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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff-Respondent John Golobe's ("Respondent") Opposition to the Appeal of Defendant-Appellant Ira Altchek ("Altchek or "Appellant"), in his capacity as Successor Trustee of the Emil Krause Revocable Trust (the "Trust"), does not provide any legal or evidentiary support for this Court's affirmation of the Trial Court's erroneous Order dated February 28, 2022 (R-6) (the "Order"), which determined that Respondent acquired full title to 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) by adverse possession. Indeed, Respondent has not even addressed a number of the legal arguments set forth in Altchek's initial Appellate Brief, dated August 8, 2022 (the "Initial Brief").

For example, Respondent has not addressed the primary basis for Altchek's argument that Respondent cannot prove the hostility and open and notorious elements of adverse possession: under New York law, there is a statutory presumption that a tenant in common in possession holds the property for the benefit of the co-tenant. In light of this presumption, New York Courts require some kind of ouster, such as an express communication of a co-tenant in possession's intention to exclude or deny the rights of co-tenants, before stripping the co-tenant(s) of their interest in the property.

Here, it is undisputed that Respondent did not engage in any very obvious and overt acts that would have indicated to the Trust (or its predecessors in interest) that he was excluding the Trust from the Premises or denying the Trust's rights with respect to it until at least 2018. It is also undisputed that Respondent has known of his co-tenancy of the Premises with the Trust for less than five years.[1] How could Respondent have ousted his co-tenant more than the twenty years ago to establish full title to the Premises by adverse possession? The answer is simple: he could not (and did not). Accordingly, for the reasons stated herein and in the Initial Brief, this Court should reverse the Trial Court's Order and declare the Trust a co-tenant in common of the Premises with a one-half interest therein.

In addition, the Court should reverse the Order to the extent it dismisses Altchek's Counterclaims for fraud and breach of fiduciary duty and remand them

[1] Respondent repeatedly asserts that his failure to discover that he is a co-tenant of the Premises rather than the owner of full title sooner is an "honest mistake," which renders his sole possession of the Premises sufficient to satisfy the hostility requirement of adverse possession. The trouble with this argument is two-fold. First, as discussed further below, Respondent's complete reliance on speculative information and the false statements of others, and his failure to conduct any independent investigation with respect to his aunt Dorothy's ("Dorothy") heirs, was unreasonable. Second, Respondent's inhabitance of the Premises was not a mistake! Respondent simply did not know he occupied the Premises for his benefit and that of his co-tenants, rather than for his exclusive benefit. Thus, there is simply no precedent or justification under New York law for Respondent's acquisition of full title to the Premises by adverse possession here.

for trial. Respondent has not presented any legal argument or evidence that supports the Trial Court's summary dismissal of Altchek's Counterclaims.

ARGUMENT

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

Respondent has not (and cannot) prove that his possession of the Premises has been hostile and under a claim of right or open and notorious. As a result, the Trial Court's Order should be reversed.

A. Respondent Cannot Prove that his Possession of the Premises has been Hostile and Under a Claim of Right

1. The Trial Court and Respondent Ignore Determinative New York Precedent Applicable Where a Claim of Adverse Possession is against a Co-Tenant, Which Prevents Respondent from Proving the Hostility Element of His Claim of Adverse Possession

The Parties agree that in order for Respondent to establish his claim of adverse possession under New York law, he 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 v. Murtagh*, 19 N.Y.3d 75, 81 (2012); Respondent's Opposition Brief, dated October 3, 2022 ("Opp. Br."), p. 15.

What Respondent and the Trial Court have ignored, however, and which this entire case turns on, is the binding New York precedent which states: "[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).

What the presumption means here is that the Trust, "a tenant-in-common seeking to assert a successful claim of adverse possession is required to show more than mere possession; the [Trust] must also [show that it] commit[ed] acts constituting ouster."[2] *Myers*, 91 N.Y.2d at 633. "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); *see also Lindine v. Iasenza*, 130 A.D.3d 1329, 1330 (3d Dep't 2015); *see also Russo Realty Corp.*, 30 A.D.3d at 500-01; *Kraker v. Roll*, 100 A.D.2d 424, 434 (2d

[2] "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 v. Bartholomew*, 91 N.Y.2d 630, 634-35 (1998) (emphasis in original). The expiration of the statutory period, however, "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). Thus, Respondent must still show ouster, and the concept of ouster is most certainly not, as Respondent argues (*see* Opp. Br., p. 33, n.6), irrelevant here.

Dep't 1984); *Perez v. Perez*, 228 A.D.2d 161, 163 (1st Dep't 1996). 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.

Furthermore, in order for Respondent to prove that his possession of the Premises has been hostile, he must prove that he entered upon the property with "intention to claim title," *Hinkley v. State of New York*, 234 N.Y. 309, 317 (1922), in a manner adverse to the Trust and its predecessors in interest, such that the Trust, "by unequivocal acts of the [Respondent], [had] notice of the hostile claim" and could "be thereby called upon to assert his legal title." *Monnot v. Murphy*, 207 N.Y. 240, 245 (1913); *Hinkley*, 234 N.Y. at 317.

It is undisputed that Respondent did not know of his shared interest in the Premises as a co-tenant in common until 2018 (at the earliest), (R-57, ¶ 43; R-230 – R-236; R-208 – R-211; R-302 – R-303; R-137, pp. 147:7 – 148:8). This means it would have been impossible for Respondent to 1) enter upon the Premises in 1992 with intention to claim title (as opposed to thinking he already held full title), or 2) make any statements or engage in any acts that could have been construed as "ouster" of the Trust or its predecessors in interest from the Premises before 2018. As a result, Respondent simply cannot prove that his possession of the Premises was hostile or in any way adverse to the Trust's interest for the statutory period.

2. The Evidence Establishes that Respondent's Possession of the Premises Has Not Been Hostile for the Statutory Period Because He Acquiesced When He Discovered the Trust's Co-Tenancy in 2018

The evidence establishes that when Respondent learned that he had not been in exclusive possession of the Premises, he acknowledged the Trust's interest as a co-tenant in common, and requested Altchek's acquiescence in the sale of the Premises. He did not immediately declare exclusive possession or intent to possess the Premises exclusively.

These facts are undisputed and proven by Respondent's sworn testimony and communications from Respondent's agents, such as his former attorney, Kevin J. Farrelly ("Farrelly") and his cousin Lois Linden ("Linden"), who had his Power of Attorney. (*See, e.g.,* R-139, pp. 155:15 – 156:2 (Respondent testified that in 2018, he learned 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-302 – R-303 (in March 2019, Farrelly acknowledged to Altchek that 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-304 – R-307 (in January 2020, Farrelly indicated to Altchek's then counsel that Respondent was having trouble getting title insurance on the Premises without a court order determining the owners of the Premises; requested that Altchek sign an agreement which listed the Trust as a co-owner of the Premises authorizing

Halstead to continue to market the Premises; and indicated that Respondent intended to provide an accounting with respect to the Premises to the Trust and share the proceeds of the sale of the Premises with the Trust); R-226 – R-228 (in May 2020, Linden conceded to Altchek that his signature (on behalf of the Trust) was needed to sell the Premises); R-310 – R-325 (in May 2020, Linden sent Altchek a draft agreement pursuant to which Respondent and Altchek were to agree to share the proceeds from any sale of the Premises); R-326 – R-328 (in May 2020, Linden sent Altchek marketing materials for the Premises, which valued it at $2.3 million[3]).

Respondent's acquiescence and attempts to work with the Trust to sell the Premises are evidence that his possession has not been hostile. *Blanchard v. Blanchard*, 4 Misc. 3d 1027(A), 2004 WL 2187604, at *3 (Sup. Ct. Bronx Co. 2004) (Renwick, J.) ("the offer to settle or compromise any claim plaintiff may have had against the subject property is relevant to the issue of hostility"); *see also Gonzalez v. Gonzalez*, 236 A.D.2d 589, 590 (2d Dep't 1997). As Justice Renwick stated in *Blanchard*, evidence of offers to settle or compromise by "the possessor

[3] It is expected that the value of the Premises has significantly increased since May 2020 as it "is within the proposed Penn Station Redevelopment Area." *See* 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).

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." 2004 WL 2187604, at *3 (citing *Van Valkenburgh v. Lutz*, 304 N.Y. 95, 99 (1952)). In other words, 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.*

Respondent has not even attempted to explain why *Blanchard* and *Gonzalez* do not apply here. *See* Opp. Br.

3. Not One of Respondent's Arguments that His Possession of the Premises Has Been Hostile Is Supported by the Facts or the Law

There is simply no basis in fact or law for a finding of Respondent's hostile possession of the Premises for the statutory period.[4]

In the Opposition Brief, Respondent first argues that his possession has been hostile because he publicly declared exclusive possession by: 1) making (false) representations to the Surrogate's Court that his father was his aunt Dorothy Golobe's ("Dorothy") sole heir; 2) (fraudulently) deeding the Premises to himself; 3) executing and recording a construction mortgage on the property; and

[4] Respondent's hostility also cannot be presumed because he cannot prove that his possession has been open and notorious for the statutory period. *See* Sections II(B)(2) and II(C) of the Initial Brief and Section I(B) *infra*.

4) maintaining exclusive possession of the Premises and making improvements to it. Opp. Br., pp. 18-20.

This argument has no merit. Respondent's actions merely demonstrate his ownership and occupation of the Premises, which is not in dispute, and which 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. In addition, Respondent's argument is undermined by his concession, as recently as 2020, that he has not held full title to the Premises. (*See* R-139, pp. 155:15 – 156:2 (Respondent testified that in 2018, he learned 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"); *see also* R-304 – R-307 (in January 2020, Attorney Farrelly indicated to Altchek's counsel that Respondent was having trouble getting title insurance on the Premises without a court order determining the owners).)

Moreover, the fact that Respondent managed the Premises, paid for its upkeep and paid taxes for more than twenty years, is not sufficient to establish Respondent's adverse possession. *Russo Realty Corp.*, 30 A.D.3d at 500-01 (citing *Perez v. Perez*, 228 A.D.2d 161, 163 (1st Dep't 1996)) ("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.") (citation omitted); *Loveless Family Tr.*, 77 A.D.3d at 1449 (finding exclusive possession of the property and payment of all related expenses for more than 20 years insufficient to establish a claim of right for purposes of adverse possession as against a cotenant); *see also Lindine*, 130 A.D.3d at 1331.

Next, Respondent argues, "hostility may be found even though the possession occurred inadvertently or by mistake" so long as the possession "constitutes an actual invasion of or infringement upon the owner's rights." Opp. Br., pp. 21-23 (quoting *Katona v. Low*, 226 A.D.2d 433, 434 (2d Dep't 1996) and citing *Bradt v. Giovannone*, 35 A.D.2d 322, 325-26 (3d Dep't 1970)). This line of cases is not instructive here because Respondent's possession of the Premises was not, as in *Katona* and *Bradt*,[5] inadvertent or by mistake, but very much intentional. The issue here, which these cases do not address, is that for the first nearly thirty years Respondent occupied the Premises, he did not know that he only held a one-half interest in the Premises as a co-tenant in common.

New York law is clear that such a mistake does not equate to hostility sufficient to support a finding of adverse possession. As discussed above, where,

[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." *Katona*, 226 A.D.2d at 434. Similarly, in *Bradt*, the plaintiffs testified that "they always assumed that the land [at issue] was their yard" and "they never intended to take any land away from anybody." *Bradt*, 35 A.D.2d at 325.

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 (quoting *Myers*, 91 N.Y.2d at 632-33). Accordingly, here, where Respondent 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 Respondent's actual possession and occupation of the Premises was not hostile or adverse to the interest of the Trust and its predecessors in interest until at least 2018. *Katona* and *Bradt* do not state otherwise – they do not even address adverse possession in the context of a co-tenancy.

Finally, Respondent argues, based upon case law from other jurisdictions that is at least sixty years old, "a finding of adverse possession is not precluded where both parties are unaware that a co-tenancy existed." Opp. Br., pp. 23-25. The trouble with this argument is that none of the old, non-binding case law Respondent cites actually supports his argument. Indeed, not one of the cases analyzes a situation in which it was obvious that both parties were unaware of the co-tenancy. *See Roberts v. Decker*, 120 Wis. 102 (1903); *Bourne v. Wiele*, 159 Wis. 340 (1915); *Kraemer v. Kraemer*, 167 Cal. App. 2d 291 (Cal. Dist. Ct. App. 1959); *Pebia v. Hamakua Mill Co.*, 30 Haw. 100 (Haw. 1927).

As Altchek explained in the Initial Brief, this case is *sui generis* because the Parties agree that neither co-tenant in common was aware of their shared interest in the Premises from 1992 until 2018, at the earliest. There is no legal precedent under New York law (or otherwise) 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 invoking the doctrine of adverse possession. For the reasons discussed above and throughout this brief and the Initial Brief, it would be nonsensical to establish such a precedent now.

4. Respondent Cannot Prove that He Had a Claim of Right to the Premises Because There was No Reasonable Basis for His Belief that He Was the Exclusive Owner of the Premises

Respondent's arguments in the Opposition Brief do nothing to support his assertion or the Trial Court's determination that he had a claim of right to the Premises because he simply cannot show that his belief that he was the sole heir to Dorothy's Estate, including the Premises, was reasonable.

RPAPL § 501(3) defines a "claim of right" as "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). Any belief Respondent held that he was the sole heir to Dorothy's Estate was a direct result of his 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."

As discussed at length in the Initial Brief, which Respondent appears to concede, Respondent's belief that Dorothy predeceased Yale was entirely speculative and not based upon personal knowledge. No investigation was conducted. Indeed, in the Opposition Brief, Respondent argues that his belief that he was the sole heir to Dorothy's Estate, including the Premises, was "sincerely held" and reasonable because it was based on, 1) the statement of Harold Kozupsky ("Kozupsky"), a friend of his father, Zangwill Golobe ("Zangwill"), 2) the Surrogate Court's determination that Zangwill was Dorothy's sole heir, 3) the fact that Yale was missing from the family for years and his age, and 4) Respondent's alleged publication of Dorothy's death in Newsday Long Island.[6] Opp. Br., pp. 16-18. None of these arguments can support a finding that Respondent's belief that Dorothy predeceased Yale was reasonable.

First, Respondent's continued reliance upon Kozupsky's statement that Yale died in June 1985, and thus predeceased Dorothy such that Zangwill was the sole

[6] Respondent also argues that to show that the basis for Respondent's belief that Yale had predeceased Dorothy was not reasonable, Altchek must suggest what Respondent should have done to ascertain whether Yale was still alive when Dorothy passed. There is no basis for this argument. It is, however, worth noting that the Title Insurance Company Respondent engaged when he first tried in 2018 to sell the Premises had no trouble ascertaining that there were co-tenants of the Premises. (R-208 – R-210.) In addition, the advent of the Internet in the 1990s might have assisted Respondent in conducting a reasonable search.

heir to Dorothy's Estate, including the Premises (R-334, ¶ 5), is not reasonable. As we now know (and Respondent concedes), Kozupsky's testimony was false,[7] and has never been corrected with the Surrogate's Court by Respondent or anyone else.

Second, Respondent's alleged reliance on the Surrogate Court's determination or its scope of inquiry is circular, nonsensical and certainly not reasonable. As discussed at length in the Initial Brief and below, the Surrogate Court's determination that Yale predeceased Dorothy such that Zangwill was the sole heir to Dorothy's Estate was based entirely upon Kozupsky's lies and Respondent's fraudulent statements.

Third, Respondent's alleged belief that Yale predeceased Dorothy because he had been missing from the family for years and was older than his siblings who had passed, was pure speculation. Indeed, Respondent acknowledged that he personally did not have any knowledge of where Yale was or when he died, (R-108, pp. 30:6 – 31:8), and testified that prior to 2019, he did not do anything to confirm that Yale predeceased Dorothy. (R-53, ¶ 20 (citing R-108, p. 31:9-12).) Such speculation is certainly not a reasonable basis for Respondent's belief.

Finally, Respondent's belief that he was Dorothy's sole heir is not substantiated by his supposed placement of an advertisement announcing

[7] Indeed, it is now clear that 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.

Dorothy's death in Newsday Long Island (to which no one responded). (*See* R-334, ¶ 4.) As an initial matter, there is no proof that Respondent actually placed the advertisement. Respondent 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 addition, there is no proof that Yale or any of his heirs or beneficiaries had access to the publication, which was distributed on Long Island. The evidence shows that Yale died at least 100 miles away from Long Island in Orange County, New York, and there is no proof in the Record that his heirs or beneficiaries lived on Long Island. (R-65.)

In sum, Respondent's utter failure to investigate whether Yale predeceased Dorothy cannot render his belief that he was Dorothy's sole heir and, thus, the exclusive owner of the Premises, reasonable such that he had a claim of right to the Premises for more than twenty years.

B. Respondent Cannot Prove that His Possession of the Premises Has Been Open and Notorious

Respondent also cannot prove that his possession of the Premises has been open and notorious for the statutory period.

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*,[8] 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 evidence here clearly establishes that Respondent did not do anything to repudiate the interest of Yale's heirs or beneficiaries, including the Trust, in the Premises until 2019, if at all.

Respondent 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 Respondent did not inform or even seek to alert the Trust or its predecessors in interest to the fact that they had an interest in the Premises until 2019. (R-58, ¶¶ 47-48.) Even then, Respondent 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.)

[8] Respondent's attempt to distinguish *Trevisano* on the basis that the description of the facts set forth in the court's decision is not expansive is unavailing. *See* Opp. Br., pp. 31-32. The *Trevisano* court provided the relevant facts upon which it granted summary judgment, denying plaintiffs' claim of adverse possession despite the continuous and actual possession of one co-tenant for the statutory period. *Trevisano*, 202 A.D.2d at 1071. Specifically, the *Trevisano* court found that the defendants proved that at the death of the plaintiff's grandparents, title to the premises vested in their children as tenants in common, and "[a]lthough plaintiff's parents remained in possession in excess of 10 years, the expiration of the 10-year period merely triggers the possibility of adverse possession; it does not establish it." *Id.* The court further 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. *Id.* (quoting *Estate of Kelley*, 140 Misc. 2d at 879). Similarly, as discussed above, here, there is no evidence of any "very obvious or overt acts" by Respondent which "unmistakably repudiate" the Trust's interest in the Premises as a co-tenant in common.

Nevertheless, Respondent argues that his possession of the Premises was open and notorious for some of the same reasons he argues that his possession was hostile: he (fraudulently) deeded the Premises to himself, he executed and recorded a construction mortgage on the property, and he maintained exclusive possession of the Premises and made improvements to it. Opp. Br., pp. 29-31. For the same reasons discussed above in Section I(A)(3), these facts do not show Respondent's repudiation of the Trust's interest in the Premises.

For the foregoing reasons, Respondent 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 Respondent acquired full title and interest to the Premises by adverse possession was clearly erroneous and should be reversed.[9]

[9] Three additional cases cited by Respondent, which he argues support the Trial Court's determination of adverse possession in his favor, are, in fact, inapposite. Opp Br., pp. 33-37. *Midgley v. Phillips*, *Galli v. Galli*, and *DeRosa v. DeRosa* are not instructive because they do not address a scenario where, as here, neither co-tenant was aware of their shared interest in the property at issue for the statutory period. Indeed, in all three cases, the non-occupying co-tenant was aware of their interests, and, yet, chose not to participate in the management or upkeep of the property. *See Midgley v. Phillips*, 143 A.D.3d 788, 789 (2d Dep't 2016) (plaintiff proved adverse possession where his co-tenant not only knew of his interest in the property, but also "refused to participate in the operation or maintenance" such that plaintiff "exclusively possessed and operated the property from that point forward"); *Galli v. Galli*, 117 A.D.3d 679 (2d Dep't 2014) (plaintiff established adverse possession where co-tenant did not claim to be unaware of her interest in the property which she inherited from her husband, plaintiff's uncle); *DeRosa v. DeRosa*, 58 A.D.3d 794 (2d Dep't 2009) (defendant proved adverse possession as against her co-tenant/brother, who had owned the property at issue exclusively and resided on it prior to conveying a one-half interest to his parents, which plaintiff and defendant then inherited as co-tenants in common upon their mother's death).

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

As discussed in the Initial Brief, the Trial Court's summary dismissal of Altchek's fraud Counterclaim was clear error, and Respondent does not substantiate the Trial Court's decision in his Opposition Brief. Most significantly, Respondent does not even address the binding legal precedent Altchek cited in the Initial Brief, which shows that Altchek's proof of Respondent's reckless failure to investigate whether Yale predeceased Dorothy and his resulting failure to disclose to the Trust and its predecessors in interest their one-half interest in the Premises as a co-tenant in common, is sufficient to establish Respondent's fraudulent intent and support a finding of fraud.

A. Altchek Presented Evidence Sufficient to Create an Issue of Fact With Respect to the Fraud Counterclaim

In order to prove a claim for fraudulent concealment, Altchek must show that the Respondent, had a duty to disclose material information to the Trust and failed to do so; the misrepresentation/concealment was intentional in order to defraud or mislead the Trust and its predecessors in interest; the Trust reasonably relied on the misrepresentation/concealment; and the Trust suffered damage as a result of its reliance on Respondent's misrepresentation/concealment. *P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep't 2003).

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

1. As a Co-Tenant in Common Respondent Had a Duty to Disclose the Trust's One-Half Interest as a Co-Tenant in Common in the Premises and to Account to It for That Interest

Respondent does not (and cannot) dispute that he had a duty to disclose information relevant to the Premises to the Trust and its predecessors in interest because he had a fiduciary duty to them as co-tenants in common. *See Pichler v. Jackson*, 157 A.D.3d 450, 450 (1st Dep't 2018) ("As tenants in common, the parties have a quasi-trust or fiduciary relation with regard to the property they commonly hold . . . ."); *see also Snyder v. Puente De Brooklyn Realty Corp.*, 297 A.D.2d 432, 435 (3d Dep't 2002).

2. Altchek Presented Sufficient Evidence of Scienter to Create a Triable Issue of Fact

Under applicable New York law that Respondent fails to address in the Opposition Brief, 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. 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, "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)). Accordingly, "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)).

Altchek presented evidence which shows Respondent's intentional and reckless failure to ever investigate whether Yale predeceased Dorothy, which he admits he did not know, and which permitted/caused him to fraudulently conceal from the Trust and its predecessors in interest their one-half interest in the Premises as a co-tenant in common. Specifically, Altchek presented evidence (set forth in detail in the Initial Brief at pp. 36-38), which shows that Respondent admitted during his deposition in this case that he did not know whether his uncle Yale was alive when his aunt Dorothy died and he did not do anything to investigate. (R-108, pp. 30:6 – 31:12.)

Moreover, it is undisputed that Respondent's admitted failure to investigate precipitated his claim of sole heirship to Dorothy's Estate, including the Premises. It necessarily follows that Respondent's subsequent failure to disclose to the Trust and its predecessors in interest the heirs of Dorothy's Estate and the Trust's one-half interest in the Premises as a co-tenant in common constitutes the requisite

scienter. At a minimum, the evidence of scienter Altchek presented to the Trial Court created an issue of fact for trial.

Rather than address the fact that Respondent's reckless actions and concealment constitute scienter for the purposes of Altchek's fraud Counterclaim,[10] Respondent argues that Altchek cannot prove scienter because Respondent held an honest and sincere belief that Yale predeceased Dorothy. The evidence presented by Altchek and discussed *supra* in Section I(A)(4), however, establishes that Respondent's failure to discover that Yale 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 Respondent that Yale had predeceased Dorothy does not provide him 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

[10] Respondent summarily states that Altchek has no support for his argument that Respondent's utter failure to investigate Dorothy's heirs was reckless because Altchek personally was not aware of Respondent's recklessness. Opp. Br., p. 43. Altchek, who is representing the interest of the Trust, of which he is the Successor Trustee, in this lawsuit, need not have personal knowledge of Respondent's fraud in order for it to be actionable. Altchek merely has a duty to the Trust and its beneficiaries and, in that capacity, hired counsel to investigate the extent of the Trust's interest and Respondent's dealings when Respondent's own counsel initially approached him regarding the Trust's interest in the Premises. (R-588, ¶ 9.) When Respondent hired his present counsel and filed his Complaint in this Action, Altchek hired trial counsel to continue that investigation and handle Respondent's claims and Altchek's Counterclaims. (R-588, ¶ 10.) It is not surprising that Altchek does not have personal knowledge of Respondent's intent with respect to the Premises as he was reliant upon trial counsel to obtain information and relay it to him. (R-589, ¶ 14.)

evidence leading to an inference of fraud, so as to impose liability for losses suffered by those who rely on the representation.").

3. Altchek Presented Sufficient Evidence of Reliance to Create a Triable Issue of Fact

With respect to the reliance element of the Counterclaim for Fraud, Altchek alleges the Trust's (and its predecessors in interests') direct and justifiable reliance to their detriment upon Respondent's fraudulent concealment of the Trust's interest in the Premises. (R-40, ¶¶ 67 and 69.)

Specifically, Altchek presented evidence that when he was administering the Trust, he did not pursue the Trust's one-half interest in the Premises as a co-tenant in common because Respondent failed to disclose Yale's interest to him (or any of his successors in interest who stepped into his shoes), including the Trust, so the Trust's interest in the Premises was not known to Altchek. Specifically, Altchek testified 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.) Further, Altchek testified, 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 Respondent's dealings with respect to the Premises." (R-588, ¶ 9.)

Citing *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817 (2016), Respondent argues that Altchek cannot prove reasonable reliance because the only

misrepresentations Respondent made were to the Surrogate's Court during the administration of Dorothy's Estate, and Altchek's reliance upon Respondent's statements to a third party does not support a finding of justifiable reliance. This argument is a straw man and should be disregarded. As discussed in the Initial Brief and above, Altchek alleged and proved Altchek's and the Trust's direct reliance upon Respondent's fraudulent concealment.

The case law that is instructive here, which Respondent failed to address in the Opposition Brief, is *John Blair Commc'ns, Inc. v. Reliance Capital Grp., L.P.* and its progeny. 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." 157 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). *See, e.g.*, *State of N.Y. Workers' Comp. Bd. v. Madden*, 119 A.D.3d 1022, 1024 (3d Dep't 2014) (finding that "[a]s the successor [in interest to a trust], plaintiff stands in the shoes of the trust," the contractual and fiduciary duties were owed "not to third parties, but to the trust – and, by extension, to plaintiff," and plaintiff's claims were direct); *see also State of N.Y. Workers' Comp. Bd. v. Wang*, 147 A.D.3d 104, 110 (3d Dep't 2017).

There can be no dispute that Yale's heirs and/or beneficiaries, including Altchek, as the Successor Trustee to the Trust, are "successors in interest" to Yale and, thus, directly relied upon Respondent'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.[11]

Accordingly, Altchek presented sufficient evidence of Altchek's direct reliance on Respondent's fraudulent concealment of Yale's one-half interest in the Premises as a co-tenant in common to create at least a triable issue of fact with respect to the Trust's reliance.

4. Altchek's Fraud Counterclaim is Timely

Respondent's argument that Altchek's Counterclaim for fraud is time barred has no merit. There is no way the Trust or its predecessors in interest could have discovered Respondent's concealment before they did, so even if a two-year statute of limitations (rather than six years) applies to Altchek's fraud Counterclaim, the Counterclaim is timely.

[11] Respondent's arguments that Altchek and the Trust did not justifiably rely on Respondent's concealment of the Trust's interest in the Premises because, 1) Respondent did not communicate with Yale or his heirs when he came into possession of the Premises or for twenty years thereafter, and 2) Respondent took public actions with respect to the Premises, such as fraudulently deeding it to himself and recording a construction mortgage, are addressed above in Sections I(A)(3) and I(B). The bottom line is that Altchek and the Trust's predecessors in interest had no reason to even suspect that they might have an interest in the Premises (or even that Dorothy owned the Premises prior to her death) which would have caused them to discover their interest.

"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)). Altchek and the Trust's predecessors in interest had no reason to discover Respondent'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.) Respondent's argument that Altchek or the Trust's predecessors in interest could have discovered their interest in the Premises sooner because his ownership of the Premises was a matter of public record has no merit for the reasons discussed above in Section I(A)(3).

Altchek's Counterclaim for fraud is not time barred and is sufficiently supported by the proof Altchek submitted to the Trial Court to create an issue of fact for trail. Accordingly, the Order dismissing Altchek's Counterclaim for fraud should be reversed, and the fraud Counterclaim remanded for trial.

III. 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

Respondent does not (and cannot) dispute that there is an issue of fact with respect to Altchek's breach of fiduciary duty Counterclaim. Respondent only disputes the timeliness of Altchek's claim.

Altchek's breach of fiduciary duty Counterclaim is timely because the statute of limitations did not begin to run until Respondent 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.

"[C]laims 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) (citations omitted) (quoting *Matter of Baird*, 58 A.D.3d 958, 959 (2009)). Respondent argues that the open repudiation doctrine does not apply here because the relief Altchek seeks is monetary, not equitable. Respondent is wrong. As discussed in the Initial Brief at pp. 50-51, Altchek seeks both equitable relief in the form of an accounting, and monetary damages. Accordingly, the open repudiation doctrine applies. *See People v. Trump*, 62 Misc. 3d 500, 508 (Sup. Ct. N.Y. Co. 2018) (the

open repudiation doctrine applies "when a mix of equitable relief and monetary damages are sought").

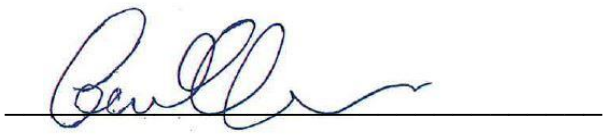
Thus, Altchek's Counterclaim for breach of fiduciary duty did not accrue until 2020, when Respondent's present counsel threatened litigation and openly repudiated the Trust's interest in the Premises, and is not time barred. The Trial Court's Order dismissing Altchek's Counterclaim for breach of fiduciary duty should be reversed, and the Counterclaim for breach of fiduciary duty should be reinstated for trial.

CONCLUSION

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

Dated: New York, New York
October 20, 2022

Respectfully submitted,



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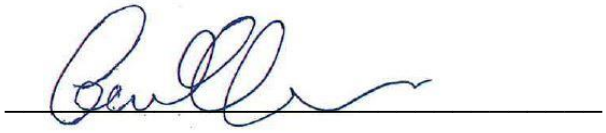
Respectfully submitted,



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