

TO BE ARGUED BY:
GUY S. HALPERIN, ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York
Appellate Division: First Department



MALI FUKS, individually and on behalf of
R&L REALTY ASSOCIATES, a New York partnership,
Plaintiff-Respondent,

-against-

RAKIA ASSOCIATES, 2701 BROADWAY ASSOCIATES,
Defendants-Appellants,

LANCASTER STUDIO ASSOCIATES, UPWEST COMPANY,
27 EAST 21 STREET COMPANY, 504 WEST 111 OWNERS CORP.
Defendants,

RUTH SHOMRON,
Defendant-Appellant,

ALFRED SZALA, GOLDSTICK WEINBERGER, FELDMAN &
GROSSMAN, P.C.,
Defendants,

ESTATE OF HOWARD SIMON, LARRY GOLDSTEIN,
Defendants-Appellants,

and LINDA GOLDSTEIN,
Defendant.

**Appellate
Division
Docket Nos.
2023-02618
2023-02621
2023-06798
2024-00643**

BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

This Appellants' Brief is submitted on behalf of Defendants-Appellants Ruth Shomron ("Shomron"), Rakia Associates ("Rakia"), 2701 Broadway Associates ("2701 Broadway"), Estate of Howard Simon ("Simon") and Larry Goldstein ("Goldstein") in the above-captioned action ("Action No. 1") which was joined for trial with [*Shomron v. Fuks, et. al.* \(Sup. Ct. N.Y. County Index No. 102882/02\)](#) (Action No. 2).

This dispute is primarily between Shomron and plaintiff Mali Fuks ("Fuks"), each of whom own a 50% general partnership interest in R&L, a New York partnership, which sponsored an offering plan dated April 18, 1990 in which the 36-unit residential apartment building located at 205 West 103rd Street, New York, New York (the "Building") was converted to cooperative ownership in 1992. (A.9099).¹

This appeal is from several adjudications by the lower court (M. Crane, J.) in connection with the parties' respective motions to confirm, reject and/or modify a report of Special Referee Lancelot B. Hewitt (the "Referee"), dated May 21, 2021 (the "Referee's Report," A112-A196). Specifically, this appeal is from:

(1) a Decision and Order entered April 11, 2023 (the "April 11, 2023 Order") which: (a) confirmed, in part, and modified, in part, the

¹ "A," followed by a number, refers to the page in the Appendix.

Referee's Report, (b) disposed of all but two of the parties' claims, (c) as for one of those remaining claims, namely, Shomron's eighth counterclaim, directed that an "inquest" be held to determine the balance of certain loans that Shomron and others made to R&L that Shomron seeks R&L to repay (the "Loans"), (d) as to the other remaining claim, denied, without prejudice to a separate motion, Shomron's motion for R&L to reimburse her for the legal fees she paid or incurred in connection with her successful prosecution of Action No. 2 on R&L's behalf, and (e) directed that a money judgment be entered against Shomron in favor of Fuks in the amount of \$375,000.00 for breach of fiduciary duties. (A24-A24.12),

(2) a Decision and Order, entered May 11, 2023 (the "May 11, 2023 Order"), which disposed of one the remaining claims, namely, Shomron's eighth counterclaim seeking the repayment by R&L of the Loans that she and others made to R&L (A24.13-A24.15);

(3) an Amended Judgment (the "Amended Judgment") entered July 5, 2023 based on the two aforementioned orders in which, among other things, a money judgment was entered against Shomron in favor of Fuks on the breach of fiduciary duty claim in the amount of

\$375,000.00, plus interest, for a total amount of \$1,270,345.89 (A24.16-A24.18); and

(4) a Decision and Order, entered October 4, 2023 (the “October 4, 20223 Order”), which disposed of the other remaining claim by granting, in part, and otherwise denying Shomron’s cross-motion to be reimbursed by R&L for the legal fees she incurred on behalf of R&L in connection with her successful prosecution of “Action No. 2” (A24.19-A24.23).

The Appellants’ Prior Successful Appeal

This is now the second appeal to this Court that Appellants’ have been compelled to make since the Referee’s Report was issued.² In the Appellants’ prior appeal (the “Prior Appeal”), this Court reversed and vacated the lower court’s previous order and judgment which denied Appellants’ motion to reject in part and modify in part the Referee’s Report, and granted Fuks's motion to confirm. (A.24.24).

In its initial confirmation of the Referee’s Report, the lower court failed to obtain and consider the record before the Referee. As a result, this Court never addressed the Prior Appeal on the merits, including some of the same issues raised in this appeal. Instead, this Court reversed and remitted the matter “to the motion

² See, Appellate Division Case Nos. 2021-03205, 2021-03206, 2022-01282, and 2022-01271.

court for a new decision that takes into consideration the transcripts and other evidence before the Referee” holding that:

Where, as here, the Referee’s factual findings are disputed, a court “may not make an order on the [referee’s] report without having before it the testimony in some form or agreement by the parties as to its substance sufficient to permit the court to pass upon a challenge made to the sufficiency of the evidence.” [citations omitted].

(A24.24-A24.26).

Since the remittitur the lower court has, among other things:

- A. Paid little more than lip service to its mandate to pass upon challenges to the sufficiency of the evidence.
- B. Repeatedly made statements not supported by the record and contradicted by the record.
- C. Grossly mischaracterized Appellants’ arguments.
- D. Unjustifiably attacked, insulted, demeaned, and impugned Shomron and her counsel to justify its improper and unjust dismissal of Shomron’s eighth counterclaim, not on the merits, but purportedly for “failure to prove damages” at an “inquest” it conducted on May 10, 2023 concerning the Loans. (A1275.187-A1275.229).
- E. Disingenuously described Shomron’s counsel as “unprepared” for the May 11, 2023 “inquest,” and incorrectly claimed that Shomron’s counsel “basically admitted [at the inquest] he “could point to no proof

other than a compilation he created after the hearing before the Special Referee had closed.”

F. Falsely accused Shomron for purportedly failing to provide it with the Referee’s April 26, 2018 decision on Fuks’ CPLR 4401 motion at the close of Shomron’s case and stated that it had to obtain it “independently” because it was not e-filed when, in fact, it had been e-filed by Shomron’s counsel but overlooked by the lower court. (See, [NYSCEF Doc. 74](#); also at A89-A111). And,

G. Dismissed Shomron’s eighth counterclaim for “failure to prove damages” because Shomron’s counsel “did not show up to court with any witnesses” for the “inquest” when, in fact, the lower court previously ruled in the April 11, 2023 Order on appeal that “[n]o new evidence will be allowed at the hearings on these loans whatsoever.”

A Sampling of the Numerous Material Misstatements Made by the Lower Court

The orders on appeal are based upon many material misstatements made by the lower court including, but not limited to:

A. The lower court’s statement that Shomron “pilfered from the company” is demonstrably false and its treatment of Shomron as a “thief” is utterly unwarranted. No such findings were either expressly or implicitly made by the Referee. Indeed, the lower court’s dismissal of Fuks’s seventh

cause of action alleging that Shomron “wasted, diverted, dissipated, misappropriated and converted” partnership funds (A.210) contradicts the lower court’s baseless statement that Shomron “pilfered from the company.”

- B. With respect to the issue of damages in connection with Fuks’s claim for breach of fiduciary duties, the lower court falsely stated that Shomron “conceded \$201,631.00 in damages” in the Prior Appeal.
- C. The lower court’s statement that Shomron failed “to maintain proper accounting records” is disingenuous because there is no evidence that Shomron maintained R&L’s “accounting records” or had any duty to do so.
- D. The lower court falsely stated that “[t]he Referee also found ... that Shomron had superior involvement with R&L to Fuks and therefore more responsibility for keeping records (Report. pg. 75)”, when, not only did the Referee make no such finding, but the page in the Report cited by the lower court (p. 75) says no such thing. To the contrary, the Referee expressly found “that Ms. Fuks was substantially and significantly involved in all aspects of the business activities of R&L” throughout her involvement in the partnership. (A.186).

E. In dismissing Shomron’s eighth counterclaim for the repayment of the Loans, the lower court falsely stated that Shomron’s proof as to the balance of the loans was based on an attorney-prepared affidavit and “chart” and an “undisclosed analysis.”.

Incredibly, the lower court even misstated the record in its criticism of this appellate court for reversing it. In particular, the lower court wrote in the April 11, 2023 order on appeal:

... the parties previously failed to provide the court with the record from that inquest [before the Referee]. Instead of finding waiver, the Appellate Division reversed this court’s decision on those motions (see 211 AD3d 467 [2022]).

It confounds the court that Shomron first moved to disapprove the [Referee’s] Report without providing the record to the judge, who was new to the case.

If the lower court had properly read defendants’ memorandum of law below, it would have realized that Appellants’ counsel did in fact offer to provide it with the hearing record after the Referee failed to do so. (A.341, at fn.2).

It is extremely disconcerting, and has shaken Appellants’ confidence in the court, that the lower court could have made so many material misstatements blatantly contrary to, or not supported by, the record, and then summarily dismissed Shomron’s eighth counterclaim, not on the merits, but upon those misstatements. Equally troubling is the conduct of the lower court, especially at the May 10, 2023

“inquest” where it trammled on Shomron and her counsel. Since the issuance of the Referee’s Report, and especially since the remittitur, the lower court has run roughshod over the facts, the law, the Appellants and their counsel and, in the process, has been neither patient, dignified nor courteous to Appellants and their counsel, both on the record and off, or in its decisions, revealing a court that has been neither fair nor impartial, but unreasonably harsh, meanspirited, and vindictive, if not vengeful, warranting the referral of this matter to another justice, should the case be remanded again.

As the Court of Appeals held in [In re Duckman, 92 N.Y.2d 141, 153-154 \(1998\)](#):

[T]he perception of impartiality is as important as actual impartiality: Judges must conduct themselves "in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property" ([Matter of Sardino v State Commn. on Judicial Conduct, 58 N.Y.2d at 290-291 \[1983\]](#); see also, [Code of Judicial Conduct Canon 2 \[A\]](#); [22 NYCRR 100.2](#) [a "judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities"]; [22 NYCRR 100.2\[A\]](#) [a "judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"])..

Nor are judges, in the interest of alleviating regrettable court congestion ... free to ignore the law in order to weed out cases they personally feel are unworthy of prosecution or clogging the system.

THE QUESTIONS INVOLVED CONCERNING THE MERITS

Q-1 Was the lower court's confirmation of the Referee's finding that Fuks sustained damage in the amount of \$375,000.00 because of Shomron's alleged breach of fiduciary duties substantially supported by the record?

A-1 The lower court, without citing any evidence, and after grossly mischaracterizing Appellants' arguments and misstating the record, held that the "Referee's calculation" of the damages that Fuks allegedly sustained because of Shomron's purported breach of fiduciary duties "is well-supported in the record" (A.24.6).

Q-2 Were the Referee's findings that specific entries in Shomron's "accounting" were "inaccurate," "incorrect," or "incomplete," substantially supported by the record?

A-2 The lower court confirmed the Referee's inexplicable and conclusory findings that specific entries in Shomron's "accounting" were incorrect or incomplete without addressing the hearing record.

Q-3 Did the lower court properly dismiss Shomron's eighth counterclaim for "failure to prove damages" seeking the repayment of loans that she and others made to R&L"?

A-3 The lower court impetuously dismissed Shomron's eighth counterclaim "for failure to prove damages" before Shomron could present her case and refused to consider submissions it had previously directed the parties to provide as to the balance of the Loans.

Q-4 Did the lower court properly dismiss Goldstein's eleventh counterclaim and Simon's twelfth counterclaim, each of whom respectively sought to enforce the terms of amendments to R&L's partnership agreement in connection with their withdrawal from the partnership, and pursuant to which they are entitled to receive certain distributions when the remaining partners receive a certain amount of distributions?

A-4 The lower court dismissed Goldstein's and Simon's respective counterclaims on the ground that neither Goldstein nor anyone from Simon's estate testified on the ground that Goldstein nor Simon testified and that "the record supports disregarding Shomron's testimony" on these counterclaims "under the doctrine of *in falsus unum, in falsus omnibus*." (A.24.10).

Q-5 Where Fuks' counsel acknowledged at the hearings that she was not challenging the value of the legal services Shomron incurred in connection with her successful prosecution of Action No. 2, and where Shomron's attorney's time records for those services were neither vague nor materially lacking in specificity, was Shomron entitled to repaid by R&L for those fees?

A-5 The lower court denied, in part, Shomron's motion to be reimbursed for the legal fees by reducing the amount sought by 50% to \$176,445.10 to purportedly "account for inefficiencies, overlitigation, excessiveness, duplicative efforts and work and excessive block billing," notwithstanding the fact that Fuks, through her attorney, did not challenge the value of the services.

Q-6 Where Fuks' disputes with Shomron, Simon and Goldstein were previously being adjudicated before an arbitrator who Fuks sued in the middle of the arbitration proceedings to induce him to resign, and where Fuks' then allowed her lawsuit against the arbitrator to be dismissed for failure to prosecute after she accomplished her goal of getting rid of him, are Shomron, Simon and Goldstein entitled to damages on their cause of action for abuse of process in the amount of the legal fees and arbitration fees they incurred in connection with that failed arbitration proceeding?

A-6 The lower court found that the abuse of process claim was without merit.

THE FACTS

As previously indicated, the primary claims in this action arise out of R&L's conversion of the Building to cooperative ownership. The undisputed fact at the heart of this controversy is that from its early inception R&L was persistently in financial distress.

As the lower court previously found in Action No. 2, “immediately” after Fuks invested in R&L in January 1989 during a “real estate recession,” R&L “required additional capital contributions from its partners to cover the building's net operating expenses, pay vacancy allowances to tenants, renovate apartments and make capital improvements to the common areas of the building. The goal was to convert it to cooperative ownership.” [*Shomron v. Fuks*, 13 Misc.3d 1228\(A\) \(Sup. Ct. N.Y. County 2006\)](#), [aff'd 70 A.D.3d 406 \(1st Dept. 2010\)](#) (finding, among other things, that Fuks participated with her husband in their fraudulent purchase of the Four Apartments, rescinded the sale of the apartments, dissolved R&L and held that R&L was entitled to a constructive trust on the rents and profits Fuks secretly earned on the apartments in an amount to be later determined).

To address R&L’s significant financial needs, while Fuks was secretly earning rental income from the Four Apartments, Shomron, entities in which she has an interest, including Appellants Rakia and 2701 Broadway, and several others, poured hundreds of thousands of dollars into the partnership for what were supposed to be short-term loans. Fuks’s financial contributions, in comparison, were meager. According to Shomron’s schedules, as between her and Fuks, between 1989 and 2019 Fuks contributed just \$64,154.16. (A.11473) while Shomron contributed \$703,405.27. (A.11443). The overwhelming majority of deposits of those loans in various amounts are clearly reflected not just in Shomron’s “accounting,” but by

bank statements and cancelled checks. How the Referee could have determined, without giving a reason, that some of the entries in Shomron's loan schedules were inaccurate, incomplete, incorrect is mind-boggling.

This dispute arose when Shomron presented Fuks with a plan to repay the outstanding loans in 1995. Although, as the Referee found, "Fuks was substantially and significantly involved in all aspects of the business activities of R&L" (A.186), Fuks purported to be "upset" and "shocked" about the loans and decided to commence her own "investigation." (A. 4967-A.4969). Fuks' ultimate response after her "investigation" was to commence Action No. 1 on December 30, 1996.

Fuks Admits R&L "Was Very Much in Need of Money and Struggled to Survive" and "Had to Find a Way to Deal with the Matters."

R&L was formed in 1985 by Shomron and Goldstein. (A. 10084). In 1987, R&L was already in "financial difficulty", so they admitted Simon as an equal one-third partner. (A.2605-A.2608). The three partners then entered into a Partnership Agreement dated as of May 5, 1987 (the "Partnership Agreement"). (A. 9596). In consideration for his admission into R&L, Simon contributed \$50,000 to the partnership and gave it a loan in the amount of \$275,000 through his company Weston Equities. (A. 9760 and 10087).

Fuks, by her own admission, was an experienced businessperson, having worked in, among other things, the diamond business, at a bank dealing in the purchase of foreign currencies, and as an owner of a clothing business. (A.5062-

A.5093). Fuks testified that at the end of January 1989, she and Shomron discussed the possibility of Fuks investing in R&L. Fuks acknowledged that it was not intended that she simply be an investor and silent partner. Fuks testified that Shomron told her that “she would love me to get into the building, she needs my energy, she likes my taste, she’s very tired. She would like to have somebody with her, helping her and doing with her that work like fresh blood to her.” (A.4538-A.4539).

Fuks admitted that before she invested in R&L, she received from Shomron the “red herring”, i.e, the preliminary offering plan for the Building (A.10912), the Building’s October 1988 rent roll (A.9678), and a “term sheet.” (A.10083; A.4544-A.45445). The red herring included R&L’s audited “Comparative Statement of Property Operations” for the Building for the years ended 1987, 1986 and 1985 which plainly showed that R&L had a **net loss** from property operations of \$82,392 for 1987, \$87,549 for 1986 and \$34,503 for seven months in 1985. (A.10942-A.10944).

Fuks acknowledged that before she invested in R&L Shomron went through the October 1988 rent roll with her, tenant by tenant, and explained how it was R&L’s plan to get as many vacancies as possible to renovate them and make them more marketable for sale. The rent roll indicates that as of October 1988, 7 apartments (out of 36 in the Building) were either vacant or were in the process of becoming vacant pursuant to “buy-out agreements.” Thus, Fuks knew before she

invested in R&L that nearly 20% of the Building, occupied by rent stabilized and rent controlled tenants, would be vacant and producing no revenue, and that the plan was to get even more vacancies. (A.4545).

In her own handwriting Fuks wrote on the October 1988 rent roll (A.9678) how many apartments were vacant, which tenants were likely to vacate their apartments, and an estimate of how much money R&L might have to pay to certain tenants to persuade them to vacate, ranging from \$15,000 to \$20,000 per buy-out. (A.4544-A.4545). Fuks acknowledged that she understood that it was a "good thing" for R&L to get vacancies in connection with the conversion of the Building to cooperative ownership. (A.5119-A.5128).

After going through the rent roll, Fuks discussed with her husband Yoram whether to invest in R&L. After they considered the proposed sale prices for the apartments as set forth in the red herring, Fuks decided to invest. (A.4554). She paid Shomron a total of \$125,000 for a subpartnership interest in Shomron's one-third interest in R&L. (A.9583).

Soon thereafter, Fuks received a letter from Shomron, dated January 31, 1989, which confirmed that she and her husband paid Shomron \$125,000.00 for a subpartnership interest in R&L (the "Subpartnership Agreement") (A.9583). Shomron agreed to "share" her one-third interest in R&L equally with the Fuks's "to the extent of all profits, losses and distributions." The agreement further provided

that "[s]hould any contributions be required to be made to the [R&L] Partnership by the partners, [the Fuks's] will be responsible for one-half of the amount [Shomron] is required to pay."

The Offering Plan for the Building was accepted for filing by the Attorney General on April 18, 1990. (A.9099). According to the April 1990 management report of R&L's managing agent Hamid Khan ("Khan"), by then R&L had 10 vacancies, meaning that approximately 28% percent of the Building was vacant and producing no revenue. (A.10112).

Included in the Offering Plan was an Independent Auditor's Report dated June 20, 1988, prepared by R&L's accountants, annexed to which was a Statement of Property Operations for the Building for the years ended 1988, 1987, 1986 reflecting losses of \$132,772, \$89,887 and \$87,549, respectively. (A.9157-A.9158).

As R&L's financial burdens mounted, Goldstein decided to withdraw from R&L by transferring his one third interest to Shomron and Simon, resulting in Shomron owning 51% and Simon 49% pursuant to an amendment to the Partnership Agreement dated as of May 17, 1990. (the "Goldstein Amendment", A.1197). The consideration for that transfer was that "[a]t such time that Ruth Shomron and Howard I. Simon have each received distributions in an amount equal to twice their [then \$165,450] total capital contributions to the Partnership made after March 31, 1990, Larry D. Goldstein shall receive one-third (1/3) of any future distributions

until such time that his capital contribution to the Partnership of \$165,450 is repaid in full.” Shomron testified in support of Goldstein’s eleventh counterclaim in Action No. 1 that Goldstein had not received any portion of the amount promised to him. (A.1201-A.1219).

Simultaneous with the execution of the Goldstein Amendment, a second amendment to the Partnership Agreement, also dated as of May 17, 1990, was executed by Fuks, Shomron and Simon pursuant to which, among other things, Shomron transferred one-half of her 51% interest in R&L to Fuks. (A.9638). Based on Shomron's prior receipt of \$125,000.00 from the Fukes in 1989, Fuks’ subpartnership interest was converted into a full partnership interest in R&L.

Several months later, as R&L continued to financially struggle, Simon decided to withdraw. Pursuant to a third amendment to the Partnership Agreement between Fuks, Simon, and Shomron, dated as of March 7, 1991, Simon formally withdrew leaving Fuks and Shomron as the remaining equal partners. (A.1220) (the “Simon Amendment”). As reflected in R&L’s March 1991 management report, by this time 12 out of 36 apartments in the Building, or 33.3%, were vacant. (A.10183).

The consideration for Simon’s withdrawal from the partnership, as set forth in the Simon Amendment, was that, among other things, he would “receive one-half (1/2) of any future distributions until such time that he receives \$230,000” and that he would thereafter “receive one-third (1/3) of any future distributions until he

receives \$50,450.00 resulting in a total payment to Howard Simon of \$280,450.00.” In furtherance of Simon’s twelfth counterclaim in Action No. 1 to enforce the terms of the Simon Amendment, Shomron testified that Simon had not received any portion of the amount promised to him. (A.1201-A.1219).

Shomron testified, and R&L’s monthly management reports reflect, that Simon made his last contribution to R&L in August 1990 when 10 out of 36 apartments in the Building were vacant. (A.4028.44; A.10134, A.10139). Shomron testified that she was “extremely worried that” she and Fuks would not “have the financing ability to go ahead.” (A.4028.47). She further testified that she discussed with Fuks bringing in a new partner but that Fuks rebuffed this idea. (Shomron testimony, A.4028.56-A.4028.58).

After the execution of the Simon Amendment, R&L promulgated a first amendment to the Offering Plan disclosing, among other things, that Simon and Goldstein had withdrawn and that Fuks was “substituted as a general partner of the Sponsor.” (A.9103). Annexed to the first amendment to the Plan was an Independent Auditor’s Report dated April 2, 1991 together with R&L’s Statement of Property Operations for the Building for the years ended 1990 and 1989 showing a net loss of \$169,646 and \$170,588, respectively. (A.9111-A.9116). As reflected in the statements, these losses did not include R&L’s expenses in connection with the conversion of the Building, such as apartment renovations, tenant relocations or

professional or other fees incurred in connection of the conversion. The statements were only intended to disclose to prospective purchasers the operations of the Building, not what R&L was spending or needed to spend to convert the Building.

Fuks certified the accuracy and truthfulness of the First Amendment to the Offering Plan, including the financial statements contained therein showing the yearly losses. (A.9130-A.9131).

R&L's tax returns for 1990 and 1991 showed a net loss of \$273,300 and \$222,899, respectively. (A.9507 and A.9529).

By the latter part of 1991, the bank that held the senior mortgage on the Building, Greater New York Savings Bank, was threatening to foreclose on its \$1,075,000.00 mortgage. (A.9810 and A.9811).

Fuks conceded that when Goldstein and Simon withdrew from R&L, they "left the partnership in a very bad situation ... with a very big debt" and a "big mortgage." When asked to explain what she meant by this she answered:

ANSWER: What I mean, the debt, I didn't mean there was a debt. I meant that there was a need for renovating and there was a need to, I don't know, maybe relocate people. Maybe there was a need for other things, **but they left the partnership when the partnership was very much in need of money and struggled to survive.** And they left the partnership like that and just, you know, did not contribute their share like they were supposed to contribute. **So, R&L had to find a way to deal with the matters.**

(A.5621-A.5623, emphasis added).

R&L's management reports for 1989 and 1990 reflect that up until the time Simon made his last contribution to the partnership in August 1990, the partners were making combined contributions on a regular basis ranging from \$15,000 to \$50,000 per month (A.10876, A.10880, A.10890, A.10895, A.10839, A.10848, A.10854, A.10859, A.10099, A.10104, A.10109, A.10115, A.10122, A.10128 and A.10134). R&L's November 1989 management report indicates the receipt of \$76,003.79 from the refinancing of the Greater New York Savings Bank mortgage. (A.10865).

Thus, from January 1989, when Fuks invested in R&L, through August 1990, when Simon made his last contribution to R&L, the partners had contributed to the partnership and received from the mortgage refinancing a total of \$545,003.79, and this was *before*, among other things, the commencement of the renovation of any of the apartments in the Building.

By Fuks' own admission, after Goldstein and Simon withdrew from the partnership, she and Shomron had the daunting task of figuring out how they were going to pay for and complete the conversion of the Building, while at the same time pay for R&L's day to day operating expenses. As the evidence indisputably showed, the completion of the conversion involved, among other things, paying money to rent regulated tenants to induce them to vacate their apartments and surrender their leases (e.g., the October 1988 rent roll [A.9678], and surrender agreements

[A.10899-A.10908, A.10909, A.10910, and A.10911]), gut renovating 10 apartments, (e.g., testimony of the building's superintendent Daniel Sanchez, A.2390-A.2391; testimony of R&L's contractor Michael Kulak, A.6955-A.6958), as well as Shomron and Fuks' testimony throughout the hearings); and reducing the Building's mortgage from \$1,075,000 to \$900,000 (Offering Plan, at A.9181-A.9185). According to Shomron, from 1990 through 1992, R&L respectively paid \$217,309.86, \$270,872.49, and \$101,909.73 towards the renovations made to the apartments and the Building. (A.11535-A.11549; Shomron testimony, A.7916-A.7928).

In the meantime, as reflected in R&L's management reports and bank records admitted into evidence, R&L also had to continue paying for, among other things, mortgage payments of \$13,000 a month, real estate taxes, fuel, water, repairs, management fees, and attorneys' fees. (E.g., 1990-1992 management reports, A.10093-A-10360; Fuks testimony, A.5479). This, too, was a struggle as exemplified by, among other things, R&L's inability from time to time to even pay for the most basic of needs, namely fuel in the winter to provide heat to its tenants. (E.g., Fuks testimony, A.5252-A.5253, where she issued her own personal check to pay for fuel); Shomron testimony, A.7327, A.7332-A.7333; letter from fuel company, A.11534).

Between the vacant apartments that were being renovated and producing no revenue, and the fact that the rest of the Building was occupied by rent regulated tenants who were paying low rents, R&L's rental income was patently insufficient to carry the Building and complete the conversion to cooperative ownership. (Shomron testimony, A.5967-A.5968; DHCR rent registration statements, A.9641-A.9677 and A.9682-A.9687).

R&L's tax returns during and after the conversion showed the following *net losses*: \$155,104 in 1986 (A.10053); \$145,460 in 1987 (A.10065); \$236,219 in 1988 (A.10016); \$241,978 in 1989 (A.10036); \$273,300 in 1990 (A.9505), \$222,899 in 1991 (A.9526); 271,001 in 1992 (A.9544); \$154,293 in 1993 (A.9566); \$111,731 in 1994 (A.9688); \$77,741 in 1995 (A.9704); and \$106,408 in 1996 (A.9736).

The undisputed evidence showed, among other things, that the Greater New York bank holding the mortgage on the Building was threatening to foreclose (A.9810, A. 9811, A.9812, A.9814, and A.9815). A tax lien had been filed against the Building for which a foreclosure was also threatened. (A.11251, A.11252, A.11254, A.11255, A.11256, and A.11260). Fuel vendors refused to deliver heating oil unless payment was made by certified checks or C.O.D (e.g., Shomron Testimony at A.6495, A.6688, A.7234, and A.8091). And workers who were renovating the apartments for R&L refused to work unless they got paid (e.g.,

Shomron Testimony, A.4074, A.4077-A.4080, A.6056-A6057, A.6067, and A.6647; Kulak testimony, A.6965-A.6966).

Fuks, who as indicated above the Referee found was substantially involved in all aspects of R&L's affairs, was well aware of R&L's struggles to pay the workers to renovate the apartments, as evidenced by, among many other things, an agreement dated August 5, 1991 she and Shomron signed promising to pay them what they were owed. (A.11250).

As between Fuks and Shomron, how they each dealt with R&L's financial struggles could not have been more different and reflected their true character and credibility. While Fuks was secretly and unlawfully profiting from the rental income she derived from the Four Apartments, the overwhelming evidence proved that Shomron and others plowed hundreds of thousands of dollars into R&L, well more than Fuks' financial contributions. Shomron seeks to honor R&L's debts and obligations, even if it means reducing her own distributions. Fuks wants to cheat everyone.

Even after Fuks commenced this action, Shomron remained committed to fulfilling R&L's financial responsibilities to Simon, Goldstein, the Building's apartment corporation, and many others. For example, in 1997 and 1998, Shomron personally loaned R&L \$69,999.96 and \$62,999.96, compared to nothing from Fuks for those same years. Shomron even continued to pay through March 2017 the

interest on one of the loans, namely, to Statement Services that had been taken to pay off another loan made to R&L. (A.11442-A.11443; Testimony of Barry Leon of Statement Services, A8431-A.8435).

The Substantial Loans Made by Shomron the R&L at the Heart of this Action

A major source of funding for R&L came from what were intended to be short term loans that Shomron personally made to R&L. From February 1, 1989, when Fuks became a subpartner, to March 31, 2017, Shomron infused R&L in the net amount of \$703,405.27 (A.11440-A.11443) compared to Fuks' \$64,154.16 total net amount.

At the hearings, Shomron gave extensive testimony and introduced into substantial documentary evidence to support the loans she and others made to or for R&L's benefit. Among other things, those documents proved that when Shomron or her related entities loaned money to or for R&L's benefit, R&L's bank accounts were frequently overdrawn, or woefully underfunded, (e.g. A.11269-A.11272, A.A-11274-A.11276, A.11282-A.11284, A.11286-A.11291, A.11292-A.11294, A.11295-A.11297, A.11298-A.11304, A.11305-A.11307, A.11308-A.11312, A.11315-A.11318, A.11327-A.11329, A.11333-A.11334, A.11335-A.11336, A.11337-A.11342, A.11330-A.11334, A.11337-A.11344, A.11352-A.11355, A.11365-A.11367, A.11345-A.11350, A.11375-A.11380, A.11387-A.11392, A.11398-A.11403, and many more).

Republic National Bank closed R&L's operating account on March 10, 1991 because it was "repeatedly overdrawn." (A.11319).

R&L's managing agent Khan wrote a letter to Fuks and Shomron stating, among other things, "it is very difficult for me to manage [the Building] with limited amount of funds" and "enclosing a list of outstanding account[s]" for which he implored them to "take immediate action" for "taxes, water and insurance." (A.11369).

It cannot be genuinely disputed that but not for Shomron's loans, R&L would not have survived.

Fuks' Abuse of Process Arising from the Parties' Prior Arbitration Proceeding

This dispute has certainly had a long and tortuous history. (See, e.g., A.300 to A.303 and A.1275.277 to A.1275.287). Since the inception of this action, it is Fuks who has engaged in a scorched earth litigation strategy that has extended the duration of this lawsuit beyond imagination. The lower court's efforts to paint Shomron as somehow equally responsible for the length of this dispute is yet another gross mischaracterization of the record. Justice Marcy Friedman, who presided over this action for much of its duration before she retired from the bench, characterized the history of this case as "tortured" and stated that much of the delays in the case were, "in the Court's opinion, unquestionably attributable to Ms. Fuks." (A.1275.439). Justice Friedman also stated that Fuks's "litigation tactics are not to be condoned,

quite the contrary,” and stated that she would “entertain proceedings at the conclusion of the referee’s hearing for a determination as to whether Ms. Fuks, based on her litigation tactics, should be required to pay Ms. Shomron’s legal fees in litigating all or part of the instant actions.” (A.1275.353).

Justice Friedman “emphasize[d] that Ms. Fuks’ repeated replacement of counsel throughout the course of these proceedings as well as their re-litigation or attempt to re-litigate issues that have already been decided, have caused delays that in this Court’s experience have been unparalleled.” (A.1275.469).

It would take many more pages to recite the long and tortuous history of this dispute caused by Fuks’ grossly manipulative and dilatory litigation tactics, not the least of which has been her constant change of lawyers at least fifteen times during this litigation, including four times during the hearings before the Referee.

One major instance of Fuks’s abusive litigation conduct that added years to this litigation, and which is one of the issues on appeal, is set forth in part in this Court’s prior decision in [*Shomron v. Fuks*, 286 A.D.2d 587 \(1st Dept. 2001\)](#) involving the failed arbitration proceeding between the parties. As recited in that decision, Fuks commenced this action in December 1996. Shortly thereafter, defendants moved to stay the action pending arbitration. Approximately a year later, the lower court granted that motion. Fuks then commenced the arbitration proceeding on

or about November 24, 1997 before the American Arbitration Association (the “AAA”) against Shomron, Goldstein and Simon. (A.11511).

Almost three years into the arbitration proceeding, when things were not going so well for her, Fuks changed lawyers in the middle of the proceeding and chose one who had a conflict of interest with the arbitrator, William Spiro (“Spiro”). To Fuks’ great satisfaction, this resulted in the AAA’s removal of the arbitrator. Shomron, Simon and Goldstein challenged that decision. This Court ultimately ordered that Arbitrator Spiro be reinstated, and that Fuks’ lawyer be disqualified. [*Id.*](#) [at 589](#).

Undeterred by this Court’s decision, Fuks engaged in an even more outrageous course of conduct to remove Arbitrator Spiro yet again. Incredibly, after she made three unsuccessful applications to the AAA for his removal, Fuks sued him in the middle of the proceedings on November 7, 2003 by the mere filing and service of a Summons with Notice. (A.11516-A.11517).

Ten days later, in a letter dated November 17, 2003, Arbitrator Spiro resigned, stating, among other things:

The charges made by the Claimant [Fuks] are patently false. In retrospect, they indicate a continuing pattern of recklessness demonstrated by hiring and firing a series of at least four attorneys and a lack of decorum in the hearings. Nonetheless, the charges which have been made give rise to potential personal expense and great personal annoyance to say the least.

Under the circumstances described above my future objectivity towards the Claimant is now subject to question. Accordingly, I am resigning as arbitrator in this matter.

(A.11518).

Counsel for Shomron, Goldstein and Simon urged Arbitrator Spiro to reconsider his resignation in a letter dated December 15, 2003. (A.11519).

Nonetheless, the Arbitrator reaffirmed his decision to resign in a letter dated December 27, 2003. (A.11524).

On January 21, 2004, the AAA sent the parties a letter for the reappointment of a new arbitrator to start the proceedings all over again. (A.11526).

Having accomplished her collateral objective of removing Arbitrator Spiro, Fuks allowed her action against him to be dismissed pursuant to an order placed on the record on March 3, 2004 on the ground that she had failed to serve a complaint after due demand had been made upon her to do so. (A.11532).

Rather than start all over again before a new arbitrator, the parties agreed to terminate the failed arbitration proceeding and return to the lower court to resolve their disputes. As a result of Fuks' conduct, the first seven plus years on this litigation was wasted.

Fuks' conduct as described above is the basis for the thirteenth counterclaim of Shomron, Simon and Goldstein for abuse of process. At the hearings, evidence was presented proving damages in the amount of \$308,059.48. Specifically,

Shomron and Simon respectively incurred \$210,974.46 and \$46,704.12 in legal fees for the failed arbitration (A.11699-A.11818), plus \$35,596.76 in arbitration fees paid by Shomron and \$6,528.29 paid by Simon (A.11700-A.11704), which they are seeking to recover in this action.

THE ORDER OF REFERENCE

Pursuant to the Order of Reference entered March 15, 2010, the parties' remaining claims in this action and Action No. 2 were referred by stipulation to a referee to hear and report. (A.69.1-A.69.51). Annexed to, and incorporated in, the Order of Reference, is the parties' stipulation placed on the record on February 24, 2010. (A.69.22-A.96.51).

Among other things, Fuks' first six causes of action which sought an accounting were settled by the February 24, 2010 stipulation. To resolve these six causes of action, the parties charted a procedural course whereby Shomron agreed to prepare and provide Fuks with schedules and ledgers reflecting the proceeds received by R&L from the sale of apartments and loans made to R&L, and the disbursement of those funds. (A.69.27-A.69-28). These schedules and ledgers have been referred to as Shomron's "accounting." But it was never intended to be the type of accounting that is typically required of a fiduciary who is in possession of a partnership's books and record and who is entrusted with the partnership's money or property.

The February 24, 2010 stipulation, incorporated in the Order of Reference, provided that “said ledgers and schedules reflect Shomron’s construction of the books and records of R&L for the purpose of this action,” and that “Ruth Shomron’s construction of such ledgers and schedules and the providing of same to Fuks’ counsel in accordance with this stipulation *shall not constitute an admission by Ruth Shomron that she had a duty to account for the matters set forth therein or that she was in possession of the books and records of R&L during the applicable time period [or] that she is in possession of R&L’s books and records at the present time.*” (A.69.28, emphasis added).

It was also agreed that Shomron would provide Fuks with “time records reflecting legal fees paid by or incurred by Ruth Shomron purportedly on behalf of R&L in connection with the prosecution of action number two, it being understood that Mali Fuks reserves all defenses with respect to Ruth Shomron’s entitlement to recover said fees.” (A.69.28).

After her receipt of Shomron’s “accounting,” and the aforesaid time records for the legal fees, Fuks was then required to deliver to Shomron specific objections to any of the matters set forth therein (A.69.31). Fuks was specifically required “to identify in her objections those discrete transactions, whether reflected in the aforementioned accounting or not, with respect to which Fuks contends that Ruth

Shomron converted or misappropriated R&L's assets or funds as set forth in the seventh cause of action of the complaint in action number one." (A.69.31-32).

Although Fuks provided objections to the "accounting," which she never introduced into evidence at the hearings, she did not provide any objections to the legal fee time records provided by Shomron. Nor did she ever object to the value of those services at the hearings.

After the exchange between the parties of Shomron's "accounting" and the objections, the parties' claims were referred to a referee to hear and report. (A.69.32). Although not prescribed by the Order of Reference, the Referee seemed to believe that his mandate was to go through every entry in the accounting, whether objected to or not, and determine whether they were accurate.

The Relief Sought by Fuks in this Action Relevant to this Appeal

Fuks originally asserted fourteen causes of action in Action No. 1. (A.197-A.225). Relevant to the Defendants-Appellants' present appeal are Fuks' first six causes of action for an accounting, her seventh cause of action for conversion, and her twelfth cause of action for breach of fiduciary duties, all against Shomron.

The Referee made inexplicable conclusory findings as to the inaccuracy of various entries in Shomron's accounting.

In her conversion claim, Fuks alleged that Shomron “wasted, diverted, dissipated, misappropriated and converted” R&L’s funds (A.211). The Referee found that Fuks failed to prove this claim (A.184) and the lower court dismissed it.

For Fuks’ breach of fiduciary duties claim, the Referee found, albeit erroneously, that Shomron breached her fiduciary duties to Fuks for various alleged “activities of misconduct.” (A.185-A.187). The Referee inexplicably found, without any evidence, that Fuks was damaged in the amount of \$375,000.00. Without stating a single fact from the hearing record, the lower court confirmed the Referee’s findings for breach of fiduciary duties and awarded Fuks a money judgment against Shomron for \$375,000.00 with statutory interest, for a total amount of \$1,270,345.89. (A.24.17). (See *Point II, infra*).

The Primary Relief Sought by Appellants in this Action Relevant to this Appeal

Shomron’s primary claim is that she, defendants Rakia and 2701 Broadway, and non-parties Michael Kaplan, Harry Salon, and Moti Silber, made substantial loans to R&L bearing interest at 10% per annum (the “Loans”). Shomron sought a declaratory judgment in her eighth counterclaim declaring that the Loans were valid and enforceable. (A.245). The Referee found (A.189-A.190), and the lower court confirmed and declared that the Loans were valid and enforceable. (A.24.11 and A.24.17). However, neither the Referee nor the lower court specified the amounts to be repaid to any of the lenders.

Shomron is also seeking to be reimbursed by the partnership for the legal fees she paid or incurred for her successful prosecution of Action No. 2 in the amount of \$352,890.20.

In the ninth and tenth counterclaims, defendants Rakia and 2701 Broadway are respectively seeking a money judgment against R&L for the repayment of their loans.

Goldstein and Simon, as former partners of R&L, are respectively seeking in the eleventh and twelfth counterclaims (A.246-247) to be paid monies owed to them pursuant to the terms of two amendments to R&L's partnership agreement. (A.1197-A.1200 and A.1220-A.1225).

And finally, in Action No. 1 Defendants-Appellants Shomron, Goldstein and Simon are seeking in their thirteenth counterclaim a judgment against Fuks for abuse of process. (A.248).

POINT I

THE REFEREE'S REPORT AND THE ORDERS ON APPEAL ARE NOT SUPPORTED BY THE RECORD AND FAIL TO STATE THE FACTS ESSENTIAL TO THEIR DECISIONS WITH RESPECT TO THE ISSUES ON APPEAL.

The law governing the confirmation, rejection or modification of a referee's report is well settled. It should only be confirmed if the findings therein are supported by the record. [*Namer v. 152-54-56 West 15th Street Realty Corp.*, 108 A.D.2d 705](#)

[\(1st Dept. 1985\)](#). While the court will look with favor upon a referee's report since the referee, as trier of fact, is considered to be in the best position to determine the issues presented, a court should confirm a referee's report only to the extent that the record substantiates his or her findings and reject findings not supported by the record. [Matter of Holy Spirit Assn. v Tax Commission of New York., 81 A.D.2d 64, 70-71 \(1st Dept. 1981\)](#).

When the record fails to substantiate the report and the recommendation made, it is the duty of the court to make its own findings and render its own decision based upon the proof in the record.” [Florio v. Florio, 143 N.Y.S.2d 105, 107 \(Sup. Ct. N.Y. County 1955\)](#); *see also*, [Kaplan v. Einy, 209 A.D.2d 248 \(1st Dept. 1994\)](#) (holding that “it is well-established that the report of a Referee shall be confirmed whenever the findings contained therein are substantially supported by the record . . . and the Referee has clearly defined the issues and resolved matters of credibility).

To aid an appellate court in determining issues on appeal [CPLR §4213\(b\)](#) requires that “[t]he decision of the court . . . *shall* state the facts it deems essential.” (Emphasis added). Because [CPLR §4319](#) provides that “[t]he decision of a referee shall comply with the requirements for a decision by the court,” a referee’s report should similarly state the facts deemed essential to its findings.

This and other appellate courts have repeatedly reaffirmed the mandatory requirement that the lower court state the facts it deems essential for its decisions. In

[Weckstein v. Breitbart](#), 111 A.D.2d 6, 7 (1st Dept. 1985), this Court held:

[CPLR 4213\(b\)](#) directs that a trial court in a court-tried case include in his decision a statement of "the facts it deems essential." This statutory requirement mandates that the court set forth those ultimate or essential facts on which it relies to reach its decision. ([General Instrument Corp. v Consolidated Edison Co.](#), 99 A.D.2d 460, 461 [1st Dept. 1984]; [Fischer v Fischer](#), 45 A.D.2d 917 [4th Dept. 1974]). This requirement recognizes that intelligent appellate review is impossible if the appellate court cannot ascertain on what facts and conclusions of law the lower court rested its decision. **Because of its importance in assuring adequate appellate review, the requirement of a statement of the essential facts may not be waived or dispensed with.** ([Conklin v State of New York](#), 22 A.D.2d 481, 482 (3rd Dept. 1965)).

(Emphasis added).

In [For the People Theatres of N.Y. Inc. v City of New York](#), 84 A.D.3d 48 (1st Dept. 2002), the Court held:

Pursuant to [CPLR 4213\(b\)](#), a trial court "should set forth those ultimate or essential facts relied upon in reaching its decision" ([General Instrument Corp. v Consolidated Edison Co. of N.Y.](#), 99 A.D.2d 460, 461 [1st Dept. 1984]; *see also*, [IBE Trade Corp. v Litvinenko](#), 16 A.D.3d 132 [1st Dept. 2005] [holding that a trial court should make findings of fact essential to support its determination on the issue]). "Mere conclusions" are insufficient as a matter of law; the facts upon which the conclusions rest must be stated (*see*, [Davin v Isman](#), 228 N.Y. 1, 10 [1920] ["Facts justifying such conclusion should be found to the end that this court ... should be able to ascertain whether such conclusion is supported by facts found"]). Otherwise, "intelligent appellate review is impossible if the appellate court cannot ascertain on what facts and conclusions of law the lower court rested its decision" ([Weckstein v Breitbart](#), 111 A.D.2d 6, 7 [1st Dept. 1985]).

See also, [*Power v. Falk*, 15 A.D.2d 216 \(1st Dept. 1961\)](#), [*Cobb v Collins*, 123 A.D.3d 520 \(1st Dept. 2014\)](#) (where court failed to state the facts it deemed essential in determining its award of damages).

Although the Referee's Report addresses many of the facts of this case, neither the Referee nor the lower court stated a single fact from the hearing record they deemed essential on *any* of the issues in this appeal, especially with respect to the Referee's conclusory finding that Fuks sustained \$375,000.00 in damages because of Shomron's alleged breach of fiduciary duties, or the conclusory finding that Shomron's "accounting" was "substantially and significantly inaccurate and incomplete."

The Referee inexplicably found that Shomron's accounting was "substantially and significantly inaccurate and incomplete" because various entries therein, even those which were not genuinely in dispute, were either "inaccurate," "incorrect," or "incomplete." The Referee gave no reasons for these findings, as he was required to do. With respect to every single one of these entries, including, but not limited to, the Loans that are the subject of Shomron's eighth counterclaim, the Referee merely states in a conclusory manner that they were inaccurate, incorrect, or incomplete. Neither the Referee nor the lower court even tried to give a sampling of why some of the entries were unacceptable.

The overwhelming majority of these entries have no relevance to the repayment of the Loans that are the subject of Shomron's eighth counterclaim. Many of the entries in Shomron's accounting concern the proceeds of the sale of R&L's apartments and loans that had been fully paid off and satisfied, namely, loans from Gotham Bank, Viva Hoffman, Lancaster Associates, Yakov Helfman, Upwest Company, 504 West 111th Owners Corp., Martina Barat, Yoram Fuks, Enrique Hauser and Yehuda Porat.

No relief was awarded to Fuks on account of any of the entries being inaccurate or incomplete. Thus, while Shomron strenuously disagrees with these findings, except for those entries relevant to the Loans Shomron does not address in this appeal the Referee's findings as to the other entries other than to argue that they should be rejected on the ground that neither the Referee nor the lower court stated even a single fact upon which these conclusions were based, as required by law. "Mere conclusions" are insufficient as a matter of law; the facts upon which the conclusions rest must be stated. [*For the People Theatres of N.Y. Inc. v City of New York, supra*, 84 A.D.3d at 60.](#)³

³ Even the Referee's statement, relied upon by the lower court, that he considered the credibility of the witnesses, is conclusory. (A.195). Indeed, this statement is made for the first and only time in the section of the Referee's Report entitled, "Conclusions."

POINT II

THE \$375,000.00 (PLUS INTEREST) AWARD IN FAVOR OF FUKS AGAINST SHOMRON FOR BREACH OF FIDUCIARY DUTIES SHOULD BE DISMISSED BECAUSE THERE IS NO PROOF OF DAMAGES.

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." [*Mohinani v. Charney*, 208 A.D.3d 404, 405 \(1st Dept. 2022\)](#) (dismissing breach of fiduciary duty claim after trial where defendant, individually, suffered no damages, and, to the extent that damages were sustained, holding that those damages would have been losses directly suffered by the defendant company); [*Besen v. Farhadian*, 195 A.D.3d 548, 549 \(1st Dept. 2021\)](#), citing [*Burry v Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 \(1st Dept 2011\)](#); [*Pokoik v Pokoik*, 115 A.D.3d 428, 429 \(1st Dept. 2014\)](#).

Damages is an essential element of breach of fiduciary duty and, in order to prevail, a plaintiff must establish that the misconduct alleged was the direct and proximate cause of the losses claimed. [*Laub v Faessel*, 297 A.D.2d 28, 30-31 \(1st Dept 2002\)](#). A breach of fiduciary duty claim is not enforceable until the aggrieved party sustains actual damage. [*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 140 \(2009\)](#); [*Suttongate Holdings Ltd. v Laconm Mgt. N.V.*, 173 A.D.3d 618 \(1st Dept. 2019\)](#).

Assuming *arguendo* that Shomron even engaged in the purported misconduct found by the Referee (A.185-187), no evidence was adduced at the hearings proving that Fuks “suffered damages caused by that misconduct.” In fact, in her Post-Hearing brief submitted to the Referee, Fuks specified the items for which she was seeking monetary damages against Shomron and none was for any of the alleged incidents of misconduct upon which the Referee based his finding that Shomron breached her fiduciary duties. (A.1193-1194).

The Referee’s only statement on the issue of damages for breach of fiduciary duties was the conclusory statement that, “the totality of the evidence demonstrates that Ms. Fuks sustained damages as a direct result of Ms. Shomron’s misconduct towards her and that the damages sustained by Ms. Fuks is in the amount of \$375,000.00.” (A.187). Neither the Referee, the lower court, nor Fuks have every stated what that the evidence consisted of because there is none.

To justify its confirmation of the Referee’s conclusory finding that Fuks sustained \$375,000.00 in damages, the lower court erroneously stated in the April 12, 2023 Order on appeal:

Shomron conceded \$201,631.00 in damages during the appeal on the first decision and order confirming the Referee’s Report ([see Appeal Reply Brief for Defendant-Appellant dated September 23, 2022, pg. 8](#) [stating that “the alleged incidents of misconduct purportedly engaged in by Shomron, . . . only add up to \$201,631.00,” not \$375,000]). The difference of less than \$125,000 certainly falls under the “significant leeway” to which the Report deserves, especially

considering Shomron's utter failure to maintain proper accounting records.

(A.24.6).

Apart from the unusual fact that the lower court decided *sua sponte* to read and consider the Appellants' Reply Brief in the Prior Appeal when neither party had submitted it among their papers below, it grossly mischaracterized Appellants' argument. In pages 7-8 of that brief (see, [Appellate Division Case No. 2021-03205, NYSCEF Doc. No. 51](#)), Shomron argued:

This Court need look no further for proof that there is not a scintilla of evidence of damages than at one particularly revealing argument in Respondents' Brief. Desperate to avoid the dismissal of Fuks' breach of fiduciary duties claim, Respondents attempt to mislead this Court into believing that they sought damages for the alleged incidents of misconduct in their post hearing brief.

Not even one of the categories identified ... by Respondents in their post-hearing brief ... corresponds to any of the alleged incidents of misconduct set forth in the Referee's Report. ... Even if all the specific categories mentioned above from the Respondents' post-hearing brief corresponded to the alleged incidents of misconduct purportedly engaged in by Shomron, they only add up to \$201,631, well short of the \$375,000 erroneously found by the Referee. But the fact that Respondents have stooped so low as to portray these categories in their post-hearing brief as corresponding to the alleged incidents of misconduct against Shomron compels the conclusion that there is no evidence to support the Referee's damage finding.

Clearly, Shomron did not concede any damages for her alleged breach of fiduciary duties, as the lower court contended.

The lower court absurdly accuses Shomron of “quibbling with the \$375,000 amount,” (A.24.6), ignoring the fact that this amount, plus interest, resulted in a money judgment against Shomron in favor of Fuks in the amount of \$1,270,345.89. (A.24-17).

The lower court also asserted that the \$375,000 amount was “based on credibility and weighing of the evidence.” (A.24.6). However, there is no documentary evidence or testimony, credible or not, with respect to Fuks’ purported damages. Nor did the Referee ever find that Shomron or any of her witnesses lacked credibility.

The lower court stated that “Shomron should not be allowed to benefit from her utter failure to keep proper financial records, which make it difficult to ascertain the exact amount she pilfered from the company (*see [Wolf v Rand, 258 A.D.2d 401, 402-03, \[1st Dept. 1999\]](#)* [court afforded “significant leeway” in awarding damages for breach of fiduciary duty, especially “[w]hen a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated” [citations omitted]).” (A.24.6).

[Wolf v Rand](#), cited by the lower court, is clearly inapposite. There, the court had sufficient evidentiary basis to determine “a fair approximation of the loss.” In the present case, the record is utterly devoid of any evidence to determine “a fair approximation of” Fuks’s alleged damages. Nor are there any findings by the

Referee that Shomron failed “to keep proper financial records” or that she “pilfered from the company.”

Fuks’ cause of action for breach of fiduciary duties is also clearly barred, at least in part, by the statute of limitations, which would also diminish any damages she purports to have sustained. Among the “activities of misconduct” found by the Referee was that Shomron executed an exclusive brokerage agreement for R&L purportedly without telling Fuks (A.187). The agreement was executed on May 4, 1991. (A.9817). This action was commenced on December 30, 1996 (A.197).

It is well settled that a claim for breach of fiduciary duties which only seeks monetary damages is governed by a three-year statute of limitations. [*IDT Corporation v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 \(2009\)](#); [*Carlington Center Point Associates v. MR Realty Associates, L.P.*, 4 A.D.3d 179, 180 \(1st Dept. 2004\)](#); [*Yatter v. William Morris Agency, Inc.*, 256 A.D.2d 260, 261 \(1st Dept. 1998\)](#). Accordingly, any alleged breach of fiduciary duties by Ms. Shomron prior to December 30, 1993 is time-barred.

In short, the record does not support the Referee’s conclusory finding that Fuks sustained damage in the amount of \$375,000 for Shomron’s alleged breaches of fiduciary duties.

POINT III

THE LOWER COURT'S DISMISSAL OF SHOMRON'S EIGHTH COUNTERCLAIM FOR THE REPAYMENT OF THE LOANS MADE BY SHOMRON AND OTHERS TO R&L ON THE GROUND OF "FAILURE TO PROVE DAMAGES" WAS UNWARRANTED, UNJUST, AND INCONSISTENT WITH THE LOWER COURT'S PRIOR RULING CONCERNING THE BALANCE OF THE LOANS TO BE PAID.

The lower court's dismissal of Shomron's eighth counterclaim, not on the merits, but for failure of proof with respect to the repayment of the Loans was, by far, its most egregious decision. It summarily swept away the eighth counterclaim in one fell swoop, and avoided its obligation to consider the hearing record, as it was directed to do by this Court.

In support of its decision to dismiss the eighth counterclaim, the lower court:

- A. falsely claimed that Shomron was a "thief" who "pilfered from the company" and thus had no credibility when there was no such finding by the Referee,
- B. contradicted its prior rulings concerning the Loans by, among other things, absurdly claiming that the Referee's Report was "silent" as to whether any of the Loan entries in Shomron's accounting were "correct," when it previously ruled that over \$500,000 of the Loans could be paid based on the correct entries,

- C. falsely accused Shomron’s counsel of “obfuscating” issues and being “unprepared” for the May 10, 2023 inquest,
- D. effectively blamed Shomron’s counsel for the dismissal of the eighth counterclaim for purportedly “not show[ing] up to court with any witnesses,” which it called “unfortunate,” when it was the lower court which ordered that no new evidence would be allowed,
- E. falsely claimed that Shomron’s proof consisted of an “attorney-prepared affidavit” and an “undisclosed analysis,”
- F. repeatedly interrupted and cut off Shomron’s counsel during the inquest,
- G. And unreasonably expected that Shomron’s counsel would present in one day what took many days of hearing testimony and hundreds of pages of documentary evidence to present to the Referee.

Shomron’s eighth counterclaim concerns loans made to R&L by herself, defendants Rakia and 2701 Broadway, and non-parties Harry Salon, Micheal Kaplan, and Moti Zilber. The largest of these Loans is, by far, Shomron’s loans. The Referee indicates that he found that Shomron’s loan schedule reflects “deposits and/or payments made to Ms. Shomron during the period February 1, 1989 through September 16, 2010.” (A.182). The Referee then goes on to specify which of the entries he found to be inaccurate.

There are 140 entries in Shomron's loan schedule. Without giving a reason, the Referee found 29 of them were inaccurate (A.182). However, out of these 29 entries, there are no entries for two of them (August 5, 1991 and August 14, 1994) and, where the Referee states that there are two entries for August 21, 1991, there is only one. There are two entries each in Shomron's loan schedule for January 7, 1992 and December 31, 1999 that the Referee found inaccurate, but did not indicate which of them were "inaccurate." Thus, when one accounts for these errors, the Referee appears to have found 24 entries to be inaccurate, not 29.

But the most glaring error in the Referee's Report concerning Shomron's loans is that 19 of the entries the Referee found to be inaccurate were either not objected to by Fuks or were stipulated by the parties in Court Exhibit X to be supported by the evidence. (A.899-A.910).

In Court Exhibit X the parties' stipulated that many of the entries in Shomron's loan schedule were not only supported by the evidence, but "represent[ed] (i) funds received either directly by R&L, or by others for the benefit of R&L, from the Lenders specified therein, or (ii) funds paid directly by R&L, or by others for the benefit of R&L, in full and partial satisfaction of each Lenders' respective Loans." The Referee never explained why he found any of the entries in Court Exhibit X to be inaccurate when the parties had effectively stipulated otherwise. Thus, when the entries from Court Exhibit X are removed from the list of

entries the Referee found to be “inaccurate,” there are only 5 purported “inaccurate” entries out of 140 entries in Shomron’s loan schedule.

With respect to Shomron’s Eighth Counterclaim for the repayment of the Loans, the lower court ruled, in pertinent part, as follows in the April 11, 2023 Order on appeal:

The trouble is the Referee never determined amounts for these loans and the court has no idea where the amounts Shomron advocates for are coming from. This is particularly troubling given that, with the exception of Mr. [Salon’s] loan, the Referee found the amounts set forth on the schedule of loans to be “substantially incorrect,” “substantially inaccurate,” or, at best, “partially correct.” Therefore, the court ... schedules an additional hearing to determine the amounts due on the balance of the remaining loans.

This hearing will be before this court, not before a Special Referee. The court reminds Shomron that she has the burden of proof on the amount of these loans. Given the inaccurate and incomplete accounting she has produced, it may be impossible to carry that burden. No new evidence will be allowed at the hearing on these loans whatsoever.

... **ORDERED** that the parties are to appear for an inquest to determine the remaining amounts, if any, on the Eighth counterclaim loans, on May 10, 2023 at 10:00 am; ...

(A.24.4).

The Lower Court’s Earlier Determination that the Balance of the Remaining Loans was \$512,731.00.

The only reason the lower court admittedly had “no idea where the amounts Shomron advocates are coming from,” or why it may have thought that “it may be impossible” for Shomron to “carry” her burden, is because it did not read the record

and apparently forgot that prior to this Court's reversal of its initial order confirming the Referee's Report, the lower court had already addressed this issue and ruled, albeit erroneously, that the remaining balance of the loans was \$512,731.00. (A.68).⁴

Specifically, the lower court previously directed the parties to provide it with their respective contentions as to the balance of the Loans by eliminating the entries in Shomron's loan schedules that the Referee found to be inaccurate. In furtherance of this directive, Fuks submitted a "Table of Loans" in which she contended that based on the entries in Shomron's loan schedules that the Referee found to be correct, the total amount to be repaid was \$726,936.00, of which \$121,231 was owed to Shomron, without interest. (A.1015-1016). Fuks' Table of Loans was annexed to Fuks' attorney's supplemental affirmation which provide no support for his numbers. (A1006-A1011).

In contrast, Shomron presented the affidavit of an accountant to support the amounts in her Table of Loans as to the balances for each of the Loans. The accountant specifically indicated that his analysis was based upon Shomron's accounting admitted into evidence at the hearings. (A.1246-1248). The accountant wrote in his affidavit, among other things:

⁴ This ruling, made in connection with Fuks' motion for the distribution of R&L's funds in the approximate amount of \$6.5 million, was effectively nullified when this Court reversed the lower court in the Prior Appeal. Another motion for the distribution of the funds is pending in the lower court.

4. ... I deleted all the entries in [Shomron's Loans] Schedules which the Referee found to be "incorrect," "inaccurate," or "incomplete," with respect to each of the Loans, leaving only those entries which the Referee found to be correct. After deleting the "incorrect," "inaccurate," or "incomplete" entries, I then applied an interest rate of 10% per annum to each Loan in accordance with the Court's July 29, 2021 Decision and Order, and calculated the interest from the date of each loan payment through December 31, 2021.

5. Based on my analysis, R&L owes the following amounts for each Loan through December 31, 2021:

Ruth Shomron:	\$2,032,334.16
Rakia Associates:	62,523.29
2701 Broadway Associates	64,482.33
Michael Kaplan	638,239.04
Harry Salon	151,235.62
Moti Zilber	41,457.53

Annexed hereto as Exhibit R is a copy of the printout for each of the Loans I personally prepared setting forth the calculations for the amounts due with interest at 10% per annum.

(A1252-A1262).

Based on the accountant's analysis, Shomron argued that the total amount to be paid by R&L for all the Loans was \$2,839,036.35 based on the entries the Referee found to be correct. (A1252-1262).

Even though Shomron's contentions as to the balance of each of the loans was supported by an accountant, and Fuks' contentions were merely numbers on a page presented by her attorney, the lower court nonetheless adopted, albeit erroneously, Fuks's Table of Loans and ruled that the total balance of the Loans to be repaid was \$512,731.00 based on the correct entries. (A.68).

The May 10, 2023 Inquest and the Resulting May 11, 2023 Order on Appeal

The parties appeared before the lower court for the inquest on May 10, 2023, after which it issued the May 11, 2023 Order on appeal dismissing Shomron's Eighth counterclaim for allegedly failing "to prove damages." The inquest was a sham and the lower court, in its castigation of Shomron and her counsel, was intemperate, impatient, discourteous, and undignified and did not render a just and fair result on the merits. This Court is respectfully referred to the 43-page transcript of the inquest to assess the proceedings for itself. (A1275.187-A1275.229).

Among the reasons offered by the lower court to support the dismissal of Shomron's eighth counterclaim was that her counsel was purportedly "unprepared" for not bringing copies of any of the documentary evidence for Fuks's counsel or the court. However, as reflected in the May 10, 2023 inquest transcript, all the hearing evidence and transcripts were in the courtroom that day. In addition, Shomron's counsel had provided to the court and to Fuks' counsel all the documentary evidence and transcripts on a flash-drive, as directed by the court in the month or so leading up to the hearing. This was in addition to the fact that during the hearings before the Referee, the parties arranged for each other to have hard copies of all the documentary evidence. Whether or not Shomron's counsel should have brought yet another set of exhibits that day, the failure to do so hardly justified the harsh decision

to dismiss Shomron's eighth counterclaim, especially when all the evidence to support the loans was sitting in the courtroom.

The lower court correctly notes in the May 11, 2023 Order on appeal that Shomron's counsel did not call any witnesses at the May 10, 2023 inquest, but neglects to mention that in the April 11, 2023 Order on appeal it refused to allow any new evidence. In contradiction to its April 11, 2023 order, the lower court wrote in its May 11, 2023 Order:

Aside from his client, he did not show up to court with any witnesses (such as one of the accountants from the inquest which might have been helpful). He did not even ask to put his client on the stand. This was unfortunate for it is Shomron/Rakia who has the burden of proof on the counterclaim.

Surely, if it was "unfortunate" that Shomron's counsel "did not show up to court with any witnesses," then, by extension, it was equally unfortunate, if not reversible error, that the lower court would not allow Shomron's counsel to call any witnesses. Had the Court allowed any new evidence, at a minimum, Shomron would have called the accountant who calculated the balance of the loans based solely on the entries the Referee found to be correct.

At the hearings, and later that day, Shomron's counsel sought to direct the lower court to Shomron's "Table of Loans" and the accountant's affidavit and analysis to support it but, before the court could locate those documents on NYSCEF during the inquest, Fuks's counsel objected contending that "these tables are not

evidence, they were not in the hearing and hence, they are just made up by the attorneys. But what the attorney says to the Court is not evidence.” (A1275.224). Incredibly, the lower court adopted Fuks’s counsel’s objection when it erroneously stated that the documents submitted by Shomron consisted of an “attorney affidavit from Shomron’s counsel (Mr. Halperin) in which he purports, based on some undisclosed ‘analysis’ (EDOC 87 ¶5), to have figured out the amounts owed” The lower court also falsely contended that “[i]n support of those amounts, [Shomron’s counsel] attaches a chart he himself prepared (EDOC 88).” (A.24.14). Clearly, the affidavit and the “chart” referred to by the lower court was not prepared by Shomron’s counsel, but by an accountant.

The lower court also stated in its May 11, 2023 Order that Shomron’s counsel “did not even try to give the court a sampling” of the evidence from the hearing to prove the loans. This, too, is disingenuous. Had the lower court demonstrated even a modicum of patience, and not repeatedly cut him off, Shomron’s counsel would have presented the relevant evidence from the hearing. What Shomron’s counsel was trying to explain to the lower court, which it did not want to hear, is that it would be impossible to present in one day what took at least a dozen days to present to the Referee. In any event, the lower court never asked for a sampling. And even if it had, a sampling would not have proven the balance of the loans.

If Shomron’s counsel had been given a reasonable chance and been asked, he easily could have provided a sampling, including, but not limited to, proof for the following entries in Shomron’s loan schedules:

<u>DATE OF ENTRY</u>	<u>SHOMRON LOAN AMOUNT</u>	<u>SUPPORTING EXHIBITS IN RECORD</u>
8-30-91	\$4,000.00	A11412.1 - A11412.7
10-25-91	\$1,500.00	A11412.8 - A11412.14
10-29-91	\$2,000.00	A11412.8 - A11412.14
11-21-91	\$2,000.00	A11412.15 - A11412.20
11-27-91 (Gotham)	\$3,000.00	A11412.21 - A11412.25
7-10-92	\$5,700.00	A11412.26 - A11412.27
8-31-92	\$3,100.00	A11412.28 - A11412.29
9-23-92	\$7,000.00	A11412.30 - A11412.35
12-21-93	\$2,500.00	A11412.36 - A11412.39
12-21-93	\$2,500.00	A11412.36 - A11412.39
1-3-94	\$3,000.00	A11412.40 - A11412.44
9-9-96	\$10,000.00	A11412.45 - A11412.50
10-1-96	\$17,000.00	A11412.51 - A11412.57
12/20/96	\$6,000.00	A11412.58 - A11412.62

It has been repeatedly held that it is the general policy of the courts to permit actions to be determined by a trial on the merits. [See, *Winters v. Atlantic Dev. Corp.*, 205 A.D.3d 447 \(1st Dept. 2022\)](#); [38 *Holding Corp. v. New York*, 179 A.D.2d 486, 487 \(1st Dept. 1992\)](#); *see also*, [Roland v. Hubbard](#), 36 A.D.2d 599 (1st Dept. 1971) (where lower court’s decision to dismiss plaintiff’s complaint at the end of plaintiff’s evidence on the ground that plaintiff failed to make out a prima facie case was modified on appeal to allow plaintiff to prosecute a new action because it was “difficult, if not impossible, to ascertain from the record if the failure of proof

resulted from its actual unavailability or from the court's continual trammeling of counsel in his effort to present his case").

For the reasons stated above, the lower court's dismissal of Shomron's eighth counterclaim, and its dismissal of Rakia's ninth counterclaim and 2701 Broadway's eleventh counterclaim respectively seeking the repayment of their loans, should be reversed and the matter remanded to a new justice to make a proper determination as the balance of the Loans to be repaid by R&L.

POINT IV

THE AMENDMENTS TO R&L'S PARTNERSHIP AGREEMENT PURSUANT TO WHICH SIMON AND GOLDSTEIN WITHDREW FROM THE PARTNERSHIP SHOULD BE ENFORCED ACCORDING TO THEIR TERMS.

"A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." [*W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 \(1990\)](#).

In his eleventh counterclaim, Goldstein seeks to enforce the terms of the Goldstein Amendment which memorialized the terms of his withdrawal from R&L. (A. 1197). Pursuant to this amendment, Goldstein is entitled to receive the sum of

\$165,450 from R&L as and when the distributions specified therein are made to Simon, Fuks and Shomron.

In his twelfth counterclaim, Simon seeks to enforce the terms of the Simon Amendment which memorialized the terms of his withdrawal from R&L. (A. 1220). Pursuant to this amendment, Simon is entitled to receive the sum of \$280,450.00 from R&L as and when the distributions are made to Fuks and Shomron.

Shomron's undisputed testimony was that neither Goldstein nor Simon have been paid any of the monies specified in their respective amendments. (A. 1204-1208).

The lower court's dismissal of Goldstein's and Simon's counterclaims was based on purported matters "outside the four corners" of the amendments. Accordingly, the dismissal of their counterclaims should be reversed, and the Court should find that they are entitled to receive the distributions specified therein.

POINT V

THE LOWER COURT ERRONEOUSLY REDUCED THE AMOUNT OF LEGAL FEES SOUGHT BY SHOMRON FROM R&L FOR THE LEGAL FEES SHE INCURRED ON R&L'S BEHALF IN CONNECTION WITH HER SUCCESSFUL PROSECUTION OF ACTION NO. 2.

Shomron seeks to be reimbursed by R&L \$352,890.20 for the legal fees she incurred for the benefit of R&L in connection with her successful prosecution of Action No. 2.⁵

In the April 11, 2023 Order, the lower court denied Shomron's motion to modify the Referee's Report to impose attorneys' fees "without prejudice to making a motion for same" and stated that the fees sought would be "limited to those fees incurred prosecuting the constructive trust claim." The court did not specify what it meant by this limitation and whether it excluded the prosecution of the fraud and breach of fiduciary duty claims that were inexplicably intertwined with, and the foundation for, the court's decision to impose a constructive trust upon Fuks for the rents and profits she earned on the Four Apartments. Nor did the lower court give any reason why it sought to limit the fee request to the "constructive trust claim."

In the October 4, 2023 Order on appeal, the lower court only awarded Shomron 50% of the amount sought. Even though Fuks never objected to the value

⁵ The grounds for Shomron's entitlement to be reimbursed by R&L for these fees are set forth in her motion below to which this Court is respectfully referred in the interest of staying within the word count limit in this brief.

of the services (A.1275.140 to 1275.141), the court held that Shomron's counsel's "invoices and timesheets are deficient for several reasons and ultimately prevent the court from determining the reasonableness of Shomron's attorneys' fee request." Among the reasons it gave is that "the time records submitted in support of this attorneys' fee request do not differentiate between those fees generally incurred in prosecuting this case, versus those fees that were specifically incurred in prosecuting the constructive trust claim."

To the extent the lower court intended to deny Shomron the right to be reimbursed for that part of the case which found that Fuks breached her fiduciary duties and committed fraud, there is no rational reason for it to have done so, especially in connection with the relief granted in [Shomron v. Fuks, 13 Misc.3d 1228\(A\) \(Sup. Ct. N.Y. County 2006\)](#), [aff'd 70 A.D.3d 406 \(1st Dept. 2010\)](#). Such a limitation is contrary to the parties' stipulation incorporated in the Order of Reference which clearly specified that among the issues to be referred to a referee was Shomron's right to be reimbursed by R&L, not just for the "constructive trust claim," but for her prosecution of Action No. 2.

The lower court held that the fees it awarded were "pursuant to the R&L Partnership Agreement (Doc 133 [R&L Partnership Agreement] Section 7.03, and [Partnership Law §§ 40](#) and [71](#). That being the case, there is no justifiable basis to

deny Shomron the right to be reimbursed for all the fees she reasonably incurred in connection with her successful prosecution of Action No. 2 on behalf of R&L.

The lower court erroneously claims that the invoices and time entries fail to differentiate what work is being done for which case when the undisputed evidence is that they were incurred solely in connection with the prosecution of Action No. 2. (A.1275.139).

The lower court claimed that “the time records are also rife with instances of block billing.” Apart from the fact that a significant number of entries merely state one activity (see time records at A.1275.14 to A.1275.116 and 1275.165 to 1275.166), block billing does not render a fee request per se unreasonable. [*J. Remora Maintenance LLC v Efromovich*, 103 A.D.3d 501, 503 \(1st Dept. 2013\)](#). A reduction in a fee request is not warranted unless “the pervasive use of block billing makes it exceedingly difficult for the court to identify whether the amount of time spent on a particular task is reasonable.” [*546-552 W. 146th St. LLC v Arfa*, 2011 N.Y. Misc. LEXIS 2873 \(Sup. Ct. N.Y. County 2011\)](#), modified in part, and aff’d in part, [*99 A.D.3d 117, 123 \(1st Dept. 2012\)*](#). In the present case, Shomron’s counsel time records do not make it exceedingly difficult to identify whether the amount of time spent on any particular task was unreasonable.

The orders on appeal should be modified to award Shomron a judgment in the amount of \$352,890.20 for the unchallenged value of the legal fees she incurred in connection with her successful prosecution of Action No. 2.

POINT VI

FUKS' LAWSUIT AGAINST THE ARBITRATOR WAS AN ABUSE OF PROCESS.

The law of abuse of process, and its evolution from British and early American law, was discussed in the seminal New York Court of Appeals case, [*Board of Education v. Farmingdale Classroom Teachers Assoc.*, 38 N.Y.2d 397 \(1975\)](#). Distilling from the lineage of cases cited therein, the Court held that there were “three essential elements of the tort of abuse of process First, there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act. Next, the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse of justification. [citation omitted]. Lastly, defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process.” [*Id.* at 403](#).

The Court in *Board of Education, supra*, further elaborated on the claim of abuse of process and pronounced:

While it is true that public policy mandates free access to the courts for redress of wrongs [citations omitted] and our adversarial system cannot function without zealous advocacy, it is also true that

legal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. Where process is manipulated to achieve some collateral advantage, whether it be denominated extortion, blackmail or retribution, the tort of abuse of process will be available to the injured party.

[Id.](#) at 404.

“As soon as the actor uses the process of the court, not to effect its proper function, but to accomplish *through it* some collateral object, he commits this tort. ... [I]f he makes use of that process, not for the purpose of attaining its proper end, but ... to coerce action, that is a perversion of process.” [Hauser v. Bartow](#), 273 N.Y. 370, 374 (1937).

In [Parkin v. Cornell University, Inc.](#), 78 N.Y.2d 523 at 530 (1991) the Court held:

The Appellate Division's alternative holding that abuse of process requires some improper conduct *after* issuance of process finds support in the language of several of our cases. We have noted several times that “[t]he gist of the action for abuse of process lies in the improper use of process after it is issued” ([Dean v. Kochendorfer](#), 237 N.Y. 384, 390 [1924]; see, [Curiano v Suozzi](#), 63 N.Y.2d 113, 117 [1984]; [Hauser v Bartow](#), 273 N.Y. 370, 373 [1937]). It is not clear, however, whether this language should be viewed as a strict and limiting definition of the tort or whether it is merely illustrative.

In none of the cases from this Court cited by the Appellate Division or by defendants was an otherwise viable abuse of process claim defeated simply because no improper conduct occurred after issuance of the process. Thus, nothing in this Court's holdings would seem to preclude an abuse of process claim based on the issuance of the process itself.

(Emphasis added).

Based on the facts adduced at the hearing, when Fuks sued Arbitrator Spiro, her clear motive was to coerce him to resign after this Court reinstated him. [Shomron v. Fuks, 286 A.D.2d 587 \(1st Dept.2001\)](#). Evidencing her improper motive were her three subsequent unsuccessful applications she made to the AAA to remove him again.

Further evidence of Fuks' motive to abuse the judicial process to achieve an improper collateral objective is that soon after the Arbitrator resigned, she allowed her action against him to be dismissed for failure to serve a complaint. By her gross manipulation of the legal process to achieve her collateral objective of coercing the Arbitrator to resign, Fuks caused years of litigation and its attendant costs to be for naught.

The orders on appeal should be modified to award a judgment in favor of Shomron and Simon against Fuks for the legal fees and arbitration fees they incurred in connection with the failed arbitration proceeding.

CONCLUSION

For the foregoing reasons, the orders on appeal should be: (1) reversed by dismissing Fuks' cause of action for breach of fiduciary duties; (2) modified by remanding Shomron's eighth counterclaim to a different justice of the lower court to make a proper determination of the amounts to be paid to Shomron, Rakia, 2701 Broadway, Michael Kaplan and Moti Silber for their loans; (3) modified by remanding Rakia's and 2701 Broadway's respective ninth and tenth counterclaims to a different justice of the lower court to make a proper determination of the amounts to be paid to them for their loans; (4) on Goldstein's eleventh counterclaim, ordering and adjudging that Goldstein is entitled to be paid by R&L the sum of \$165,450.00 at the time Simon, Shomron and Fuks receive their distributions in accordance with the terms of the Goldstein Amendment; (5) on Simon's twelfth counterclaim, ordering and adjudging that Simon is entitled to be paid by R&L the sum of \$280,450.00 at the time Shomron and Fuks receive their distributions in accordance with the terms of the Simon Amendment; (6) on the thirteenth counterclaim for abuse of process, awarding a money judgment against Fuks in favor of Shomron in the amount of \$246,571.22, and in favor of Simon against Fuks in the amount of \$53,232,41, for the legal fees and arbitration fees they respectively incurred, with interest; (7) awarding a judgment in the amount of \$352,890.20 in favor of Shomron against R&L for the legal fees she paid or incurred in connection

with her successful prosecution of Action No. 2; and (8) such other relief as this Court may deem just and proper.

Dated: February 12, 2024

THE LAW FIRM OF GUY S. HALPERIN, PLLC

A handwritten signature in blue ink that reads "Guy S. Halperin".

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PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO 22 NYCRR § 1250.8[j]

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 13,924.

Supreme Court of the State of New York
Appellate Division: First Department

MALI FUKS, individually and on behalf of
R&L REALTY ASSOCIATES, a New York partnership,

Plaintiff-Respondent,

-against-

RAKIA ASSOCIATES, 2701 BROADWAY ASSOCIATES,

Defendants-Appellants,

LANCASTER STUDIO ASSOCIATES, UPWEST COMPANY,
27 EAST 21 STREET COMPANY, 504 WEST 111 OWNERS CORP.

Defendants,

RUTH SHOMRON,

Defendant-Appellant,

ALFRED SZALA, GOLDSTICK WEINBERGER, FELDMAN & GROSSMAN, P.C.,

Defendants,

ESTATE OF HOWARD SIMON, LARRY GOLDSTEIN,

Defendants-Appellants,

and LINDA GOLDSTEIN,

Defendant.

STATEMENT PURSUANT TO CPLR 5531

1. The index numbers for the above case originating in Supreme Court, New York County are 122768/1996 and 102882/2002.
2. The full names of the original parties are the same; there has been no change.
3. Action commenced in Supreme Court, New York County.
4. Action was commenced by the filing of a Summons and Complaint, dated December 26, 1996
5. Nature of action: Business Relationships.
6. This appeal is from the Decision and Order of the Hon. Melissa Crane, dated April 10, 2023, Decision and Order of the Hon. Melissa Crane, dated May 10, 2023, an Amended Judgment of the Hon. Melissa Crane, dated May 26, 2023, and Decision and Order of the Hon. Melissa Crane, dated October 3, 2023.
7. Appeal is on the Appendix method.



Affidavit of Service by Email

2023-02618,
2023-02621,

State of New York }
County of Kings }

MALI FUKS, INDIVIDUALLY AND ON BEHALF OF R&L REALTY ASSOCIATES, A NEW YORK PARTNERSHIP,

-AGAINST-

RAKIA ASSOCIATES, 2701 BROADWAY ASSOCIATES, LANCASTER STUDIO ASSOCIATES, UPWEST COMPANY, 27
EAST 21 STREET COMPANY, 504 WEST 111 OWNERS CORP. RUTH SHOMRON,

JONATHAN DIDIA being duly sworn, deposes and says that he is over 18 years of age, and is not a party to the action, on Tuesday, February 13, 2024 deponent served 1 copy of the within Brief upon

Becker & Poliakoff, LLP, Albert K. Lawler ALawler@beckerlawyers.com

by emailing the digital copies of the documents upon the above parties at the email addresses designated by said parties. All parties consent to email service.

Sworn to before me
Tuesday, February 13, 2024

WILLIAM BAILEY
Notary Public, State of New York
No. 01BA6311581
Qualified in Richmond County
Commission Expires Sept. 15, 2026

JONATHAN DIDIA

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