New York County Clerk's Index No. 655854/20
Appellate Division–First Department Docket No. 2022-01026

Court of Appeals

of the

State of New York

JOHN GOLOBE,

Plaintiff-Respondent,

– against –

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

Defendant-Movant.

MOTION FOR LEAVE TO APPEAL

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STATE OF NEW YORK COURT OF APPEALS

JOHN GOLOBE,	:	
Plaintiff-Respondent,	:	**NOTICE OF MOTION FOR LEAVE TO APPEAL IN A CIVIL CASE**
v.	:	
IRA ALTCHEK, as Trustee of the Emil Krause Revocable Trust,	:	Index No. 655854/2020 (New York County)
Defendant-Appellant.	:	CA 2022-01026 (First Department)

MOTION BY:

Defendant-Appellant Ira Altchek, as Trustee of the Emil Krause Revocable Trust ("Defendant"), by its Attorneys, Duane Morris LLP.

DATE, TIME & PLACE OF HEARING:

February 21, 2023 at 9:00a.m., before the New York State Court of Appeals, 20 Eagle Street, Albany, New York 12207.

Pursuant to 22 N.Y.C.R.R. § 500.21(a), this motion is submitted without oral argument.

SUPPORTING PAPERS:

(1) Procedural History and Timeliness of Motion; (2) Basis for Jurisdiction; (3) Questions Presented; (4) Preservation of Questions for Review; (5) Why the Questions Presented Merit Review; (6) Order and Memorandum Opinion of the New York Supreme Court, Appellate Division, First Department, Affirming Judgment, as well as the Trial Court Judgment; and (7) Disclosure Statement. Defendant is simultaneously filing herewith one copy of the briefs and record below.

REQUESTED RELIEF:

An Order granting leave to appeal to the New York Court of Appeals.

GROUNDS FOR RELIEF:

C.P.L.R. § 5602(a)(1)(i); 22 N.Y.C.R.R. § 500.22(b)(4); this appeal presents a novel issue of law that has not yet been addressed by the New York Court of appeals, as well as an issue of public importance.

Dated: February 6, 2023

DUANE MORRIS LLP

By: _____

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MEMORANDUM OF LAW

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I. PROCEDURAL HISTORY AND TIMELINESS OF MOTION

On October 30, 2020, Plaintiff John Golobe ("Plaintiff" or "Golobe") filed a Complaint in Supreme Court, New York County, seeking a declaration that he is the sole and exclusive owner, by adverse possession, of the real property located at 265 West 30th Street, New York, NY, designated as Lot 5, Block 780 on the tax map of New York County (the "Premises"), and that Ira Altchek ("Altchek"), as Trustee of the Emil Krause Revocable Trust (the "Trust") ("Defendant") has "no proper or valid claim thereto." (R-26, ¶ 1; R-30, ¶ 26).

On February 5, 2021, Defendant filed an Answer and Counterclaims seeking (1) a declaration that "the Trust is an owner of one half of the Estate of Dorothy Golobe including, but not limited to, the Premises as a cotenant in common," and (2) equitable relief and monetary damages for Plaintiff's fraud and breaches of fiduciary duty to the Trust and its predecessors in interest, his co-tenants in common in the Premises, with respect to the Premises. (R-31 – R-43).

On February 28, 2022, Supreme Court, New York County (Schechter, J.), granted Plaintiff's Motion for Summary Judgment and held that Defendant is no longer a co-tenant in common with a one-half interest in the Premises because Plaintiff acquired exclusive ownership of the Premises by adverse possession. (R-6). This Order was entered on the docket via Notice of Entry on March 4, 2022 (annexed hereto as **Exhibit A**).

On March 7, 2022, Defendant filed its Notice of Appeal of Supreme Court's February 28, 2022 Order. (R-3 – R-4). On August 8, 2022, Defendant filed its Appellate Brief with the Appellate Division, First Department, on October 4, 2022, Plaintiff filed its Appellate Brief in response, and on October 20, 2022, Defendant filed its Reply Brief.

On January 5, 2023, the Appellate Division, First Department, affirmed Supreme Court's Decision and Order granting Plaintiff's Motion for Summary Judgment and denying Defendant's Counterclaims for Fraud and Breach of Fiduciary Duty (annexed hereto as **Exhibit B**, along with the Notice of Entry that was filed on the same date). The Appellate Division held that: (1) the motion court properly determined Plaintiff established by clear and convincing evidence that he actually, exclusively possessed the Premises under a claim of right, open and notoriously for the statutory period, because, *inter alia*, he made observable improvements to the Premises and leased portions of the mixed-use building to third-parties; (2) Defendant's contentions that undisputed offers of settlement warranted denial of summary judgment were erroneous because Plaintiff was not aware of Defendant's interest in the Premises until 2018; and (3) Defendant's fraud and breach of fiduciary counterclaims were properly dismissed because it failed to establish scienter as to misstatement to the Surrogate's Court and otherwise failed to demonstrate any act of wrongdoing. *See id.*

On January 5, 2023, Plaintiff filed a Notice of Entry of the First Department's Decision and Order on the New York County Supreme Court docket, under index number 655854/2020. *See* Ex. B.

II. BASIS FOR JURISDICTION

This Court has jurisdiction of this motion pursuant to C.P.L.R. § 5602(a)(1)(i).

This action originated in Supreme Court, New York County, and the Order of the Appellate Division. First Department, dated January 5, 2023, is a final order which affirmed a judgment awarding Plaintiff Summary Judgment upon his direct claim for adverse possession and dismissed Defendant's counterclaims for fraud and a breach of fiduciary duty.

III. QUESTIONS PRESENTED

1. Can a party satisfy the hostility, open, and notorious elements of adverse possession when he held only a one-half interest in real property as a co-tenant in common and was unaware for more than twenty years that he was not in exclusive possession of the property because of his own failure to conduct any reasonable investigation after inheriting a one-half interest?

2 What is the standard for an Administrator conducting a reasonable heir search in the age of the Internet when he does not know he is the sole heir of decedent's property?

3. Is it a breach of a fiduciary duty for an Administrator not to conduct a proper heir search that would have revealed a succession of co-tenants in common with a one-half interest in real property; deed that real property to himself; and then bring an action to obtain sole ownership by adverse possession?

These questions raise novel issues of law and present matters of great public importance in the administration of estates.

IV. PRESERVATION OF QUESTIONS FOR REVIEW

On November 5, 2021, Defendant moved in Supreme Court for Summary Judgment arguing it was entitled to judgment because, *inter alia*, Plaintiff's possession of the premises has not been hostile or under a claim of right, and Plaintiff has not occupied the real property openly and notoriously. (R-586 – R-587).

Additionally, the three questions of law posed above were presented to the Appellate Division on appeal from the final judgment. (R-3 – R-4).

V. WHY THE QUESTIONS PRESENTED MERIT REVIEW

The issues sought to be reviewed are novel issues of law not previously addressed by the Court of Appeals. Additionally, the questions presented are likely to evade review, are likely to be repeated, and represent matters of great public importance.

VI. STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff's aunt, Dorothy Golobe ("Dorothy")[1] died intestate on February 24, 1992. (R-50, ¶ 4; R-67). Dorothy was survived by her two brothers, Yale Golobe ("Yale") and Zangwill Golobe ("Zangwill"), who became co-distributees of her entire Estate. (R-50, ¶ 4; R-67). Dorothy's Estate included the Premises. (R-50, ¶¶ 2-3). Accordingly, Yale and Zangwill each inherited a one-half interest in the Premises as co-tenants in common. (R-56, ¶ 46, R-65).

Nevertheless, Plaintiff, Zangwill's son, who petitioned the New York County Surrogate to become Administrator of his Aunt Dorothy's Estate, represented to the Surrogate on several occasions that his father was Dorothy's sole distributee. (R-51, ¶¶ 6-7; R-54, ¶ 26; R-85 – R-88; R-96). Plaintiff made this representation despite knowing he did not actually know whether his Uncle Yale had survived Dorothy, and despite failing to conduct any reasonable investigation into Yale's whereabouts. (R-53, ¶¶ 19-20; R-108, pp. 31:9 – 31:12). Plaintiff admittedly based his conjecture on: (a) the fact that Yale was older than Dorothy; and (b) testimony of his father Zangwill's long-time friend, Harold Kozupsky ("Kozupsky"), that Yale died six or seven years before Dorothy. (R-53, ¶ 19; R-54, ¶¶ 22-23; R-71, p. 4:11-12; R-89 – R-90). Solely based upon the representations of Plaintiff and Kozupsky, the

[1] Defendant intends no disrespect in referring to the various persons by their first names. This is necessary as several of these persons share the same last name.

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

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

In actuality, Yale survived Dorothy and did not pass away until January 4, 1993. (R-51, ¶ 8; R-65). When Yale died, his one-half interest in the Premises as a co-tenant in common passed through his heirs and assigns, and ultimately went to Emil Krause, who left his Estate to the Trust. (R-56 – R-57, ¶¶ 36-39; R-65; R-234). In 2000, Altchek distributed all known assets of the Trust following the death of Emil Krause. (R-57, ¶ 41; R-274 – R-275, pp. 17:21 – 18:1).

Plaintiff did not learn until 2018, when a Title Company and a real estate broker both conducted a title search on the Premises in connection with his effort to sell the Premises, that Yale had survived Dorothy and had inherited a one-half interest in Dorothy's Estate (including the Premises), such that Plaintiff held only a one-half interest in the Premises as a co-tenant in common, and was not the sole and exclusive owner of the Premises. (R-57 – R-58, ¶¶ 43-44; R-137, pp. 147:7 – 148:8;

R-208 – R-211; R-230 – R-236; R-302 – R-303).

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

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

In May 2020, Plaintiff's cousin, Lois Linden ("Linden"), to whom he had given his Power of Attorney with respect to the Premises, also acknowledged that the Premises could not be sold without Altchek's consent, as he was the Trust's representative. (R-60, ¶¶ 56-57; R-216 – R-218; R-226 – R-228; R-308). At the end of May 2020, Linden sent Altchek marketing materials which valued the Premises at $2.3 million.[2] (R-61, ¶ 64; R-326 – R-328). Thus, it is clear that when Plaintiff

[2] It is expected that the value of the Premises has increased significantly since May 2020, as it is "within the proposed Penn Station Redevelopment Area." (R-28); *see also* Matthew Haag and Patrick McGeehan, *With Cuomo Gone, Hochul Revises Plan for Penn Station, N.Y.*, N.Y. TIMES

and his representatives first learned of the Trust's interest in the Premises, they acquiesced in the joint ownership and sought to address it. At one point, Altchek and Linden were even negotiating a Settlement Agreement which contained a statement that Plaintiff and the Trust each owned a "50% undivided interest" in the Premises. (R-589, ¶ 13; R-61, ¶¶ 60-61; R-311).

In September 2020, however, Plaintiff retained new counsel and, for the first time, Plaintiff disputed the Trust's interest in the Premises. (R-589, ¶ 12; R-590). Specifically, on September 8, 2020, Plaintiff's current counsel sent Altchek an e-mail advising him that he was "preparing papers in a lawsuit, seeking a judgment that John Golobe is the 100% owner of the [P]remises." (R-590).

On October 30, 2020, Plaintiff initiated this action to seek a declaration that he is the sole and exclusive owner of the Premises by adverse possession, "in fee simple absolute, and that the defendant has no proper or valid claim thereto." (R-26, ¶ 1; R-30, ¶ 26). Most significantly, during his deposition in connection with this Action, Plaintiff testified that he had never even seen the Complaint and was unaware that this Action had been instituted in his name. (R-62, ¶¶ 66-67; R-107, p. 26:14-22; R-147, P. 18:3-4).

(available at: https://www.nytimes.com/2021/11/03/nyregion/penn-station-nyc-hochul.html) (indicating Governor Hochul's plan to move forward with the $7 billion reconstruction of Penn Station and the surrounding areas).

Notably, prior to the commencement of this Action, Plaintiff suffered two strokes – one in 2000 and another in 2018. (R-56, ¶¶ 33-35; R-103, p. 10:16-18; R-140, pp. 159:20 – 161:19). Plaintiff was also hospitalized during portions of 2018 and 2019, and when not hospitalized, he required 24-hour live-in care. (R-56, ¶ 35; R-140, pp. 159:20 – 161:9). Plaintiff acknowledged that he was not "fully conscious of what was happening … at that time period." (R-56, ¶ 35; R-140, pp. 159:20 – 160:12). Thus, it is unclear whether Plaintiff: (a) had or has the mental capacity to pursue the claim of adverse possession he pursues in this action; or (b) intended or intends to establish himself as the sole owner of the Premises, to the detriment of his estranged family members.

The Supreme Court and Appellate Division both ignored the inconsistent and undisputed actions taken by Farrelly and Linden (including her Power of Attorney) on Plaintiff's behalf, and Plaintiff's mental capacity, prior to the filing of this Action.

VII. THE NOVEL ISSUES OF LAW PRESENTED

The questions present novel issues of law with respect to RPAPL § 541 (adverse possession), an unclear and unfavorable statute, not previously addressed by this Court. This Court has wide discretion to review a case that raises substantial and novel questions of law, especially if the controversy or issue typically evades review and is likely to be repeated. *Wisholek v. Douglas*, 97 N.Y.2d 740, 742 (2002); *Matter of Hearst Corp. v Clyne*, 50 N.Y.2d 707, 714-15 (1980)). That is this case.

First, this Court has not yet had the opportunity to determine whether:

(1) the hostile, open, and notorious elements of an adverse possession claim are satisfied where a party acquires exclusive title and possession of real property by virtue of his own willful ignorance which resulted in a misrepresentation to the Surrogate's Court, and therefore never attempted to oust or exclude his rightful co-tenants;

(2) a party has committed fraud when he willfully and recklessly makes misrepresentations to the Surrogate's Court that he is the sole and rightful heir of an estate;

(3) it is a breach of a fiduciary duty to conceal from rightful co-tenants their interest in real property for the party's own benefit, and then bring an action to obtain sole ownership of the real property by adverse possession; and

(4) what is the standard for an Administrator conducting a reasonable heir search before making representations to the Surrogate's Court, especially in the age of the Internet.

Adjudication of these specific questions is noticeably absent from this Court's jurisprudence. More specifically, this Court has not had the opportunity to address these questions in situations where neither party was actually aware of the purported "adverse" possession of the real property.

Second, these questions of law have the potential to evade review, as they

feature indicia of purposeful, willful, or reckless concealment of operative facts such that the litigation may never come to fruition.

Third, this fact pattern is likely to be repeated. To that effect, the First Department's opinion actually incentivizes potential distributees to (1) willfully avoid conducting a thorough or even a reasonable heir search in the pursuit of greater personal gain, and (2) rely on such willful ignorance to justify and/or excuse misrepresentations made to New York Courts.

What this Court has addressed, is that for possession of property to be "hostile," the possessor must enter the property with the "intention to claim title" in a manner adverse to the true owner, such that the "real owner may, by unequivocal acts of the usurper, have notice of the hostile claim and be thereby called upon to assert his legal title." *Monnot v. Murphy*, 207 N.Y. 240, 245 (1913); *see also Hinckley v. State of New York*, 234 N.Y. 309, 317 (1922). Hostility is more difficult to prove with respect to property that is held by co-tenants in common because: (1) there is a statutory presumption that "a tenant in common in possession holds the property for the benefit of the co-tenant," *Russo Realty Corp. v. Orlando*, 30 A.D.3d 499, 500 (2d Dep't 2006); (2) this presumption lasts twenty years rather than ten years, *Myers v. Bartholomew*, 91 N.Y.2d 630, 634-35 (1998); and (3) the expiration of that statutory period does not establish adverse possession *per se*, but merely

triggers the possibility. *See Trevisano v. Giordano*, 202 A.D.2d 1071, 1071 (4th Dep't 1994).

Therefore, in order to succeed on a claim of adverse possession, Plaintiff was required to demonstrate that he took possession of the Premises with the intent to claim exclusive title (rather than with the mere belief that he was already the rightful owner), and then maintained hostile possession for more than twenty years. Plaintiff cannot satisfy either prong.

Plaintiff did not, and could not, ever prove hostile intent or possession as he admits that he did not know until 2018, at the earliest, that he jointly held the Premises as a co-tenant in common and was not the sole possessor. We know of no legal precedent under New York law in which both co-tenants were unaware of their shared interest in real property for the statutory period and one co-tenant was then awarded the entire property by adverse possession. To that effect, the record demonstrates the following undisputed facts:

- At the time of Dorothy's death in 1992, neither Plaintiff nor his father knew that Yale was still alive, and both Plaintiff and Yale were unaware of their shared interest in the Premises from 1992 until 2018, at the earliest. (R-57, ¶¶ 42-43; R-58, ¶¶ 47-48; R-108, pp. 30:6 – 31:20; R-139, p. 156:14-17; R-269 – R-270, pp. 12:9 – 13:12).

- Plaintiff only discovered that he was not the sole owner of the entire Premises in 2018 when a Title Company and a real estate broker retained on his behalf conducted a title search in connection with his attempts to sell the Premises, which disclosed that his uncle Yale survived Dorothy and therefore inherited one-half of her estate,

including a one-half interest in the Premises. (R-57 – R-58, ¶¶ 43-44; R-208 – R-211; R-230 – R-236; R-302 – R-303).

- Even after Plaintiff learned that he had not been in exclusive possession of the Premises, he acknowledged the Trust's interest and requested Altchek's acquiescence in its sale rather than declaring exclusive possession or intent. (R-58 – R-59, ¶¶ 47-50; R-269 – R-270, pp. 12:9 – 13:12; R-302 – R-303).

- Plaintiff's counsel had clearly indicated an intent to share the proceeds of the sales of the Premises, thereby precluding a claim of hostility or exclusive possession, stating that "after a closing, the parties will share the proceeds of the sale [of the Premises]." (R-60, ¶ 55; R-305).

- Linden, to whom Plaintiff had given Power of Attorney with respect to the Premises, conceded joint ownership – thereby precluding a claim of hostility or exclusive possession – stating that Plaintiff was "eager to sell" the Premises, but that it "cannot be done until we have your signature on the sales agreement," and that Plaintiff "hope[d to] … work together to get the property sold and the monies into escrow." (R-60, ¶ 56; R-228).

- On May 14, 2020, Linden forwarded Altchek a draft Settlement Agreement pursuant to which (1) the parties were to share the proceeds of the sale of the Premises, and (2) the parties acknowledged their mutual ignorance to the fact of the one-half interests until the title search was run in 2018. (R-60, ¶¶ 58-61; R-310 – R-325).

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

Offers "to settle or compromise any claim [a] plaintiff may have had against the subject property is relevant to the issue of hostility." *Blanchard v. Blanchard*, 4 Misc. 3d 1027(A), 2004 WL 2187604, at *3 (Sup. Ct. Bronx Cty. Sept. 8, 2004). "Evidence of such conduct or words on the part of the possessor after the prescriptive

period has run, although not dispositive on the claim of adverse possession, has been found probative of the character of [the] possession." *Id.* (citing *Van Valenburgh v. Lutz*, 304 N.Y. 95, 99 (1952) (holding that hostility was lacking where defendant "had the opportunity to declare his hostility and assert his rights against the true owner, [but] voluntarily chose to concede that the plaintiffs' legal title conferred actual ownership entitling them to the possession of [the premises]"). To that extent, if a claimant negotiated to purchase his co-owner's rights, "then his possession arguably would not have been 'hostile' because it would have been under an acknowledgement that [the co-owner] had an interest in the subject property." *Blanchard*, 2004 WL 2187604, at 3.

The First Department's analysis of the foregoing issues, or lack thereof, is wholly unavailing and strongly supports Defendant's Motion for Leave to Appeal. Specifically, and among other things, the First Department distinguished *Blanchard* by distinguishing between the *Blanchard* plaintiff's offer to purchase his ex-wife's share and Plaintiff's offer of settlement by noting only that Plaintiff was not aware of his co-tenancy until 2018. *See* Ex. A at 2-3. This, however, is the very point of this motion. It is an open question of law whether the possession of property can be hostile and exclusive when ***neither party*** is aware of a co-tenancy, especially when such ignorance is assisted by the possessor's own, improper acts. In rendering its decision, the First Department ignored these unsettled questions and improperly

presupposed that the lack of knowledge as to co-tenancy was irrelevant to the question of hostility with respect to a claim of adverse possession.

Where, as here, there are no precedential New York cases that address the unique scenario where neither co-tenant was aware of the co-tenancy throughout the statutory period, a court must look to the purpose behind the adverse possession laws in New York. This has not yet been done. Therefore, this Court should grant Defendant's Motion for Leave to Appeal. Ultimately, this Court should acknowledge the presumption in favor of a co-tenant's holding of a property for the other co-tenant's benefit, and not to their exclusion, and should accordingly reverse the order of the First Department.

Moreover, although this Court should grant leave to appeal by virtue of the open questions of New York law concerning Plaintiff's exclusive possession of the Premises, it is also worth noting that the First Department erroneously determined that Plaintiff's possession of the Premises was "open and notorious." 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 v. Giordano*, 202 A.D.2d 1071, 1071 (4th Dep't 1994) (emphasis added) (citations omitted).

In determining that Plaintiff engaged in the requisite "obvious and overt" acts

to satisfy the "open and notorious" prong of the inquiry, the First Department stated:

> Plaintiff's claim of right arising from the administrator's deed, which was recorded in the New York City Register's Office on or about November 19, 1992, vested 20 years later, in 2012 … Under that claim of right, plaintiff constructed an open and notorious wood deck and other observable improvements on the property, encumbered the property with a construction loan which he later satisfied, leased portions of the mixed-use building to third parties solely in plaintiff's name, and there was no acknowledgement, by plaintiff or anyone else, of any other interest in the property for a period exceeding 20 years.

See Ex. A, at pg. 2.

The First Department's decision exemplifies the open questions of state law that are ripe for determination by this Court.

Although the First Department is correct in its factual recitations, the evidence clearly establishes that Plaintiff did not sufficiently repudiate the interest of Yale's heirs and beneficiaries, including the Trust, in the Premises. Notwithstanding Plaintiff's offers of settlement – which themselves preclude a finding of open and notorious possession – the execution of the deed, the construction loans, the improvements to the property, and the leases are also legally insufficient to demonstrate open and notorious possession. These actions merely demonstrate Plaintiff's (one-half) ownership and actual occupation of the Premises, which is not in dispute.

A mere occupation of the Premises does not repudiate or otherwise alter 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 the property for the benefit of its other co-tenants. *See Trevisano*, 202 A.D.2d at 1071 (distinguishing between exclusive possession and the requisite overt acts, and noting that "[e]xclusive possession alone is not the equivalent of an ouster" in determining that the record did not support a finding of "very obvious and overt acts which unmistakably repudiate a non-possessory owner's right"); *see also Kraker v. Roll*, 100 A.D.2d 424, 434 (2d Dep't 1984) (finding no repudiation of a plaintiff's title or adverse possession until the property was actually sold to a third-party, which the possessor had also offered to split the profits upon sale); *In re Estate of Kelley*, 140 Misc. 2d 876, 879 (Sup. Ct. Monroe Cty. 1988) (holding that "no claim of right was made by the tenant in possession until the executor attempted to sell the property without respondent's consent" where there was nothing in the record to indicate that the possessor "did anything which would have repudiated the cotenant's rights to [the property]").

It belies logic to conclude, as the First Department did, that the mere upkeep of real property could function as sufficient "open and notorious" exclusive ownership, whereby the co-tenant had no reason to know of its interest in the real property by virtue of the possessor's improper and disingenuous misrepresentations to a New York Court. Under this framework, *any* possession of property would

necessarily be open and notorious, because it is practically impossible to possess real property for such an extended period of time without engaging in proper maintenance. Accordingly, this Court should grant Defendant's Motion for Leave to Appeal and reverse the order of the First Department.

VIII. THE OPEN QUESTIONS OF LAW HAVE THE POTENTIAL TO EVADE REVIEW, ARE LIKELY TO BE REPEATED, AND ARE MATTERS OF GREAT PUBLIC IMPORTANCE

These questions of law have the potential to evade review, as they feature indicia of purposeful, willful, or reckless concealment of operative facts such that the litigation may never come to fruition. Additionally, this fact pattern is likely to be repeated. To that effect, the First Department's opinion actually incentivizes potential distributees to (1) willfully avoid conducting a thorough or even a reasonable estate search in the pursuit of greater personal gain, and (2) rely on such willful ignorance to justify and/or excuse misrepresentations made to New York Courts.

Finally, these open questions of law constitute matters of great public importance. The decision to deprive an individual of his or her own legal and rightful property is one of the most drastic remedies that a court sitting in a civil matter can order. Indeed, this relief is anathema to the values that this State, and the country, hold dear. For this reason, the law on adverse possession should be well-

defined and this case provides the prototypical factual scenario that will allow this Court to do so, especially given the substantial value of the Premises involved herein.

IX. DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f) Defendant Ira Altchek, as Trustee of the Emil Krause Revocable Trust, is not a corporation and therefore does not have any parents, subsidiaries, or affiliates.

CONCLUSION

For the foregoing reasons, Defendant Ira Altchek, as Trustee of the Emil Krause Revocable Trust, respectfully requests that this Court grant its Motion for Leave to Appeal to the Court of Appeals.

Dated: February 6, 2023

DUANE MORRIS LLP

By: _____

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Tel.: (212) 692-1000
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Ira Altchek, as Successor Trustee of
the Emil Krause Revocable Trust

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

JOHN GOLOBE,

Plaintiff,

-against-

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

Defendant.

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Index No. 655854/2020

Hon. Jennifer Schecter
Part 54

Motion Seq. No. 002

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true copy of the Decision and Order on Motion Seq. No. 002, made in this action by Justice Jennifer Schecter, dated February 28, 2022, and entered in the office of the Clerk of the County of New York on February 28, 2022 (NYSCEF Doc No. 82).

Dated: March 4, 2022

McLAUGHLIN & STERN, LLP

By: *s/John M. Brickman*
John M. Brickman, Esq.

Attorneys for Plaintiff
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(516) 829-6900

TO: All Counsel Of Record Via NYSCEF

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: HON. JENNIFER SCHECTER **PART** 54
Justice

----------X

JOHN GOLOBE,

Plaintiff,

- v -

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

Defendant.

----------X

INDEX NO 655854/2020

MOT SEQ NOS 001 002

DECISION + ORDER ON MOTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 69, 70, 71, 72, 73, 74, 75, 78, 79, 80

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 76, 77

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents and for the reasons set forth on the record, it is

ORDERED that plaintiff's motion for summary judgment is GRANTED in its entirety and defendant's second and third counterclaims are dismissed because defendant failed to raise any triable issues as to any fraud or breach of fiduciary duty; and it is further

ORDERED that defendant's motion for summary judgment is DENIED; and it is further

ADJUDGED and DECLARED that plaintiff John Golobe is the sole and exclusive owner of the premises at 265 West 30th Street, New York, NY, designated as Lot 5, Block 780 on the tax map of New York County in fee simple absolute and that defendant Ira Altchek, as Trustee of the Emil Krause Revocable Trust, has no proper or valid claim thereto.

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2/28/2022
DATE

JENNIFER SCHECTER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER

655854/2020 GOLOBE, JOHN vs. ALTCHEK, IRA
Motion No. 001 002

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

JOHN GOLOBE,

Plaintiff-Respondent,

Index No. 655854/20

- against -

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

NOTICE OF ENTRY

Defendant-Appellant.

----------X

PLEASE TAKE NOTICE that the attached is a true copy of a Decision and Order, dated January 5, 2023, by the Appellate Division of the Supreme Court for the First Judicial Department, entered in the Office of the Clerk of said Court on January 5, 2023.

Dated: January 5, 2023

McLAUGHLIN & STERN, LLP

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John M. Brickman

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Supreme Court of the State of New York
Appellate Division, First Judicial Department

Renwick, J.P., Gesmer, Kennedy, Scarpulla, Pitt-Burke, JJ.

17020 JOHN GOLOBE,
Plaintiff-Respondent,

Index No. 655854/20
Case No. 2022-01026

-against-

IRA ALTCHEK, as Trustee of the Emil Krause Revocable Trust,
Defendant-Appellant.

Duane Morris LLP, New York (Leslie D. Corwin of counsel), for appellant.

McLaughlin & Stern, LLP, Garden City (John M. Brickman of counsel), for respondent.

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered February 28, 2022, which granted plaintiff's motion for summary judgment for a declaration that plaintiff is the sole and exclusive owner of the premises in fee simple absolute and that defendant has no proper or valid claim thereto and dismissed defendant's counterclaims, unanimously affirmed, without costs.

The motion court properly determined that plaintiff established by clear and convincing evidence that he actually, exclusively possessed the property under a claim of right, openly and notoriously, for a continuous period since 1992, entitling him to a declaration that he is the sole and exclusive owner of the premises and dismissal of defendant's counterclaims (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]). Where tenants in common are concerned, "the period required by RPAPL 541 is 20 years of continuous exclusive possession before a cotenant may acquire full title by adverse possession" (*Myers v Bartholomew*, 91 NY2d 630, 632 [1998]). Even absent an ouster

of the cotenant, the occupying cotenant still must demonstrate open and overt acts "which unmistakably repudiate a non-possessory owner's right by one possessing the property" (*Trevisano v Giordano*, 202 AD2d 1071, 1071 [4th Dept 1994]).

Here, plaintiff's acts of exclusive ownership fulfill that criterion. Plaintiff's claim of right arising from the administrator's deed, which was recorded in the New York City Register's Office on or about November 19, 1992, vested 20 years later, in 2012 (*Myers v Bartholomew*, 91 NY2d at 632). Under that claim of right, plaintiff constructed an open and notorious wood deck and other observable improvements on the property, encumbered the property with a construction loan which he later satisfied, leased portions of the mixed-use building to third parties solely in plaintiff's name, and there was no acknowledgement, by plaintiff or anyone else, of any other interest in the property for a period exceeding 20 years. This satisfies the hostility element, as "[a] rebuttable presumption of hostility arises from possession accompanied by the usual acts of ownership" (*Estate of Becker v Murtagh*, 19 NY3d at 81).

Although defendant urges that plaintiff's offer to settle their respective interests in the property in 2019 warranted denial of summary judgment, defendant's reliance on *Blanchard v Blanchard* (4 Misc 3d 1027[A], 2004 NY Slip Op 51079[U] [Sup Ct, Bronx County 2004]) is misplaced. There, the parties were divorced parents, and the defendant husband seeking title to the marital home by adverse possession had raised the children in the former marital residence "with plaintiff's acquiescence" (2004 NY Slip Op 51079 [U],*1). Thus, the court reasonably determined that the husband's offer to purchase the wife's share suggested that he may not have intended his occupancy to be hostile to her cotenancy (2004 NY Slip Op 51079 [U],*4). Here, by contrast, defendant submitted no evidence that plaintiff was even aware that defendant had an interest in

the property as a tenant-in-common until 2018, when it was discovered that his uncle had not predeceased the aunt from whom he inherited the property, and the settlement overtures consistently asserted that plaintiff had always acted as the property's sole owner for the statutory period.

Finally, defendant's assertion that the counterclaims should not have been dismissed is unavailing, even if they were timely asserted. With respect to the fraud counterclaim, the record shows that defendant failed to establish plaintiff's scienter as to any misstatement or defendant's own reliance on any misstatement made to the Surrogate's Court (*see Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016] [reliance element of fraud claim fails where a "third party is alleged to have relied on the misrepresentations in a manner that caused injury to the plaintiff"]; *Abrahami v UPC Constr. Co.*, 224 AD2d 231, 233 [1st Dept 1996] ["In order to show an intent to deceive, plaintiffs must establish that defendant knew, at the time they were made, that the representations were false"]). The breach of fiduciary duty counterclaim is insufficient because defendant failed to show an act of wrongdoing to support the claim (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Specifically, defendant fails to cite any case indicating that an administrator's fiduciary duty requires him to conduct an extraordinary search to confirm the death of a potential distributee where none is ordered by the Surrogate's Court, which is the crux of his claim. Thus, the motion court properly dismissed the counterclaims.

We have considered defendant's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: January 5, 2023

Susanna Molina Rojas
Clerk of the Court

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK	)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On February 6, 2023

deponent served the within: **Motion for Leave to Appeal**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on February 6, 2023

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

Job# 318175