To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2022-01026

JOHN GOLOBE,

Plaintiff-Respondent,

against

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

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

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STATEMENT OF THE QUESTIONS INVOLVED

1. Does a cotenant who establishes actual, continuous, exclusive, open and notorious possession, under a claim of right hostile to his cotenant's ownership rights, for over 20 years, thereby acquire, by adverse possession, his cotenant's ownership interest in jointly owned real property?

The lower court answered this question in the affirmative.

2. Is the plaintiff entitled to summary judgment dismissing counterclaims of fraud and breach of fiduciary duty where, after discovery, the defendant did not and could not present admissible evidence of scienter or wrongful conduct, and where the defendant did not demonstrate first-party reliance on any alleged misrepresentations by the plaintiff, and where the relevant public events giving rise to the counterclaims occurred approximately eighteen years prior to suit being filed?

The lower court answered this question in the affirmative.

PRELIMINARY STATEMENT

The Supreme Court properly directed judgment in favor of plaintiff John Golobe ("Plaintiff" or "John") declaring that he is the sole and exclusive owner of 265 West 30th Street, New York, New York (the "Premises") and also properly dismissed Defendant's counterclaims for declaratory judgment, fraud, and breach of fiduciary duty.

In its decision (the "Decision"; R. 7-23[1]) and order (the "Order"; R. 5-6) of February 28, 2022, the Supreme Court found that John established the elements necessary to prove adverse possession of the Premises. The Decision and Order also found that Defendant has no valid claim to the Premises and that he failed to raise any triable issue of fact that would preclude the dismissal of his counterclaims for fraud and breach of fiduciary duty.

On February 24, 1992, Dorothy Golobe ("Dorothy"; John's aunt) died intestate and without issue. In March 1992 the Surrogate's Court appointed John as her administrator. In October 1992, John's father, Zangwill Golobe ("Zangwill"), renounced his interest in his sister Dorothy's estate and John inherited at least one-half of Dorothy's estate, including the Premises.

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[1] This and similar citations refer to pages of the Record on Appeal.

By administrator's deed dated October 27, 1992, and recorded on November 19, 1992, John became the sole and exclusive record owner of the Premises. Decades later, around 2018, John learned for the first time that his uncle Yale Golobe ("Yale")[2] — Defendant's predecessor in interest — had survived Dorothy and became entitled at Dorothy's death — almost 30 years ago — to a one-half interest in the Premises as tenant in common with John.

Before 2018, John understood that Zangwill was Dorothy's sole heir and that John was the rightful owner of her entire estate, including the Premises. Since taking title to the Premises in 1992, John has exercised open, notorious, exclusive and continuous possession of the Premises and otherwise satisfied the statutory requirements of adverse possession.

In the face of these incontrovertible facts, Defendant contends that John cannot establish a hostile, open and notorious occupation of the Premises because his possession of the Premises for almost 30 years was due to a mistaken belief, *i.e.*, that Yale had predeceased Dorothy and thus John believed himself to be the sole owner of the Premises, when, in fact, in 1992 Yale had succeeded to a one-half interest. That is not the law in New York.

[2] Yale was the brother of Zangwill and Dorothy. They had no other siblings.

Contrary to Defendant's arguments, a plaintiff seeking to establish adverse possession need not prove enmity or specific acts of hostility to meet the hostility requirement. Rather, the law merely requires a showing that the possession constitutes an actual invasion of or infringement upon the owner's rights. If the plaintiff's possession is open, notorious, and continuous for the applicable statutory period, a presumption of hostility arises. Indeed, "hostility may be found even though the possession occurred inadvertently or by mistake." *Katona v. Low*, 226 A.D.2d 433, 434 (2d Dep't 1996). Accordingly, the Supreme Court correctly decided that John is entitled to judgment declaring that he is the sole owner of the Premises, notwithstanding the Defendant's claim to a one-half interest, as successor to Yale.

To further challenge John's three decades' possession of the Premises, Defendant asserts baseless counterclaims of fraud and breach of fiduciary duty. The claims are meritless insofar as they are based on the contentions, *without a shred of evidence*, that John, along with two attorneys, concocted a plan to lie to the Surrogate's Court that Yale predeceased Dorothy. Since John's representations to the Surrogate's Court and subsequent actions with respect to the Premises were proven to be based entirely on his honest, yet mistaken, belief that Dorothy had survived Yale, there can be no fraudulent or wrongful conduct, so there can be no claim of fraud or breach of fiduciary duty. John relied on the sworn statement and

sworn testimony of attorney Harold Kozupsky that Yale had predeceased Dorothy. There was no reason to doubt Kozupsky's representations — he knew the Golobe family for decades. Indeed, all of the surrounding facts and circumstances confirmed Kozupsky's testimony — if further confirmation were needed at all.

Notwithstanding Defendant's protestations, there is simply no evidence whatsoever to support Defendant's underlying unsupported and frivolous claim that John, along with attorneys Harold and Roy Kozupksy, "lied" to the Surrogate's Court and that John subsequently concealed this lie for decades. In discovery and in his briefings before the Supreme Court, Defendant has for all intents and purposes conceded that no such evidence exists.

Moreover, the fraud counterclaim fails because Defendant did not and cannot plead that he or any predecessor in interest relied on any misrepresentation or omission from John. In 2016, the Court of Appeals made clear that reliance by a third party — such as the Surrogate's Court — on purported misrepresentations does not state a claim for fraud.[3] In any event, the insufficient fraud claim is time-barred. Consequently, the Supreme Court correctly dismissed Defendant's fraud claim.

[3] *See Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 820 (2016).

Defendant's breach of fiduciary duty claim similarly fails because it pleads no wrongdoing and discovery has revealed not a shred of evidence of any wrongdoing. Defendant now admits there was none. The breach of fiduciary duty claim is also time-barred. Consequently, the Supreme Court correctly dismissed Defendant's breach of fiduciary duty claim.

Accordingly, the Supreme Court's Decision and Order dated February 28, 2022, should be affirmed.

STATEMENT OF THE CASE

A. Background

In 1919, Henry Golobe ("Henry"), John's paternal grandfather, purchased the Premises. R. 50. Henry had three children – Yale, Dorothy, and Zangwill. *Id.* John understood that Yale was approximately a decade older than Dorothy. R. 333. Zangwill was John's father. R. 50. Henry died in 1958, leaving his estate, including the Premises, to his daughter Dorothy. *Id.* Neither Dorothy nor Yale had children. *Id.* Zangwill had only one child – John. *Id.*

Dorothy died intestate at age 85 on February 24, 1992. R. 50. In March 1992, the Surrogate's Court appointed John as administrator of her estate. R. 52. At Dorothy's death in 1992 and until 2018 or later, John believed that his father

(Zangwill) was the sole heir to Dorothy because he understood that the only other potential heir, Yale, Dorothy's and Zangwill's long-absent brother, had predeceased Dorothy. R. 52, 335.

John's long-standing belief that Yale predeceased Dorothy was based initially on the fact that Yale had not been in touch with the family for many years and that it was extremely unlikely that Yale remained alive at 95 (or more) years. R. 334. John's (and his family's) belief gained support when he placed an ad in the newspaper announcing Dorothy's death, which provided contact information for anyone interested to contact him. John received no response. *Id*. John's belief was then confirmed by Harold Kozupsky, a lawyer who had known and been a friend of the Golobe family for more than three decades. *Id*. As sworn proof that Yale predeceased Dorothy and that Zangwill was Dorothy's only heir, in March 1992 Harold Kozupsky provided an affidavit of heirship to the Surrogate's Court in connection with the administration of Dorothy's estate, stating that Yale had died in June 1985, with Zangwill her only heir. *Id*.; R. 54. Moreover, on March 25, 1992, Mr. Kozupsky testified under oath before the Court Attorney-Referee that Yale predeceased Dorothy and that Zangwill was Dorothy's only heir. *Id*. On that same date, the Court Attorney-Referee, satisfied with the proofs, determined that "[b]ased upon the testimony and the court file, it appears that [Dorothy] was survived by a sole distribute, her brother Zangwell [*sic*] Golobe." R. 72. Around

September 1992, Zangwill renounced his interest in Dorothy's estate, including his interest in the Premises, and John became the heir to at least one-half of Dorothy's estate, including the Premises. R. 34, 335.

Unbeknown to John until 2018 or later, Yale in fact died in January 1993, eleven months after Dorothy. R. 57. Consequently, after Dorothy's death Yale succeeded to a one-half interest in Dorothy's ownership of the Premises, and upon Zangwill's renunciation of his inheritance, John and Yale became tenants-in-common, each with a one-half interest in the Premises. *Id*. In 2018 or later, John also learned that when Yale died in January 1993, he was survived by his wife Helen Golobe ("Helen"). R. 56. In July 2000 the Emil Krause Revocable Trust (the "Trust") succeeded to Helen's interest. R. 56-57. Ira Altchek, the Defendant in his fiduciary capacity, is the successor trustee of the Trust. *Id*. Defendant, as successor-in-interest to Yale, now claims for the first time, *almost 30 years after the death of Dorothy*, a one-half interest in the Premises. *Id*.; R. 31-43.

On October 30, 2020, John commenced the present action under RPAPL Article 15, seeking a judgment that he is the sole and exclusive owner of the Premises by virtue of adverse possession and that Defendant has no valid claim. R. 24-30.

B. Defendant's Allegations

On February 5, 2021, Defendant filed an answer with counterclaims (the "Answer"; R. 31-43). The Answer asserted counterclaims for (i) a declaration under RPAPL § 1201 that the Trust is an owner of one half of the assets of Dorothy, including a one-half interest in the Premises as cotenant in common, (ii) fraud, and (iii) breach of fiduciary duty.

Defendant based his claims on the conclusory and imagined allegation that John engaged in a "fraudulent scheme" with his father, and attorneys Harold and Roy Kozupsky, to "defraud the Surrogate's Court of New York County" to obtain for himself Dorothy's assets when she died. R. 34 (¶¶ 31-32). Defendant alleged that John "orchestrated" this "scheme" by petitioning to become the administrator of Dorothy's estate, and then engaging his father's friend, Harold Kozupsky — an attorney — to lie under oath in Surrogate's Court that Yale predeceased Dorothy and that Zangwill was Dorothy's sole heir. *Id.* Defendant further alleged that John arranged for his father to renounce in John's favor his one-half interest in Dorothy's estate, including his interest in the Premises. *Id.* (¶ 34). Finally, Defendant alleged that John concealed Yale's interest in the Premises from Yale and his successors until 2019. *Id.* (¶ 31).

In short, Defendant's claim is predicated on the unsupportable allegation that John, Zangwill, and "their attorneys" Harold and Roy Kozupsky "were aware that Yale survived Dorothy" and then conspired to lie about it to the Surrogate's Court. R. 38-39 (¶ 59).

Following discovery, Defendant failed to present a shred of evidence to support this frivolous accusation before the Supreme Court. Indeed, at his deposition, Defendant admitted that he has no basis for this claim:

> Q. Are you aware of a fraudulent scheme in which Mr. John Golobe participated to get hold of the asset - -when I say get hold, to get ownership of the assets of Dorothy Golobe?
>
> . . .
>
> A. I don't know anything about these people.

R. 280, lines 17-20, 24.

> Q. Are you aware of a fraudulent scheme participated in by Zangwill Golobe to gain ownership of the assets of Dorothy Golobe?
>
> A. I don't know anything about the behavior of these people.
>
> Q. Do you have an opinion as to the behavior of those two gentlemen in regard to the matter I just addressed?
>
> A. Yes.
>
> Q. What is that opinion?
>
> A. That they behaved in an improper manner.

Q. And tell me exactly how they behaved in an improper manner. In other words, what did they do that was improper?

A. I don't know. I don't have information. It's my opinion.

R. 28, lines 5-20.

Q. Well, do you have a belief that there came a time that John knew that Yale outlived Dorothy; is that correct?

A. Yes.

Q. What is your belief as to when John learned that?

A. I don't know.

Q. Was it in the 1990s?

A. No.

Q. It was after the 1990s; is that right?

A. Yes.

R. 288, lines 10-20.

Q. Do you contend that either of the Kozupskys was involved in a plan to – by which the plaintiff would get the assets of Dorothy Golobe?

A. I don't know what these parties did.

R. 290, lines 14-17.

C. Facts Constituting Adverse Possession

By administrator's deed dated October 27, 1992, and recorded on November 19, 1992, John became the sole and exclusive record owner of the Premises. R.

55,204-07. After John took ownership to the Premises in 1992, he alone managed and operated it as a rental property. R. 55, 336. Since 1992, John alone dealt with tenants, including negotiating all leases. *Id*. Since 1992, John alone paid all property taxes, capital costs, and other expenses relating to the Premises, and John collected and retained all the rents. *Id*.

Since 1992, John also made many substantial upgrades, renovations, and capital and other improvements to the Premises, including improvements that are conspicuous from the exterior. R. 55, 337. The improvements included, but were not limited to, a complete structural support overhaul and an interior gut renovation to all three floors, a new front entrance and new steel clad exterior door, all new windows on the second and third floors, replacement of the entire roof, installation of a wrought iron railing on the front and side of the roof of the building, removal of the 20-foot brick extension of a non-active chimney, installation of a wood deck, and the relocation and installation of a new front door for the first floor store entrance. R. 55-56, 337-38. Since 1992, in connection with these improvements, John applied for and received all necessary building permits from the relevant New York City agency. R. 338.

In June 1993, John obtained a $73,975 construction loan, which he secured by giving a mortgage that encumbered the entire Premises. R. 337, 560-79. The

mortgage contained a warranty of title under which John represented that he was the sole owner of the Premises. *Id*. The mortgage was publicly recorded in the New York County land records in July 1993 for all to see. *Id*. Following John's payoff of the construction loan, a satisfaction of mortgage was publicly recorded in 1998. R. 337, 580-81.

Neither Defendant nor his predecessors-in-interest ever took possession of the Premises or any portion. R. 56. It is simply irrefutable that John's occupancy of the Premises was hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for more than 28 years. R. 338.

D. The Decision and Order

Following discovery, on November 5, 2022, John and Defendant filed competing motions for summary judgment. R. 331-32, R. 585-86. After briefing from the parties and oral arguments from counsel, the Supreme Court properly determined, in relevant part, that:

> To prevail on summary judgement, the plaintiff must establish by clear and convincing evidence adverse possession. Applying the 20 year period applicable by virtue of RPAPL 541, plaintiff satisfies that burden here.
>
> Plaintiff has proven that he had actual possession of the property, that it was open and notorious, exclusive and continuous since 1992, that's

> well over the 20 years, and in the 20 continuous years, there was never any acknowledgment of another interest whatsoever.
>
> Hostility, moreover, is inferred. Hostility doesn't have to be enmity, as established by the case law, it's inferred, unless prior to vesting, and the key is prior to vesting, there is an admission that valid claim to title lies with someone else, and that did not happen here.
>
> And the cases that establish that are Vaccaro, 181 AD3d 751, a 2020 Appellate Division case; Midgley, 143 AD3d 788, a Second Department, 2016 case; and Galli, 117 AD3d, 679, a Second Department case from 2014.

Decision, R. 20-21.

The Supreme Court further explained its rationale for correctly rejecting Defendant's arguments:

> And the lack of a requirement of any -- you know, like enmity, I should say, that's established in -- I think the case is Katonah versus Lowe, 226 AD 2d 433 at 434, a 1996 Second Department case, and there, like here, there was a misapprehension in terms of lack of any interest and the Court still found that there could be adverse possession and hostility, and the Court says: All that is needed is that possession constitutes an actual invasion or infringement of the owner's rights, and then hostility could be found.
>
> And the case of Greenberg versus Sutter, 257 AD2d, 646, that's a Second Department case from 1999.
>
> Here, unlike in Loveless and Trevisano, there was never, ever any acknowledgment of another interest during the 20-year period. The plaintiff had exclusive possession, paid all the taxes, made all the decisions constantly, made all the improvements, collected all the rents, entered into all the leases, took out and repaid a loan, all without any recognition or consultation of another, and did this open and obviously to the world, in terms of holding itself out as the landlord.

> These unequivocal acts were so open and public, that notice to the co-tenant is presumed under the circumstances; and to be clear, there is never any permission, ever, from Yale or his descendants here.
>
> And just to add, too, that I did find compelling the reasoning from out-of-state cases that seem to be squarely on point, too, in terms of why there is adverse possession here, and the cases that I'm referring to are Bourne, from the Wisconsin Supreme Court, that's 159 WIS, 340 a 1915 case; and there is also a Hawaii case [*Pebia v. Hamakua Mill Co*.], that is reported at 30 HAW 100, but I am missing the name of the case. It is cited – it's okay, it is cited in the papers, in plaintiff's papers, but I found those reasonings compelling, in terms of situations where neither side knew of the existence of the interest, and just in general, the public policy in favor of alienability of property.
>
> So for those reasons, I am granting plaintiff's motion for summary judgement.

Decision, R. 21-22.

The Supreme Court entered its Order granting John's motion for summary judgment, dismissing Defendant's counterclaims for fraud and breach of fiduciary duty due to Defendant's failure "to raise any triable issues," declaring John the sole and exclusive owner of the Premises, and also declaring that Defendant had no proper or valid claim to the Premises. Order, R. 6.

ARGUMENT

I. THE SUPREME COURT CORRECTLY DETERMINED THAT JOHN PROVED EACH OF THE ELEMENTS NECESSARY TO ESTABLISH ADVERSE POSSESSION

The doctrine of adverse possession protects against parties taking from an adverse possessor who acts in reasonable reliance on apparent ownership. It ensures stability of title and the continuing alienability and productivity of land. *See, e.g., Walling v. Przybylo*, 7 N.Y.3d 228, 233 (2006).

"In order to establish a claim of adverse possession, a plaintiff must prove that the possession was: (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous throughout the 10-year statutory period." *Children's Magical Garden, Inc. v. Norfolk St. Dev., LLC*, 164 A.D.3d 73, 80 (1st Dep't 2018).

The Supreme Court correctly determined that John established by clear and convincing evidence that his possession of the Premises was (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for 28 years. Each element is addressed in turn below.

A. John's Possession of the Premises was Hostile and Under a Claim of Right During the Statutory Period.

1. The Supreme Court Correctly Held that John's Possession of the Premises Was Under a Claim of Right.

Under RPAPL § 501(3), "[a] claim of right means a reasonable basis for belief that the property belongs to the adverse possessor or property owner as the case may be." *See also Estate of Becker v. Murtagh*, 19 N.Y.3d 75, 81 (2012) ("hostile and under a claim of right [i.e., a reasonable basis for the belief that the subject property belongs to a particular party"]).

The Supreme Court correctly determined that John's claim of right to the Premises was reasonable since it was predicated on the belief that he was the sole heir to Dorothy upon his father's (Zangwill's) renunciation. John's belief was sincerely held and reasonable since at Dorothy's death in 1992, Yale had been missing from the family for many years and if still alive would have been around 95 years old. R. 334. Moreover, although John had published in *Newsday* the fact of Dorothy's death, along with his contact information, no one responded. *Id*. John's belief that Yale predeceased Dorothy was reaffirmed after Dorothy's death by Harold Kozupsky, a lawyer who had known and been a friend of the Golobe family for three decades. Harold Kozupsky provided an affidavit of heirship to the Surrogate's Court as sworn proof that Yale had died in June 1985 and that

Zangwill was Dorothy's only heir. *Id.* Moreover, Harold Kozupsky testified under oath before the Surrogate's Court that Yale predeceased Dorothy and Zangwill was Dorothy's only heir. *Id.* Perhaps most importantly, the Surrogate's Court specifically adjudicated that Zangwill was Dorothy's only heir. R. 72. Accordingly, John had every reason to believe that he was the sole and exclusive heir of Dorothy's estate, including the Premises.

Defendant's arguments that the foregoing facts do not give rise to a reasonable basis for John's belief that he was the sole heir following his father's renunciation would create an impossible standard. At the outset, Defendant's argument that John should have conducted a *further* investigation is irreconcilable with the fact that the Surrogate's Court was satisfied with the proofs presented and specifically determined that Zangwill was Dorothy's only heir. R. 72. There is no basis in law to support the notion that John should have treated the issue of Dorothy's rightful heir(s) with greater circumspection than did the Surrogate's Court, or that John was obligated to conduct an extrajudicial investigation into this issue following the Surrogate's Court determination.

Moreover, Defendant never bothers to articulate what the size or scope of this additional investigation would look like. Most importantly, Defendant cannot point to any facts of which John had notice, or of which he should have been on

notice, or of any specific avenues of inquiry that actually would have led to the discovery that Yale was still alive at the time of Dorothy's passing. Consequently, Defendant's vague allusion to a further investigation is not only without any support in the law, but it is ultimately futile in demonstrating how, even if it did occur, it would have rendered John's belief in his sole and exclusive right to the Premises unreasonable.

Consequently, the Supreme Court correctly determined that John's possession of the Premises was under a claim of right.

2. The Supreme Court Correctly Held that John's Possession of the Premises Was Hostile to Defendant's Rights to Same.

As the Court of Appeals explained succinctly, "[b]y definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner." *Walling v. Przybylo*, 7 N.Y.3d at 232 (2006). The element of hostility merely requires "a showing that the possession constitutes an actual invasion of or infringement upon the owner's rights." *Katona* v. *v. Low*, 226 A.D.2d 433, 434 (2d Dep't 1996); *see also, Vaccaro v. Town of Islip*, 181 A.D.3d 751, 752 (2d Dep't 2020).

Beginning with his representations to the Surrogate's Court, all of John's acts of possession were an infringement (albeit unknowing) on Yale's rights and a

demonstration of the "hostility" required for adverse possession. In October 1992, John deeded the Premises to himself under a claim of right to the entire Premises and recorded that interest for the world to see. R. 55, 204-07. John's administrator's deed gave notice to the world of John's claim to sole and exclusive ownership. At the moment of that deed's recording, anyone in the world with a potentially competing claim of ownership of the Premises was placed on notice of John's hostile and irreconcilable claim of sole and exclusive ownership.

By executing and recording the construction mortgage in July 1993 (R. 560-79), John again (i) represented that he was the sole owner of the Premises and (ii) caused a lien to be placed against the entire Premises, further evidencing his claim of sole ownership – acts necessarily hostile to any other person's claim of ownership. *See Henness v. Hunt*, 272 A.D.2d 756, 757 (3d Dep't 2000) ("a mortgage has long been recognized as a conveyance of an interest in real property"). John subsequently paid the mortgage note and a satisfaction was recorded, further demonstrating his claim to the Premises. *See Graham v. Graham*, 45 Misc. 2d 298, 301-02 (Sup. Ct. Allegany Co. 1965) (finding payment of a mortgage and recording of a deed as factors supporting adverse possession claim).

As further evidence of John's hostile possession of the Premises, for the next three decades he maintained absolute discretion over every aspect of the Premises. John exercised complete and total control of the Premises and spent around a million dollars in capital improvements, taxes, and upkeep.[4]

Finally, Defendant ignores John's almost thirty-year use of the Premises as a rental property in the middle of Manhattan, including a retail cigar store. R. 55, 336. John alone managed and operated the Premises and dealt with and negotiated all of the leases. *Id*. John collected and retained for himself *all* of the rent – conduct that is hostile to Yale or anyone else claiming an interest. *See Culver v. Rhodes*, 87 N.Y. 348, 354 (1882) ("exclusive receipt of rents and profits" is hostile to the rights of the co-owner).

Consequently, the Supreme Court correctly determined that John's possession of the Premises was hostile to Defendant's (and Defendant's predecessors-in-interest's) rights to the Premises.

[4] John expended well over $500,000 in capital improvements and approximately $300,000 in property taxes between 2009 and 2020 alone. R. 336-38, 340-538. John also expended thousands of dollars on property insurance and upkeep. *Id*.

a. John Need Not Demonstrate Enmity or Specific Acts of Hostility to Prove Hostility.

Defendant's primary argument is that John cannot establish hostility because he was unaware of Defendant's claim to the Premises until 2018. More specifically, Defendant argues that John cannot adversely possess the Premises without knowing specifically of Defendant's competing right, and taking action hostile to it thereafter. However, this argument fundamentally misunderstands the legal concept of hostility in the context of adverse possession.

New York law is clear that "the plaintiff's possession does not require a showing of enmity or specific acts of hostility [to satisfy the hostility requirement.]" *Katona*, 226 A.D.2d at 434. Rather, New York law only requires "a showing that the possession constitutes an actual invasion of or infringement upon the owner's rights. Consequently, hostility may be found even though the possession occurred inadvertently or by mistake . . . . " *Id*. (internal citations omitted); *see also Bradt v. Giovannone*, 35 A.D.2d 322, 325–26 (3d Dep't 1970); *Greenberg v. Sutter*, 257 A.D.2d 646, 646 (2d Dep't 1999); *Kappes v. Ruscio*, 170 A.D.2d 743, 744 (3d Dep't 1991).

Katona and *Bradt* are particularly instructive. In *Katona*, the plaintiff, an adverse possessor, entered upon a triangular piece of 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." *Katona*, 226 A.D.2d. at 434. Later, the plaintiff sued to quiet title, seeking a declaration that he owned the disputed piece of property in addition to the adjacent land which he possessed and to which he held title. *Id.* The Second Department held that the plaintiff's likely mistaken belief that the disputed parcel was part of the land which he owned outright did not preclude a finding of hostility, and awarded plaintiff's summary judgment on his adverse possession claim. *Id.* The Second Department stressed that, with respect to the issue of hostility, "[a]ll that is required is a showing that the possession constitutes an actual invasion of or infringement upon the owner's rights." *Id*.

In *Bradt*, the plaintiffs entered upon a strip of land between the end of their property line and the fence line of a neighboring property owned by the defendant. 35 A.D.2d 322 at 324. When the defendant tried to erect a fence along the true property line of the land, plaintiffs sought to quiet title to the disputed strip of land, claiming adverse possession. *Id*. The defendant argued that plaintiffs could not establish hostility, pointing to plaintiffs' testimony that they assumed that the land up to the original fence was their yard and that they never intended to take any land away from anybody. *Id*. at 325. The Third Department reversed the trial court's dismissal of plaintiff's adverse possession claim, holding that the defendant's

argument was contrary to the law on adverse possession and hostility. As the court noted, "[p]ossession is not the less adverse because a person takes possession of the land in question innocently and through mistake, it being the visible and adverse possession, with an intention to possess the land occupied under the belief that it is the possessor's own, that constitutes its adverse character, not the remote belief of the possessor." *Id*. at 325-26.

Here, Defendant's argument that John cannot establish adverse possession because he took "possession with the belief that he was already the exclusive owner of title" is completely irreconcilable with the holdings in *Katona* and *Bradt*. *See* Defendant's Brief, p. 16. Both cases, like the present matter, dealt with possessors who mistakenly believed they held exclusive title to the entirety of the real property they possessed when, in fact, their rights were only partial. Both cases dealt, as this one deals with, possessors who did not manifest any intention to take or appropriate the property rights of another person holding a competing claim to that real property. Both cases resulted in a finding of hostility necessary to establish adverse possession.

That John's initial interest in the Property was as a co-tenant with the Defendant's predecessor-in-interest does not alter the outcome. As the Supreme Court observed in awarding summary judgment for John, other jurisdictions have

held that a finding of adverse possession is not precluded where both parties are unaware that a co-tenancy existed. *See, e.g.*, *Pebia v. Hamakua Mill Co.*, 30 Haw. 100, 109 (1927) ("nor is there any reason why he should be held to hold in subordination to his co-tenant's rights, when he denies from the outset that there is a co-tenancy and when so far as appears the one out of possession who is a co-owner in fact does not know, any more than the one in possession does, that he is a co-owner and does not claim to be such"); *Roberts v. Decker*, 120 Wis. 102 (1903) ("To hold that the defendants must give notice of their adverse holding to one of whose claims they were in utter ignorance, and whose rights they had never acknowledged by word or deed, would be absurd"); *Bourne v. Wiele*, 159 Wis. 340 (1915) (since "all the evidence on the subject indicates that neither the widow nor the present defendants ever knew of the existence of the plaintiffs[' co-tenancy], and hence never acknowledged that the plaintiffs had any interest in the premises," knowledge of the adverse claim was not necessary to establish adverse possession); *Kraemer v. Kraemer*, 167 Cal. App. 2d 291, 309 (1959) ("[w]here a tenant in common enters into possession and claims under an invalid deed purporting to convey the property to him, the recordation of the deed is notice to his cotenants of its existence and therefore of the adverse character of his claim so as to start the statute of limitations running, *at least where he knows nothing of the existence of the other cotenants*") (internal citation and quotations omitted) (emphasis added).

Here, the record shows that John took possession of the Premises believing it was his exclusively, following the Surrogate Court's determination and the recordation of his deed. The parties' respective lack of knowledge of the co-tenancy is not a bar to adverse possession and Defendant cites no authority to that effect. All that matters is that John actually invaded and infringed upon Defendant's rights to the Premises when he prepared and recorded a deed that named himself its sole and exclusive owner and then began a nearly thirty-year period of actual, open, notorious, and exclusive possession of the property. Defendant's arguments regarding John's lack of knowledge regarding Defendant's competing claim are irrelevant to the issue of hostility.

b. Hostility is Presumed Due to John's Satisfaction of the Remaining Elements of Adverse Possession.

Even if the foregoing facts and law did not demonstrate conclusively the requisite element of hostility for adverse possession, hostility nevertheless is presumed where the other elements of the claim are established. *See, e.g., Becker v. Murtagh,* 19 N.Y.3d 75, 81 (2012) ("A rebuttable presumption of hostility arises from possession accompanied by the usual acts of ownership") *DeRosa v. DeRosa*, 58 A.D.3d 794, 796 (2d Dep't 2009) (defendant resided exclusively at the subject premises for ten years following the death of her mother in 1983, then the next

ten years, defendant , openly, notoriously, exclusively, and continuously possessed the property; "[w]here, as here, the use of the property is open, notorious, and continuous for the full statutory period, a presumption of hostility under a claim of right arises").

As set forth below, John satisfies each of the other elements of adverse possession. John openly and notoriously exercised complete and exclusive control of the Premises since 1992, including by holding himself out to the world to be the sole owner. The documentary evidence, together with John's sworn testimony and affidavit, easily prove his actual, open and notorious, and exclusive possession of the Premises for the requisite twenty-year period applicable in the case of a co-tenancy (*i.e.*, a ten-year period following the presumptive ten-year period prescribed in Real Property Actions and Proceeding Law § 541).

Consequently, even if John could not establish hostility independently, which he has, hostility is presumed due to his satisfaction of the other elements of adverse possession.

c. John's Negotiations with Defendant Subsequent to the Vesting of Tile in the Premises via Adverse Possession are Immaterial.

Defendant argues that the efforts by John's representatives after 2018 to settle all claims between them somehow negates John's ability to claim hostile

possession under a claim of right. This position is meritless and any facts related to it are ultimately immaterial.

Actions or statements made after title by adverse possession vests will not affect or destroy the matured right of ownership. *See, e.g., Gerlach v. Russo Realty Corp*., 264 A.D.2d 756, 757 (2d Dep't 1999) ("an inference of hostile possession or claim of right will be drawn when the other elements of adverse possession are established, unless, *prior* to the vesting of title, the party in possession has admitted that title belongs to another") (emphasis added). Indeed, an adverse possessor whose interest has vested is free to adjust his interest in the property in any way he sees fit. *See, e.g*., *Knapp v. City of New York*, 140 A.D. 289, 297 (1st Dep't 1910) ("plaintiffs had a perfect right, their title having ripened, to fortify that title in any way they pleased, and such acts could not destroy that which had become perfected"); *see also Midgley v. Phillips*, 143 A.D.3d 788, 791 (2d Dep't 2016) (internal citation and quotations omitted) ("Since title to the property [by adverse possession] fully vested in . . . 1991, [plaintiff] was free to fortify that title in any way he pleased, and asking a potential claimant for a quitclaim deed could not destroy that which had become perfected"; defendant's claim that plaintiff's attorney told defendant in 2009 that [defendants] were entitled to receive something for their interests was insufficient to raise a triable issue of fact).

As demonstrated below, title to the Premises vested in John by adverse possession in 2012. John's post-vesting discussions or negotiations with the Defendant, several years after title to the Premises vested in John by adverse possession, are immaterial.[5]

B. John's Possession of the Premises was Actual.

One claiming real property adversely must be in actual possession of the property for the claim to be effective. "[T]his means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period." *Brand v. Prince*, 35 N.Y.2d 634, 636 (1974).

Since 1992, John has been in actual possession of the Premises by, among other things, unilaterally managing and operating it as a rental property. As the Supreme Court determined, and as Defendant's briefing seemingly concedes, John satisfies the second element.

[5] Defendant's argument regarding these communications also runs afoul of the principle that settlement discussions are inadmissible to prove liability. *See, e.g., CIGNA Corp. v. Lincoln Nat. Corp*., 6 A.D.3d 298, 299 (1st Dep't 2004) ("The proffered evidence consists largely of documents prepared and exchanged for purposes of settlement, which are inadmissible to prove either liability or the value of the claims.")

C. John's Possession of the Premises was Open and Notorious.

To establish adverse possession, the possession must be open and notorious such that the other party has notice of the hostile claim and "be thereby called upon to assert his legal title." *Monnot v. Murphy*, 207 N.Y. 240, 245 (1913).

Here, everything John did with respect to the Premises was open and notorious, beginning with the recording of the administrator's deed giving notice to the world of his sole and exclusive claim to the Premises. R. 55, 204-07. Defendant's contention that John's public recording of a deed naming him the sole and exclusive owner of the Premises "did not repudiate Yale's (or his successors in interest) interest in the Premises" is difficult to understand. *See* Defendant's Brief, p. 32. It appears impossible to image a more open and notorious way of repudiating a person's interest in real property than publicly recording a deed that names someone else as the sole and exclusive owner.

Additionally, shortly after recording the deed, in June 1993, John obtained a $73,975 construction loan from Citizens Bank, which he secured by giving a mortgage that encumbered the entire Premises. R. 337, 560-79. The mortgage contained a warranty of title under which John again represented that he was the sole owner of the Premises. *Id.* The mortgage was recorded in the New York County land records in July 1993. *Id.* Following John's payoff of the construction

loan, a satisfaction of mortgage was publicly recorded in 1998. R. 337, 50-81. Simply, put, everything John did concerning the Premises was public and thus open and notorious.

John's almost thirty-year use of the Premises was also no secret. Since 1992, John operated the Premises on 30th Street in Manhattan as a rental property, which he alone managed. R. 55, 336. Since 1992, John alone dealt with the tenants, negotiated all leases, and collected and retained all the rent for himself. *Id.*

As further evidence of John's actual, open and notorious, and exclusive ownership, John alone paid all property taxes and other expenses relating to the Premises. *Id*. Indeed, every publicly available New York City tax document identified John, and John alone, as the owner of the Premises.

Moreover, since 1992, John made many substantial upgrades, renovations, and capital and other improvements to the Premises, including capital and other improvements that are conspicuous from the exterior, the majority of which occurred around 1993. R. 55-56, 337-38. The improvements included, but were not limited to, a complete structural support overhaul and an interior gut renovation to all three floors, a new front entrance and new steel clad exterior door, all new windows on the second and third floors, replacement of the entire roof, installation

of a wrought iron railing on the front and side of the roof of the building, removal of the 20-foot brick extension of a non-active chimney, installation of a wood deck, and the relocation and installation of a new front door for the first floor store entrance. *Id.* John spent well over $500,000 for capital improvements. R. 336-38, 340-538. Many of these improvements required building permits, for which John applied and received, and which are also matters of public record. R. 338.

Considering the ample record evidence of John's open and notorious activities concerning the Premises (*see* Point I), the Defendant's reliance on *Trevisano v. Giordano*, 202 A.D.2d 1071 (4th Dep't 1994), claiming that it "addressed a similar set of facts," is misplaced. *See* Defendant's Brief, p. 30. Although *Trevisano* also involved a co-tenancy, the decision contains no explanation of the adverse possessor's actions, and no recital of facts, so the general discussion in *Trevisano* provides *no* instruction here.

Here, the uncontroverted record demonstrates overwhelmingly that John took actions consistent with exclusive ownership, acts that were irreconcilable with the interests of Yale or his successors and that were a matter of public record. John's possession of the Premises could hardly be more open and notorious.

D. John's Possession of the Premises was Exclusive.

"To establish the 'exclusivity' element, the adverse possessor must alone care for or improve the disputed property as if it were his/her own." *Estate of Becker v. Murtagh*, 19 N.Y.3d 75, 83 (2012). The record is unchallenged that since 1992, John alone performed or directed every action taken with respect to the care and improvement of the Premises, treating the Premises as if it belonged to him alone. John managed and maintained the Premises as a rental property, collected and retained all rents, and exclusively made all decisions, including those concerning the rent, renters, and leases. As the Supreme Court determined, and as Defendant's briefing seemingly concedes, John satisfies the fourth element.

E. John's Possession of the Premises was Continuous for the Statutory Period.

"[C]ontinuous possession is satisfied when the adverse claimant's acts of possessing the property, including periods during which the claimant exercises dominion and control over the premises or is physically present on the land . . . are consistent with acts of possession that ordinary owners of like properties would undertake." *Ray v. Beacon Hudson Mountain Corp*., 88 N.Y.2d 154, 159 (1996). Since no later than October 27, 1992, when John took title by deed, he alone has managed and operated the Premises as a rental property. It is indisputable – and

Defendant does not appear to dispute – that John's exclusive possession of the Premises has been continuous for more than 28 years, exceeding the twenty-year period applicable to co-tenants. See RPAPL § 541.[6]

Thus, John's adverse possession claim ripened no later than October 2012 — twenty years after he first took possession. Accordingly, the Supreme Court correctly determined, and Defendant's briefing seemingly concedes, that John satisfies the fifth element.

F. Relevant Case Law Supports The Supreme Court's Determination.

Other recent Appellate Division decisions concerning adverse possession involving cotenants confirm that John is entitled to summary judgment.

DeRosa v. DeRosa, 58 A.D.3d 794 (2d Dep't 2009), demonstrates that the lack of knowledge of a co-tenancy does not preclude a claim of adverse possession when the elements are otherwise satisfied. The record in *DeRosa* (relevant

[6] Defendant confusingly spends roughly a page and a half of his brief addressing the concept of ouster. Ouster is irrelevant to the Supreme Court's decision and, indeed, John does not argue in favor of a finding of ouster. A showing of ouster is not required where the period of exclusive and continuous possession in a tenancy-in-common exceeds 20 years, as it did here. *See Myers v. Bartholomew*, 91 N.Y.2d 630, 634-35 (1998) ("*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.") (emphasis added).

portions of which appear in the Record on Appeal here) shows the following relevant facts: In 1975 the defendant's mother conveyed to the defendant (the counterclaimant adverse possessor) her fee interest in the family home. R. 631, ¶ 2. At the time of the conveyance the defendant believed that her mother "was the sole owner of the Property." R. 632, ¶ 3. Unbeknownst to defendant, her brother (plaintiff) held a one-half interest in the property at all relevant times, making defendant and plaintiff co-tenants upon the conveyance of the mother's interest to defendant.

Throughout the statutory period it was defendant's "honest belief" that she owned the entire property, having first learned of her brother's claimed interest 31 years later, when she received a letter from his attorney. *Id*. Like Yale here, the plaintiff in *DeRosa* had not been heard from for decades and was unable to be reached, as his whereabouts were unknown. R. 633-34, ¶¶ 8-9. Defendant, believing mistakenly that she "was the sole owner of the Property," paid all taxes and expenses on the property for thirty years. R. 634, ¶ 10. Defendant also took a mortgage loan secured by the property and made various improvements. R. 634-35, ¶¶ 10-12. On these facts the Appellate Division found that the defendant established her claim of adverse possession (and the presumption of hostility), despite the fact that the defendant took possession under the mistaken belief that

the property was owned entirely by her – unaware of the co-tenancy with her brother. 58 A.D.3d at 796.

The nature of John's adverse possession here was even more substantial than the adverse possession in *DeRosa*. Here, as in *DeRosa*, John took possession of the Property by deed under the mistaken belief that the entire property belonged to him. As in *DeRosa*, John was unaware of the co-tenancy for almost thirty years. As in *DeRosa*, here Yale was estranged from the family for decades and unable to be located. As in *DeRosa*, John spent the next thirty years treating the property as his own, exclusively making all tax and maintenance payments, and performing substantial capital improvements of over $500,000. Moreover, like the defendant in *DeRosa*, John "encumbered the property with a mortgage, which was recorded." 58 A.D.3d at 794.

In *Midgley v. Phillips*, 143 A.D.3d 788 (2d Dep't 2016), the plaintiff's decedent ("Midgley") alleged that his father had owned the property until his death in 1970. The father left his estate, in equal parts, to Midgley and Sayre. Midgley claimed that in 1971, Sayre refused to participate in the operation or maintenance of the property, and that Midgley possessed and operated the property exclusively from them. Midgley paid the real estate taxes and leased the property to various farmers and a nursery. Midgley collected all of the rents, and he farmed the

property in years when he could not find a suitable tenant. Sayre died in 2005. Midgley commenced the action in 2009 and alleged that he had become sole owner by adverse possession.

The court held that Midgley had established his *prima facie* entitlement to summary judgment. His possession from 1971 to 1991 was actual, open and notorious, exclusive, and continuous. Midgley demonstrated that tenants dealt exclusively with him during the relevant period. Midgley also established that he and his tenants "usually cultivated and improved" the property (within the meaning of RPAPL § 522[1] as then framed) by using it as an active farm and in a manner that was consistent with the property's character, location, condition, and potential uses.

Galli v. Galli, 117 A.D.3d 679 (2d Dep't 2014), involved a nephew's adverse possession claim against his aunt. As of 1972, the nephew and his parents owned a 75 percent interest in the property, where they resided. The nephew's uncle (Henry), who was married to the aunt (Mary Jean), owned the other 25 percent. Henry made no contribution to the maintenance of the property and did not live there. He died intestate in 2000, and Mary Jean succeeded to Henry's 25 percent interest in the property. By 2005, following the death of his parents, the nephew alone owned the 75 percent interest.

Because the nephew resided at the property for the statutory period and the aunt resided elsewhere and made no contribution to maintenance, the Appellate Division affirmed summary judgment for the nephew. "Where, as here, the party claiming adverse possession is a tenant-in-common in exclusive possession, the statutory period required by RPAPL § 541 is 20 years of continuous exclusive possession before a cotenant may acquire full title by adverse possession." 117 A.D.3d at 681 (quoting *DeRosa*, 58 A.D.3d at 795). The nephew's actual, open and notorious, exclusive, and continuous possession for the required 20-year period gave "rise to an inference of hostile possession or claim of right." 117 A.D.3d at 681.

Here, John stands in parity with the adverse possession claimants in each of these cases. Thus, the Supreme Court correctly determined that John satisfies all the elements of adverse possession.

II. THE SUPREME COURT CORRECTLY DISMISSED DEFENDANT'S COUNTERCLAIMS

The Supreme Court correctly dismissed each of Defendant's counterclaims for his failure to raise a triable issue of fact. Defendant's counterclaims are completely unsupported by the record in general and Defendant's deposition testimony in particular. Asked specifically about John's participation in an alleged

fraudulent scheme, Defendant responded that it was his "opinion" that John acted in an "improper manner," but that Defendant did not "know anything about these people," R. 280-81, referring to John and any others who supposedly were part of the scheme.

Defendant has raised no triable issue concerning his supposition and conjecture that John or any person associated with him engaged in any wrongful or fraudulent conduct, including before the Surrogate's Court. Discovery has produced not a shred of evidence to support Defendant's foundational claim that Harold lied to the Surrogate's Court and that John knew (or for that matter had any reason to know) that it was a lie. In short, Defendant has demonstrated no need for, or entitlement to, a trial.

On summary judgment "defendant is required to assemble, lay bare and reveal his proofs in order to show that his defenses are real and capable of being established." *Chem. Bank v. Queen Wire & Nail Inc*., 75 A.D.2d 999, 1000 (4th Dep't 1980). Here, Defendant falls woefully short, and his counterclaims were properly dismissed.

A. The Supreme Court Properly Dismissed Defendant's Counterclaims for Fraud and Breach of Fiduciary Duty for Failing to Raise a Triable Issue of Fact.

The Supreme Court properly applied the well-established summary judgment burden-shifting standard and dismissed Defendant's counterclaims. Once a *prima facie* showing of entitlement to summary judgment has been made, the burden shifts to the party opposing summary judgment to "lay bare his proof and present evidentiary facts sufficient to raise a genuine triable issue of fact." *Smith v. Johnson Products Co*., 95 A.D.2d 675, 676 (1st Dep't 1983). Mere conclusory assertions, speculations or expressions of hope are insufficient to defeat the motion. *Amatulli v. Delhi Constr. Corp*., 77 N.Y.2d 525, 533 (1991).

John established entitlement to summary judgment. The record shows that the Surrogate's Court was satisfied with sworn proof from an attorney that Yale had predeceased Dorothy. The attorney's sworn proof was direct evidence of the matter asserted. Diverting attention from the manifest sufficiency of that proof, Defendant hurls a battery of allegations against John that are palpably self-contradicting. Defendant asserts that John committed intention fraud, but also acted recklessly, because "he knew he did not know whether Yale predeceased Dorothy or whether he was the sole owner of the Premises." Defendant's Brief, p. 43. If, as Defendant contends, John did not whether Yale predeceased Dorothy,

then John could not have actively concealed that Yale was alive when Dorothy died. One cannot be guilty of actively concealing a fact of which he is unaware. Defendant also contends that John is guilty of fraudulent misrepresentation because he acted upon "mere[] speculation," Defendant's Brief, p. 38, and "conveniently relied on" testimony that attorney Harold Kozupsky gave to the Surrogate's Court. *Id.*, p. 37.

Simply put, Defendant's allegations are all over the place. On the one hand, he observes that John lacked personal knowledge that Yale predeceased Dorothy. Yet in his next breadth, Defendant assigns fault to John for crediting the sworn testimony of an attorney who claimed to have personal knowledge that Yale predeceased Dorothy. Defendant thus posits that John is liable for believing the sworn testimony of an attorney and long-time family friend – testimony that the Surrogate's Court credited.

Defendant's discussion of the reliance element of fraud is inapposite, because, among other reasons, the record contains no probative evidence that John committed fraud. Defendant's mere accusation that John engaged in "fraudulent concealment," Defendant's Brief, p. 36, is connected to *no* proof in the record and is supported by nothing more than Defendant's own *ipse dixit.* In short, the record contains no proof that properly could sustain a finding of liability on

Defendant's conclusory counterclaims. Defendant's mere hope that he will present "additional proof during trial," Defendant's Brief, p. 37, to sustain his counterclaims (indeed, with no offer of the nature of that proof) is woefully insufficient to defeat summary judgment. This Court has observed that the "presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment." *American Sav. Bank FSB v. Imperato,* 159 A.D.2d 444 (1st Dep't 1990). Stated differently, "[t]o require a trial [a] fact issue must be genuine, bona fide and substantial."

For over 150 years the law in New York has required wrongful conduct to establish a claim for fraud or fraud-based breach of fiduciary duty. Courts reject claims based on representations made in the honest belief of their truth. *See, e.g., Marsh v. Falker*, 40 N.Y. 562, 573 (1869) ("It is impossible to impute fraud when the statement is made in the honest belief of its truth"); *Kountze v. Kennedy,* 147 N.Y. 124, 129 (1895) ("if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit"); *Williams v. Van Norden Tr. Co.,* 104 A.D. 251, 254 (1st Dep't 1905) ("An honest mistake as to the condition of the bank and an honest belief in the solvency of the institution, if it exists, negative the conclusion of the fraud upon which the plaintiff's cause of action must depend"); *Balboa Realty Co. v. Brenglass Realty Corp.,* 147 Misc. 602, 604 (Sup. Ct. Bronx Co. 1932), *aff'd,* 238 A.D. 830

(1st Dep't 1933) ("Fraud must be established by clear, positive, and convincing evidence. . . . Fraud cannot be presumed. It must be proven, and if there is left room for the inference of an honest intent, the proof of fraud is wanting"); *Kramer v. Joseph P. Day, Inc*., 26 N.Y.S.2d 734, 737 (Sup. Ct. N.Y. Co. 1941) ("If the statement was honestly made in reliance upon information honestly acquired and in the honest belief in its truth, then the party who made it may not be held liable for fraud and deceit, whatever other liability he may incur"); *Abrahami v. UPC Const. Co*., 224 A.D.2d 231, 233 (1st Dep't 1996) ("[To show an intent to deceive, plaintiffs must establish that defendant knew, at the time they were made, that the representations were false").

Here, the unrebutted evidence shows that John held an honest, albeit mistaken, belief that Yale had predeceased Dorothy. The record contains no proof that John's belief was anything other than sincere. His Petition to the Surrogate's Court, which included the sworn affidavit of Harold Kozupksy, represented that Yale had died in 1985 and that John's father was Dorothy's only heir. R. 51, 89-90. Harold then testified under oath before the Surrogate Court, swearing again that Yale had predeceased Dorothy. R. 68-72. Harold knew the Golobe family for decades and John had no reason whatsoever to doubt the attorney's sworn testimony. Harold's sworn statements also made sense, given Yale's age, and were consistent with the fact that Yale had not been heard from for many years.

Harold's sworn testimony – if it needed confirmation at all – was seemingly confirmed by the fact that Yale did not respond to the announcement of his sister's death in the newspaper. R. 334.

Defendant admitted in his deposition (R. 281) that he has no evidence to establish that John's representations were "known to be untrue or recklessly made," Defendant's Brief, p. 41, and thus no evidence or basis to conclude that a fraud was perpetrated.

Defendant's attempt to convert John's honest mistake to actionable fraud and concealment is also belied by Defendant's repeated acknowledgment that John was not even aware of the Trust's (or his predecessors in interests') interest in the Premises until 2018, at the earliest. Defendant thus supports his fraud counterclaim with the starkly incongruent and untenable contention that John willfully concealed a fact of which he was unaware.

Sensing the utter lack of evidentiary support for his counterclaims, Defendant's brief devotes considerable effort to his argument that John should have conducted further investigation into Yale. Defendant, however, offers no explanation why John was not entitled to rely – as did the Surrogate's Court – on the sworn testimony from a third party-an attorney, who was an "officer of the

court" – who had a personal relationship with the Golobe family and attested that Yale predeceased Dorothy.

Defendant does not and cannot cite any authority that would assign liability to John in the circumstances presented on this record. Moreover, Defendant does not identify any additional investigation that John supposedly should have conducted in the circumstances. In short, Defendant presents no evidence whatsoever to demonstrate anything other than John held a reasonably-grounded belief that Yale had predeceased Dorothy. Defendant's claims of fraud and breach of fiduciary duty therefore must fail.

Apart from the foregoing, Defendant cannot satisfy the fraud element of justifiable first-party reliance. *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817 (2016); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc*., 151 A.D.3d 83 (1st Dep't 2017). Defendant contends that he satisfied this requirement by alleging that Yale and his heirs directly relied upon John's fraudulent concealment of information regarding the Premises. *See* Defendant's Brief, pp. 35-36.

Nowhere does Defendant specify – as required by CPLR § 3016(b) – what information was known to John and concealed or what John did to conceal such information. One cannot conceal (or disclose) what one does not know, and the

record establishes beyond question that John did not know that Yale survived Dorothy or that Yale was an heir to Dorothy's estate. John made no misrepresentation to Yale or his heirs, and did nothing to conceal any information. The notion that Yale and his successors-in-interest relied upon John – who was estranged from and/or unknown to them – in *any* fashion is contrary to the undisputed facts; indeed, it is little shy of silly. Indeed, John did not communicate with Yale or his heirs during the relevant statutory period regarding *any* topic. The alleged misrepresentations or concealments were simply "not communicated to, or relied on, by [Defendant]." *Pasternack*, 27 N.Y.3d at 829.

Defendant's claim of reliance on some purported concealment is also rebutted by the undisputed evidence and by common sense. John's claim to the Premises, and everything he did with respect to the Premises, were matters of public record and open for the entire world to see. *See, e.g., Tall Tower Capital, LLC v. Stonepeak Partners LP*, 174 A.D.3d 441, 442 (1st Dep't 2019) (no "reasonable reliance" since the "lawsuit was a matter of public record and could have been verified by defendant through the exercise of ordinary diligence").

The record shows that John made no attempt to conceal anything. The opposite is true — his mistaken belief that he was the sole owner of the Premises was open and obvious for anyone to discover. The fact of Dorothy's passing was

made public through the Newsday publication, the subsequent Surrogate's Court action, and the recording of the administrator's deed. Certainly, Defendant cannot be heard to argue that John concealed the date of Yale's death. Yet neither Yale nor any of his heirs ever bothered to inquire about Dorothy or learn of her death. The record offers no basis to conclude that Yale or his heirs ever relied, reasonably or otherwise, on any alleged misrepresentation of John. To the contrary, with any minimal effort, Yale and his successors could have learned of the death of Dorothy, who was Yale's only sister.

For the foregoing reasons, the Supreme Court properly dismissed Defendant's fraud claim.

B. The Fraud and Breach of Fiduciary Duty Claims are Barred by the Statute of Limitations.

"A cause of action sounding in fraud must be commenced within six years from the date of the fraudulent act or two years from the date the party discovered the fraud or could, with due diligence, have discovered it." *Ghandour v. Shearson Lehman Bros. Inc*., 213 A.D.2d 304, 305 (1st Dep't 1995). Thus, Defendant's

baseless claim of fraud expired, at the latest, six years after the purported fraudulent misrepresentations to the Surrogate Court in 1992.

Defendant attempts to circumvent the statute of limitations by asserting a theory of continuous fraudulent concealment. But that theory is inapplicable where there are no facts to support the underlying fraud or, for that matter, any evidence that John "concealed" anything. The limitations period will begin when the facts giving rise to the fraud are discoverable with ordinary diligence, such as where the facts are a matter of public record or otherwise open to discovery. *See, e.g., Aozora Bank, Ltd. v. Deutsche Bank Sec. Inc*., 137 A.D.3d 685, 690 (1st Dep't 2016); *TMG-II v. Price Waterhouse & Co*., 175 A.D.2d 21, 22-23 (1st Dep't 1991). Consequently, under the fraud discovery rubric, Defendant's fraud claim was time barred two years after the 1992 Surrogate's Court proceeding or, at the latest, John's 1992 recording of his deed.

Defendant cannot shut his eyes to the fact that the Surrogate's Court proceeding, John's recording of his deed to the Premises, his construction mortgage, and the satisfaction of that mortgage were all matters of public record. Defendant also cannot ignore that John published Dorothy's death in the newspaper.

Consequently, the fraud claim is untimely.

New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. "Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214(4), which has a three-year limitations period." But "[w]here . . . the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies." *IDT Corp. v. Morgan Stanley Dean Witter & Co*., 12 N.Y.3d 132, 139 (2009).

Here, Defendant seeks money damages of no less than $3 million on his counterclaim for breach of fiduciary duty. R. 42. The accounting relief which Defendant also demands is by any reasonable measure incidental to the $3 million damages claim. Accordingly, the three-year limitations period applies.[7]

"Claims for breach of fiduciary duty accrue, and the statute of limitations begins to run, as of the date of the alleged breach, not when it was discovered." *Blumenstyk v. Singer*, 2014 WL 3870616, at *5 (Sup. Ct. N.Y. Co., Aug. 4, 2014). Defendant urges that the open repudiation doctrine tolls the statute of limitations. Under that doctrine the statute of limitations "does not begin to run until the

[7] Under the six-year limitations period, the breach of fiduciary duty claim also would be untimely.

fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated." *Knobel v. Shaw*, 90 A.D.3d 493, 496 (1st Dep't 2011). *See also Blumenstyk*, 2014 WL 3870616 ("The statute of limitations may be tolled while a relationship of trust and confidence exists between the parties . . . . In such cases, the statutory period does not begin to run until the fiduciary relationship is repudiated or otherwise ended"). But the open repudiation doctrine for breach of fiduciary duty applies only to claims for equitable relief. *See, e.g., Stern v. Morgan Stanley*, 129 A.D.3d 619 (1st Dep't 2015) ("the breach of fiduciary duty claim was not tolled by the open repudiation doctrine. That rule applies only to claims for accounting or equitable relief, and plaintiffs' claims are solely at law"). Here, Defendant's breach of fiduciary duty claim seeks damages – and the request for equitable relief (an accounting) is merely incidental to its damages claim. Accordingly, the open repudiation doctrine is not applicable. Nevertheless, if the open repudiation doctrine did apply, Defendant's claim for breach of fiduciary duty would still be time-barred, as demonstrated below.

Defendant asserts that John breached fiduciary obligations as administrator of Dorothy's estate and as a cotenant of the Premises by failing to disclose to Yale (and his survivors-in-interest) his one-half interest in the Premises and also for not accounting for Yale's one-half interest. R. 41-42. To the extent John, as administrator of Dorothy's estate, owed a fiduciary duty to Yale, the alleged

fiduciary breach (failing to disclose Yale's one-half interest in Dorothy's estate) occurred no later than 1992, when John repudiated any interest Yale might have had in the public estate proceedings and in publicly recording a deed naming himself as the sole and exclusive owner of the Premises. Accordingly, under this analysis, the breach of fiduciary duty claim expired in 1995.

To the extent Defendant's claim is predicated on John's purported fiduciary obligations as a co-tenant of the Premises, those claims accrued no later than October 2012, when, as set forth in Point I above, by virtue of adverse possession the co-tenancy relationship between John and Defendant terminated. Accordingly, under this analysis, the breach of fiduciary duty claim expired, at the latest, in October 2015.

Consequently, under any analysis, the breach of fiduciary duty claim is untimely and was rightfully dismissed.

Defendant's first counterclaim seeks to "recover[, pursuant to RPAPL § 1201,] on behalf of the Trust a one half interest in all assets which flowed from Henry Golobe to the Estate of Dorothy including, but not limited to, a one half interest in the Premises as a cotenant in common." R. 39. Under RPAPL § 1201, "[a] joint tenant or a tenant in common of real property, or his executor or administrator, may maintain an action to recover his just proportion against his co-

tenant who has received more than his own just proportion, or against his executor or administrator." "[T]he statutory purpose . . . . is the codification of the long-established principle that a tenant be required to account to co-tenants for rents received from third parties." *Trotta v. Ollivier*, 91 A.D.3d 8, 14 (2d Dep't 2011). Since RPAPL § 1201 applies only to real property, Defendant's first counterclaim, to the extent it seeks a declaratory judgment with respect to assets other than the Premises, is misplaced.

With respect to the Premises, under RPAPL § 1201, a "six-year statute of limitations is applicable to the enforcement of the personal liability of the co-tenant." *Goergen v. Maar*, 2 A.D.2d 276, 279 (3d Dep't 1956). Absent an agreement as to how rents from properties should be distributed, the statute of limitations under RPAPL § 1201 begins to run when the cotenant in possession openly repudiates his or her obligation to account or when the relationship ended. *Matter of Steinberg*, 183 A.D.3d 1067 (3d Dep't 2020). *See also Rokeach v. Zaltz*, 112 A.D.2d 209, 209 (2d Dep't 1985) (the statute of limitations for claims of a cotenant accrues when the "tenancy in common has been dissolved").

Here, regardless of when Defendant claims John "repudiated" Defendant's interest, Defendant's claim for relief under RPAPL§ 1201 accrued, at the latest, when the co-tenancy relationship ended in October 2012 and John took ownership

of the entire Premises by adverse possession. *See* Point II, above. Since Defendant's claim began to run at the latest in October 2012, the statute of limitations expired in 2018. Even if Defendant's counterclaims are deemed interposed when the complaint was filed on October 30, 2020 (*see* CPLR 203[d]), Defendant's first counterclaim is time barred and must be dismissed.[8]

CONCLUSION

For all the foregoing reasons, the judgment of the Supreme Court should be affirmed.

Dated: October 3, 2022

Respectfully submitted,

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[8] John also notes that if the Court affirms summary judgment on his claim for adverse possession, then necessarily the first counterclaim for a declaration that Defendant is an owner of one-half of the Premises must fail.

Certification Pursuant to 22 N.Y.C.R.R. § 1250.8(j)

In accordance with 22 N.Y.C.R.R. § 1250.8(j), the undersigned hereby certifies that the foregoing brief was prepared on a computer using 14-point Times New Roman for text and 13-point Times New Roman for footnotes, with double-spaced line spacing, except for quotes placed in indented block-quote format, which are in single-spaced type. The brief contains 11,667 words, exclusive of signature block and pages including the table of contents and table of authorities, as determined by the word count function of the word-processing system on which the brief was prepared. The said word count is compliant with the applicable 14,000-word limit, excluding caption and signature block.

Dated: October 3, 2022

John M. Brickman