened litigation, so it cannot be barred by any statute of limitations.

CONCLUSION

For the reasons set forth above, and based upon the evidence in the Record, the Trial Court's Decision and Order granting Plaintiff's Motion for Summary Judgment; denying Altchek's Motion for Summary Judgment; and dismissing Altchek's Counterclaims should be reversed, and the Trust should be declared a one-half owner of the Premises as a co-tenant in common, and Altchek's Counterclaims should be reinstated and the Action set for trial.

Dated: New York, New York
August 8, 2022

Respectfully submitted,



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STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

JOHN GOLOBE,

Plaintiff-Respondent,

– against –

IRA ALTCHEK, as Trustee of the
Emil Krause Revocable Trust,

Defendant-Appellant.

1. The index number of the case in the court below is 655854/20.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about October 30, 2020 by filing of a Summons and Complaint. Issue was joined on or about February 5, 2021 by service of an Answer with Counterclaims.

5. The nature and object of the action is for fraud and breach of fiduciary claim.

6. This appeal is from the Decision and Order of the Honorable Jennifer Schecter, dated February 28, 2022, which granted Plaintiff's Motion for Summary Judgment and denied Defendant's Motion for Summary Judgment.

7. This appeal is on the full reproduced record.