

**Special Referee Decision and Order, dated June 6, 2017 [A70-A88]**

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

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MALI FUKS, individually and on behalf of R&L Realty  
ASSOCIATES, a New York Partnership,  
Plaintiff,

Index No. 122768/96  
**Action No. 1**

-against-

**Decision and Order**

RAKIA ASSOCIATES 2701 BROADWAY ASSOCIATES,  
LANCASTER STUDIO ASSOCIATES, UPWEST COM-  
PANY, 27 EAST 21 STREET COMPANY, 504 WEST 111  
OWNERS CORP., RUTH SHOMRON, ALFRED SZALA,  
GOLDSTICK, WEINBERGER, FELDMAN & GROSSMAN,  
P.C., ESTATE of HOWARD SIMON, LARRY GOLDSTEIN  
and LINDA GOLDSTEIN,

Defendants.

-----X  
RUTH SHOMRON, on behalf of R&L REALTY ASSOCIATES,  
a New York Partnership.

Index No. 102882/02  
**Action No. 2**

Plaintiff,

-against-

DARVA FUKS, as Executrix of the deceased YORAM FUKS,  
GADI HILL, Trustee of U/T/A Dated February 20, 1993,  
GREENLAND HOLDING CO., LTD., and MALI FUKS,  
Defendants.

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**ORDER OF THE SUPREME COURT, NEW YORK COUNTY: PART 81R**

Action No. 1 defendant Ruth Shomron (“Ms. Shomron”) moves for an order, pur-  
suant to CPLR 4401, granting her a judgment as a mater of law at the close of plaintiff’s direct  
case with respect to the claims alleged in the instant action.<sup>1</sup>

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<sup>1</sup>The instant matter was referred to the undersigned Special Referee by decision and order dated March 9, 2010 (Friedman, J.) to “hear and report with recommendations” certain issues enumerated in a Stipulation placed on the record on February 24, 2010. At all relevant times, plaintiff Mali Fuks (“Ms. Fuks”) and defendant Ruth Shomron (“Ms. Shomron”) were partners in

### Contentions<sup>2</sup>

plaintiff R&L Realty Associates (“R&L”), a New York partnership formed in May 1985. Ms. Fuks became a partner in R&L in 1998 when she purchased a 1/3 interest in Ms. Shomron’s ½ partnership interest in R&L. In or about 1991, Ms. Fuks obtained a 50% partnership interest in R&L.

The complaint in Action No. 1 of the instant action ( Deemed a Court Exhibit) alleges causes of action for an Accounting (One through Six), Conversion (Seventh), Misrepresentation (Eighth), Fraud (Ninth), Constructive Trust (Tenth), Breach of Good and Fair Dealing (Eleventh), Breach of Fiduciary Duties (Twelfth), Legal Malpractice (Thirteenth), and “Aiding and Betting” (Fourteenth), as well as counterclaims.

In the February 24, 2010 stipulation, the parties resolved certain issues in the instant action. The parties agreed, *inter alia*, that the causes of action were being voluntarily discontinued against all of the defendants except for Ms. Shomron. The parties also agreed that as to the Accounting causes of action, Ms. Shomron “shall” provide plaintiff Mali Fuks (“Ms. Fuks”) with a “schedule” reflecting “all sales proceeds” received by R&L, “loan proceeds” by R&L after January 30, 1989, excluding mortgages, rents and profits, as well as other information, including disbursements, by March 10, 2010. It was agreed that by April 1, 2010, Ms. Fuks “shall” deliver to Ms. Shomron, through counsel, specific objections to “any of the matters set forth in the schedules and ledgers” provided by Ms. Shomron.

Further, the parties agreed that by decision and order filed September 27, 2006 (Stackhouse, J.), which was affirmed by the Appellate Division, First Department, the eighth cause of action was dismissed; the fifth and sixth causes of action were rendered moot; and that the first through sixth counterclaims were either resolved by the decision or rendered moot. Additionally, the parties agreed that the thirteenth cause of action was settled and that the fourteenth cause of action was voluntarily discontinued.

Additionally, as to Action No.2, it was agreed by the parties that all of the causes of action and counterclaims had been resolved and determined by the court’s decision and order filed September 27, 2006, except for the third cause of action that seeks the imposition of a constructive trust with respect to certain R&L rents and profits.

Consequently, the remaining causes of action in Action No. 1 allege the following: an Accounting, Conversion, Fraud, Constructive Trust, Breach of Good Faith Dealing, and Breach of Fiduciary Duty were referred to the undersigned Special Referee to hear and report with recommendations.

<sup>2</sup>By order of the court dated February 21, 2017, the court ordered that Ms. Fuks had until March 15, 2017 to submit written opposition to the instant motion. Ms. Fuks failed to submit any written opposition to the instant motion on or before March 15, 2017. The undersigned Special Referee, however, accepted Ms. Fuks’ previously submitted “Answer to Submission of Memorandum of Law for Directed Verdict in Accounting Trial and Cross-Motion for Dismissal” dated January 23, 2017, as written opposition to the motion.

Additionally, Ms. Fuks’ counsel, Mr. Albert Lawler, was permitted to present oral opposition to such motion on May 2, 2017, the first day of the re-commencement of the hearing

In support of the motion, with respect to the causes of action alleging an Accounting, Ms. Shomron contends that a certified accounting was provided to Ms. Fuks, pursuant to the parties' Stipulation dated February 24, 2010. Ms. Shomron contends that there was no requirement in the Stipulation that there be an account for each and every one of the categories demanded in the first through six causes of action alleged in the complaint and that the certified accounting only addresses plaintiff R&L Realty Associates' ("R&L") sale and loan proceeds, and the disbursement of certain funds and transactions subsequent to January 31, 1989.<sup>3</sup> Ms. Shomron maintains that the evidence presented by Ms. Fuks at the hearing was speculative, included unsupported conclusions and false assumptions and that Ms. Fuks has therefore failed to demonstrate that a "single entry" in the certified accounting was inaccurate or incomplete.

With respect to the cause of action alleging conversion, Ms. Shomron contends that Ms. Fuks has failed to demonstrate any misconduct on her part and further, that such cause of action is time-barred by CPLR§214(4), given that the instant action was commenced on December 30, 1996, and that the alleged conversions occurred prior to December 30, 1993.<sup>4</sup>

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after a stay obtained by Ms. Fuks at the Appellate Division, First Department expired. Counsel for Ms. Shomron was permitted to respond orally to such opposition.

<sup>3</sup>It must be noted that the protracted litigation in this instant matter began in December 1996, and that such litigation included an arbitration proceeding that did not result in the issuance of an arbitration award, as well as various stays and appeals.

<sup>4</sup>It must be noted that a party may move for judgment dismissing one or more causes of action asserted against him or her on the ground that the "cause of action may not be maintained because of . . . statute of limitations," pursuant to CPLR 3211(a)(5). Moreover, pursuant to CPLR 3211(a), a party may move on one or more of the grounds set forth in CPLR 3211(a) at any time before service of the responsive pleading is required. Under CPLR 3211(e), any objection or defense based upon a ground set forth in CPLR 3211(a) is waived unless raised by such motion or in the responsive pleading. Here, Ms. Shomron did not waive any "objection or defense" based upon the ground of statute of limitations inasmuch as such ground is alleged in

With respect to the cause of action alleging fraud, and R&L's alleged "negative capital account" which was "falsely" allocated to her, as well as with respect to an alleged re-financed mortgage held by Greater New York Savings Bank ("Greater New York"), Ms. Shomron contends that Ms. Fuks has failed to demonstrate that she made any material misrepresentation of an existing fact regarding the R&L account or pertaining to the re-financed mortgage. Ms. Shomron also contends that the cause of action is time-barred by CPLR§213(8).

With respect to the cause of action alleging breach of fiduciary duty, Ms. Shomron contends that Ms. Fuks has failed to demonstrate any misconduct on her part and further, that the claim is time-barred by CPLR§214(4) with respect to any alleged misconduct that occurred prior to December 30, 1993.

With respect to the cause of action alleging imposition of a constructive trust, Ms. Shomron contends that a claim for constructive trust is not available to enforce a legal right that is itself barred by the statute of limitations and that to the extent Ms. Fuks seeks to enforce her "time-barred" claims for fraud, conversion and breach of fiduciary duties, this cause of action is time-barred as well.

With respect to the cause of action alleging breach of "Good Faith and Fair Dealing", Ms. Shomron contends that Ms. Fuks has failed to demonstrate that she has failed to exercise good faith in the performance of any contract involving R&L and further, that the claim is time-barred by CPLR§ 213(2) with respect to any alleged breaches arising prior to December 30, 1990.

**Law**

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the first affirmative defense asserted in her answer ( Deemed a court exhibit) in instant matter.

Any party may move for judgment with respect to a cause of action or issue upon grounds that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties (see, CPLR 4401).

A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party. In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the non-movant (see, *Szczerbiak v. Pilat*, 90 NY2d 553, 554 [1997]).

### **Analysis**

#### **Accounting**

In an accounting proceeding, the party objecting to an accounting bears the burden of coming forward with evidence to establish that the account is inaccurate or incomplete and, upon the satisfaction of that showing, the accounting party must prove by a fair preponderance of the evidence that his or her account is accurate and complete (see, *Matter of Crane*, 100 AD3d 626 [2<sup>nd</sup> Dept. 2012]).

An objecting party's conclusory and unsubstantiated objections do not satisfy the objecting party's burden (see, *Matter of McAlpine*, 85 AD3d 1185, 1186 [2<sup>nd</sup> Dept. 2011]). In-

deed, the burden does not even shift to the accounting party if the objecting party's objections are not supported by evidence showing, *prima facie*, that the accounting was inaccurate or incomplete (*see, Schulman v. Levy, Sonet & Sigel*, 302 AD2d 321 [1<sup>st</sup> Dept. 2003]).

Here, the "accounting" that Ms. Shomron agreed to provide Ms. Fuks in accordance with the parties' Stipulation dated February 24, 2010 was admitted into evidence at the hearing as Plaintiff's Exhibit#3B. Ms. Fuks presented the testimony of expert witnesses Ziva Guttman ("Ms. Guttman"), Richard Farren ("Farren") and Preston Faro ("Faro"), as well as documentary evidence in the form of expert reports, in an effort to meet her burden of coming forward with evidence to establish that the accounting provided by Ms. Shomron is inaccurate or incomplete (*see, Matter of Crane, supra*).

The extensive testimonial evidence given by Ms. Guttman at the hearing, as well as the content of her report,<sup>5</sup> sufficiently establishes that the "accounting" submitted by Ms. Shomron in the instant matter is to an extent inaccurate or incomplete, thus requiring Ms. Shomron to prove by a fair preponderance of the evidence that her accounting is accurate or complete (*see, Matter of Crane, supra*).

For example, Report#14 of Ms Guttman's report sets forth evidence regarding loans involving R&L and individuals such as Michael Kaplan and Harry Salon, various businesses, as well as defendants Rakia Associates ("Rakia"), 2701 Broadway Associates ("2701 Broadway"), Lancaster Studio Associates ("Lancaster"), and Upwest Company ("Upwest"), which sufficiently establishes a degree of inaccuracy or incompleteness in the accounting with respect to these specific R&L loans, in that the evidence set forth in Report#14 sufficiently contradicts

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<sup>5</sup>Plaintiff's Exhibit#149.

the evidence set forth in the accounting as to these loans.

As such, affording Ms. Fuks “every inference which may properly be drawn from the facts presented,” and considering the facts in a “light most favorable” to Ms. Fuks, it is the court’s determination that the totality of the evidence adduced at the hearing demonstrates that there is a rational process by which the trier of fact could base a finding in favor of Ms. Fuks, the non-moving party in the instant action (see, CPLR 4401; *Szczerbiak v. Pilat, supra*).

Accordingly, that branch of the motion made by Ms. Shomron for an order granting her a judgment as a matter of law on the cause of action seeking an accounting must be denied.

#### **Conversion**

The tort of conversion is established when one who owns and has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner. The history of the application of this particular common law cause of action “conversion” has always centered exclusively on the physical theft of specific, identifiable, corporeal, tangible personal property, in its most rudimentary sense (see, *Shmueli v. Corcoran Group*, 9 Misc2d 589, 592-593 [Sup. Ct, New York County, 2005]).

As the nature of personal property evolved to the point where tangible documents represented highly valuable rights, such as promissory notes, stock certificates, insurance policies, and bank books, the tort of conversion was expanded by common law courts to include such documents within its definitional scope, despite their intangible aspects, which invariably, are the primary components of the document’s value (*id.*).

An action to recover damages for an injury to property, except as provided in CPLR§214-c<sup>6</sup>, must be commenced within three years of the alleged “injury” (see, CPLR§214 (4); *Vigilant Ins. Co. Of Am v. Housing Auth. Of the City of El Paso, Texas*, 87 NY2d 36, 44 [1995]).

Here, the seventh cause of action alleges that Ms. Shomron, in concert with Simon and Goldstein, “wasted, diverted, dissipated, misappropriated and converted” the amount of \$2,500,00.00, representing “illegal withdrawals, squandering the over-mortgaging proceeds, cash receipts of sales prices, cash receipts from loans,” and sharing commissions with certain professional-confidants.” It is alleged that Ms. Fuks demanded the converted property from Ms. Shomron, Simon and Goldstein but that they refused and/or failed to “rectify the situation” and that Ms. Fuks sustained damages as a result in the amount of \$2,500,000.00, and punitive damages in the amount of \$7,500,00.00.

Clearly, the claim fails to alleged a specific time at which Ms. Shomron alleged converted the sum of \$2,500,000.00. Such claim would be time-barred, however, with respect to any monies allegedly converted by Ms. Shomron prior to December 30, 1993 (see, CPLR§214 (4); *Vigilant Ins. Co. Of Am v. Housing Auth. Of the City of El Paso, Texas, supra*).

Moreover, the extensive testimonial and voluminous documentary evidence adduced at the hearing sufficiently demonstrates that subsequent to when Ms. Fuks obtained a partnership interest in R&L in 1988, Ms. Shomron, on behalf of R&L, engaged in a multitude of business transactions that were consummated without the knowledge and/or consent of Ms. Fuks. Such evidence also demonstrates that many of those transactions involved entities in which Ms.

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<sup>6</sup>New York’s “toxic tort” statute.

Shomron had an interest or affiliation.

For example, the documentary evidence<sup>7</sup> sufficiently demonstrates that during the period November 1990 through August 1995, R&L borrowed various sums of money from 2701 Broadway, a business entity in which Ms. Shomron had an interest, and that 2701 Broadway made payments towards the monies owed over that period of time. Ms. Fuks testified credibly that she was not aware of the loan transactions between R&L and 2701 Broadway until sometime in November 1995 (see, *Lauria v. Lauria*, 187 AD2d 888, 889 [3<sup>rd</sup> Dept. 1992]). Ms. Fuks also testified credibly that she was also unaware until sometime in November 1995 that R&L engaged in loan transactions with other entities in which Ms. Shomron had an interest, including defendants Rakia, Upwest, and Lancaster (*.id*)

As such, affording Ms. Fuks “every inference which may properly be drawn from the facts presented,” and considering the facts in a “light most favorable” to Ms. Fuks, it is the court’s determination that the totality of the evidence adduced at the hearing demonstrates that there is a rational process by which the trier of fact could base a finding in favor of Ms. Fuks, the non-moving party in the instant action, on this claim (see, CPLR 4401; *Szczerbiak v. Pilat, supra*).

Accordingly, that branch of the motion made by Ms. Shomron for an order granting her a judgment as a matter of law on the seventh cause of action (Conversion) must be denied.

**Fraud**

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<sup>7</sup>(See, Plaintiff’s Exhibit#3B, R&L Realty Associates-RS Account QuickReport-Loans involving R&L and 2701 Broadway).

The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (*see, Introna v. Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2<sup>nd</sup> Dept. 2010]).

A cause of action sounding in fraud must be commenced within 6 years from the date of the fraudulent action or 2 years from the date the party discovered the fraud or could, with due diligence, have discovered it. An inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered that fraud “turns upon whether a person or ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred” (*see, CPLR* §213 (8); *Kaufman v. Cohen*, 307 AD2d 113, 122-123 [1<sup>st</sup> Dept. 2003]; *Cusimano v. Schnurr*, 137 AD3d 527 [1<sup>st</sup> Dept. 2916]).

Here, the ninth cause of action alleges that in 1988, R&L had a negative capital account and that at the end of 1989, the negative capital account reflected the amount of \$519,722.00. The cause of action alleges that when “outgoing partner” Goldstein withdrew from R&L in 1990, his indebtedness to R&L was in the amount of \$179,664.00, representing his share of the negative capital account. It is alleged that at the end of 1990, Ms. Shomron instructed the R&L accountants to assign Goldstein’s debt to R&L to Ms. Fuks.

It is also alleged that when “outgoing partner” Simon withdrew from R&L he owed a debt to R&L in the amount of \$113,000.00, and that at the end of 1990, Ms. Shomron instructed R&L’s accountants to allocate the amount of \$132,000.00 in the negative capital account to Ms. Fuks, as well as the amount of \$143,000.00 of negative operational losses. The cause of action alleges that Simon received the amount of \$84,000.00 in negative capital while

Ms. Shomron was credited with a “positive” amount of \$37,421.00. It is further alleged that upon Simon’s departure from R&L in 1991, the additional sum of negative capital was allocated to Ms. Fuks in the amount of \$113,000.00, but not to Ms. Shomron. The claim alleges that Ms. Fuks was damaged due to the “false allocation” of negative capital and therefore sustained damages in the amount of \$2,500,000.00.

Additionally, the claim alleges that in or around November 1989, R&L re-financed a mortgage held by Greater New York Savings Bank and that the partners of R&L at the time, including Goldstein, Simon and Ms. Shomron, knew that the New York State Attorney General would not have authorized a plan of conversion into the cooperative ownership if there was a mortgage exceeding the amount of \$900,000.00. It is alleged that Simon, Goldstein and Ms. Shomron caused R&L to commit to a mortgage in the amount of \$1,075,000.00. The claim alleges that after “pay-outs,” R&L received only the amount of \$76,000.00, whereas the costs of re-financing amounted to \$118,000.00, and that Ms. Shomron used the re-financing of the mortgage with Greater New York Savings as a “vehicle” to pay out investment in the “guise” of re-payment of “owners’ loans.” It is alleged that Ms. Fuks sustained damages in an amount that exceeds the sum of \$2,500,000.00.

It is the court’s determination that the claim is not time-barred with respect to the allegations that Ms. Shomron directed R&L accountants at the end of 1990 and in 1991, respectively, to “falsely allocate” monies to Ms. Fuks from the negative capital accounts of R&L, given that such instructions were allegedly given by Ms. Shomron within six years of the commencement of the instant action in 1996 (see, CPLR§213(8); *Kaufman v. Cohen, supra*; *Cusimano v. Schnurr, supra*).

Additionally, the documentary evidence submitted by Ms. Fuks, as set forth in Farren's reports,<sup>8</sup> sufficiently contradict the evidence set forth in the accounting with respect to R&L's capital accounts to support Ms. Fuks' allegations regarding the "false allocation" of monies" and "negative capital accounts."

As such, affording Ms. Fuks "every inference which may properly be drawn from the facts presented," and considering the facts in a "light most favorable" to Ms. Fuks, it is the court's determination that the totality of the evidence adduced at the hearing demonstrates that there is a rational process by which the trier of fact could base a finding in favor of Ms. Fuks, the non-moving party in the instant action, on this claim (see, CPLR 4401; *Szczerbiak v. Pilat, supra*).

However, that part of the claim alleging fraud with respect to R&L's re-financing of the mortgage held by Greater New York Savings Bank is time-barred. The claim alleges that R&L re-financed the mortgage in November 1989, and that Ms. Shomron thereafter used the re-financing as a "vehicle" to commit fraud against R&L and cause Ms. Fuks to sustain damages. Such claim is time-barred, given that the alleged fraud was allegedly committed in November 1989, more than six years from the date of the commencement of the instant action on December 30, 1996 (see, CPLR§213(8); *Kaufman v. Cohen, supra*; *Cusimano v. Schnurr, supra*).

Accordingly, that branch of the motion made by Ms. Shomron for an order granting her a judgment as a matter of law on the ninth cause of action (Fraud) is granted only to the extent that the claim is time-barred with respect to the allegations pertaining to R&L's re-financing of the mortgage held by Greater New York Savings Bank.

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<sup>8</sup>Plaintiff's Exhibit#s 255A and 255B.

### Constructive Trust

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him [or her] into a trustee. The element of a constructive trust are: (1) a fiduciary or confidentiality relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment (*see, Kaprov v. Stalinsky*, 145 AD3d 869, 871-872 [2<sup>nd</sup> Dept. 2016]).

As the elements serve only as a guideline, a constructive trust may still be imposed even if all of the elements are not established. Thus, although the elements of a constructive trust must be proven by clear and convincing evidence, the constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice (*id.*).

The statute of limitations for a claim seeking the imposition of a constructive trust is six years. A claim for the imposition of a constructive trust accrues when the acts occur upon which the claim is predicated, the wrongful withholding (*see, CPLR§213(1); Kohan v. Nehmadi*, 130 AD3d 429, 430 [1<sup>st</sup> Dept. 2015]).

Here, the tenth cause of action alleges that a special relationship of confidence, trust and fiduciary duties arose between Ms. Fuks and Ms. Shomron due to their relationship as partners in R&L. The claim alleges that Ms. Shomron violated the relationship of confidence, trust and fiduciary duties owed to Ms. Fuks by her many acts, omissions, misrepresentations, and mismanagement in the creation of “bogus” loans, “double crediting funds” with respect to R&L, illegal withdrawals, and unrecorded cash transactions.

It is also alleged that Ms. Shomron caused a commingling of funds by and among her several affiliated entities and R&L, including defendants Rakia, 2701 Broadway, Lancaster, Upwest, and 27 East 21<sup>st</sup> Street Company. The claim alleges that Ms. Shomron used R&L funds to pay her “private” as well as affiliated entity expenses.

It is further alleged that Ms. Shomron’s abuses deprived Ms. Fuks of the beneficial interest, proceeds and expected revenues she would “otherwise would have received or been entitled to” had there been no such abuse of confidence. The claim alleges that Ms. Fuks has no adequate remedy at law and that Ms. Fuks is entitled to the imposition of a constructive trust upon funds equal in amount to those illegally diverted to the affiliated entities of Ms. Shomron.

The claim fails to state the time at which Ms. Shomron allegedly committed the acts upon which the claim is predicated, the “wrongful withholding.” Such claim would be time-barred, however, with respect to any acts that were allegedly committed by Ms. Shomron prior to December 30, 1990 (see, CPLR§213(1); *Kohan v. Nehmadi*, 130 AD3d 429, 430 [1<sup>st</sup> Dept. 2015]).

Further, Ms. Fuks has submitted sufficient evidence to support the claim of Ms. Shomron’s alleged “commingling of “funds by and among” R&L and Ms. Shomron’s affiliated entities, including defendants Rakia, 2701 Broadway, Lancaster, Upwest and 27 East 21<sup>st</sup> Street Company, as well as the other allegations.

As such, affording Ms. Fuks “every inference which may properly be drawn from the facts presented,” and considering the facts in a “light most favorable” to Ms. Fuks, it is the court’s determination that the totality of the evidence adduced at the hearing demonstrates that

there is a rational process by which the trier of fact could base a finding in favor of Ms. Fuks, the non-moving party in the instant action, on this claim (see, CPLR 4401; *Szczerbiak v. Pilat, supra*).

Accordingly, that branch of the motion made by Ms. Shomron for an order granting her a judgment as a matter of law on the tenth cause of action (Constructive Trust) must be denied.

**Breach of Good Faith and Fair Dealing**

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. Encompassed within the implied obligation of each promisor is to exercise good faith any promises which a reasonable person in the position of the promisee would be justified in understanding were included. This embraces the pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract (see, *Dalton v. Educational Testing Service*, 87 NY2d 384, 389 [1995]).

Where the contract contemplates the exercise of discretion, the pledge includes a promise not to act arbitrarily in exercising that discretion. The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship (*id.*).

The breach of the covenant of good faith and fair dealing is not a tort, but rather is a contract claim (see, *Smile Train, Inc. v. Ferris Construction Corp.*, 117 AD3d 629, 630 [1<sup>st</sup> Dept. 2014]). The applicable statute of limitations for breach of the covenant of good faith and fair dealing is six years (see, *Lieberman v. Worden*, 268 AD2d 337 [1<sup>st</sup> Dept. 2000]).

Here, the eleventh cause of action alleges that Ms. Shomron breached the implied contractual duty of good faith and fair dealing owed to Ms. Fuks with regard to the many acts, omissions, misrepresentations, mismanagement, creation of “bogus” loans, “doubling” crediting of funds, illegal withdrawals, unrecorded cash transactions, invading of the reserve fund of the Coop and exposing it and R&L to legal liabilities, as well as costs and expenses. It is alleged that Ms. Fuks sustained damages in the amount of \$2,500,000.00, as well as punitive damages in the amount of \$7,500,000.00.

The claim fails to state the time at which Ms. Shomron allegedly breached the covenant of good faith and fair dealing with respect to the performance of any specific contract or number of contracts. Such claim, however, would be time-barred with respect to any alleged breach committed by Ms. Shomron prior to December 30, 1996 (see, *Lieberman v. Worden*, 268 AD2d 337 [1<sup>st</sup> Dept. 2000]).

Further, Ms. Fuks has failed to submit sufficient evidence of a specific contract or a number of specific contracts in which Ms. Shomron allegedly breached the “covenant of good faith and fair dealing” in the course of any contract performance by failing to “exercise good faith,” or acted in a way which had the effect of “destroying or injuring” her rights to “receive the fruits of the contract or contracts” (see, *Smile Train, Inc. v. Ferris Construction Corp.*, *supra*; *Dalton v. Educational Testing Service*, *supra*).

As such, affording Ms. Fuks “every inference which may properly be drawn from the facts presented,” and considering the facts in a “light most favorable” to Ms. Fuks, it is the court’s determination that the totality of the evidence adduced at the hearing demonstrates that there is no rational process by which the trier of fact could base a finding in favor of Ms. Fuks,

the non-moving party in the instant action, on this claim (see, CPLR 4401; *Szczerbiak v. Pilat, supra*).

Accordingly, that branch of the motion made by Ms. Shomron for an order granting her a judgment as a matter of law on the eleventh cause of action (Breach of Good Faith and Fair Dealing) must be granted.

### **Breach of Fiduciary Duty**

To establish a *prima facie* case for breach of fiduciary duty a plaintiff must allege: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages directly caused by the defendant's misconduct (see, *Village of Kiryas Joel v. County of Orange*, 144 AD3d 895, 898 [2<sup>nd</sup> Dept. 2016]). Under New York law, partners in a partnership owe each other a fiduciary duty (see, *Le Bel v. Donovan*, 96 AD3d 415, 417 [1<sup>st</sup> Dept. 2012]).

New York does not provide any single limitations period for breach of fiduciary duty claims. Generally, the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought. Where the relief sought is equitable in nature, the six-year statute of limitations period of CPLR§213 (1) applies. On the other hand, where claims alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging "injury to property," to which a three-year statute of limitations applies (see, *Kaufman v. Cohen*, 307 AD2d 113, 118 [1<sup>st</sup> Dept. 2003]; *Cusimano v. Schnurr*, 137 AD3d 527 [1<sup>st</sup> Dept. 2016]).

Here, the twelfth cause of action alleges that Ms. Shomron took "total" control and management of R&L's partnership affairs, sharing only minimal information with Ms. Fuks and that Ms. Shomron also neglected important areas of management and business with respect

to R&L.

It is alleged that Ms. Shomron breached the fiduciary duty owed to Ms. Fuks by charging her private affairs to R&L; invading the reserve fund of the “coop” for illegitimate reasons; negotiating open ending contracts with contractors by the hour instead of a “per job capped fee,” thereby charging R&L for renovation works performed at other properties owned by her; negotiating with Greater New York Savings Bank in a “secret” manner; maintaining a “false, misleading, and chaotic” accounting system in order to cover up “double crediting in contributions; concealing Ms. Fuks’ interest during the period 1989 to 1990; secretly sharing commissions with the “managing agent”; and secretly sharing commissions with John Pollis, a real estate and mortgage broker. The claim alleges that Ms. Fuks sustained damages in the amount of \$2,500,00.00 as a result of Ms. Shomron’s breach.

Here, the claim fails to state the time at which Ms. Shomron allegedly committed acts that demonstrate a breach of the fiduciary duties owed to Ms. Fuks. Such claims, however, are time-barred with respect to any acts allegedly committed by Ms. Shomron prior to December 30, 1993 (see, *Kaufman v. Cohen*, 307 AD2d 113, 118 [1<sup>st</sup> Dept. 2003]; *Cusimano v. Schnurr*, 137 AD3d 527 [1<sup>st</sup> Dept. 2016]).

Further, the extensive testimony and voluminous documentary evidence sufficiently supports this claim, including, for example, that Ms. Shomron failed to file timely tax returns for R&L for the years 1994, 1995, 1996, 1997 and 1998, and that Ms. Fuks was unaware of such failure during those years.

As such, affording Ms. Fuks “every inference which may properly be drawn from the facts presented,” and considering the facts in a “light most favorable” to Ms. Fuks, it is the

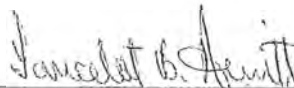
court's determination that the totality of the evidence adduced at the hearing demonstrates that there is a rational process by which the trier of fact could base a finding in favor of Ms. Fuks, the non-moving party in the instant action, on this claim (see, CPLR 4401; *Szczerbiak v. Pilat, supra*).

Accordingly, that branch of the motion made by Ms. Shomron for an order granting her a judgment as a matter of law on twelfth cause of action (Breach of Fiduciary Duty) must be denied.

Consequently, the motion made by Ms. Shomron for an order granting her judgment as a matter of law at the close of plaintiff's direct case is granted only to the extent of the ninth cause of action alleging fraud and the allegations regarding R&L's alleged re-financing of a mortgage held by Greater New York Savings Bank, as time-barred, and the eleventh cause of action which alleges the breach of good faith and fair dealing. Such motion is denied in all other respects.

The foregoing constitutes the decision and order of the court.

Date: June 6, 2017.



**Lancelot B. Hewitt,  
Special Referee**

Enter:

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**Clerk of the Court**