To be Argued by:
JOSEPH N. PAYKIN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

Docket No.:
2011-00599

PATRICK QUADROZZI, Individually and as a Shareholder of the following Corporations, AMSTEL RECYCLING, INC., QUADROZZI CONCRETE CORP., QUADROZZI ENTERPRISE CORP., QUADROZZI EQUIPMENT LEASING CORP., QUADROZZI INC. d/b/a NYCEMCO, QUADROZZI REALTY, INC. and BEACH CHANNEL DRIVE LANE ENT. INC., suing individually and derivatively and on their behalf,

Plaintiffs-Respondents,

– against –

THE ESTATE OF JOHN QUADROZZI, THERESA QUADROZZI Individually and as Executrix of the Estate of JOHN QUADROZZI, JOHN QUADROZZI, JR., CATHERINE QUADROZZI, ATLANTIC CONCRETE CORP., BAY 32ND PLACE DEVELOPMENT CORP., EDGEWATER CONCRETE LOADING CORP., GOWANUS INDUSTRIAL PARK INC., HARLEM CONCRETE LOADING CORP., MANHATTAN WEST CONCRETE LOADING CORP., MASPETH CONCRETE LOADING CORP., MASPETH TRUCK DEPOT CORP., QUADROZZI ACQUISITION CORP., QUADROZZI, LTD., QUALITY CONCRETE CORP. OF NEW YORK, QUALITY ASSURANCE CONCRETE CORP., QUEENS (CONCRETE) DELIVERY AND LEASING INC., RED HOOK CONCRETE LOADING CORP., RED HOOK TRUCK DEPOT CORP., AMSTEL RECYCLING INC., QUADROZZI CONCRETE CORP., QUADROZZI ENTERPRISE CORP., QUADROZZI EQUIPMENT LEASING CORP., QUADROZZI, INC. d/b/a NYCEMCO and QUADROZZI REALTY INC.

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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Queens County Clerk's Index No. 26125/05

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—Second Department

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QUADROZZI CONCRETE CORP., QUADROZZI ENTERPRISE CORP., QUADROZZI EQUIPMENT LEASING CORP., QUADROZZI, INC. d/b/a NYCEMCO and QUADROZZI REALTY INC.

Defendants-Appellants.

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1. The index number of the case in the court below is 26125/05.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, Queens County.

4. The action was commenced on or about November 10, 2005 by the filing of a Summons and Verified Complaint. Issue was joined by the filing of a Verified Answer on or about January 26, 2006. The Defendants filed an Amended Verified Answer to the Verified Complaint on or about November 1, 2006.

5. The nature and object of the action involves Plaintiff seeking issuance of shares of contested companies, *inter alia*.

6. This appeal is from a Judgment, entered on June 23, 2010 in favor of Plaintiffs.

7. This appeal is on the full reproduced record.

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QUESTIONS PRESENTED

1. Whether the trial court erred in its determination that the Certified Transaction warranted the imposition of a constructive trust in favor of plaintiff Patrick Quadrozzi on 25% of the shares of the Certified Companies?

2. Whether the trial court erred in determining (i) that a claim for the imposition of a constructive trust with respect to the Certified Transaction was timely asserted within the applicable limitations period and/or (ii) that defendants are estopped from asserting the statute of limitations with respect to such transaction?

3. Whether the trial court erred in its determination that the Gowanus Transaction warranted the imposition of a constructive trust in favor of plaintiff Patrick Quadrozzi on 25% of the shares of Gowanus?

4. Whether the trial court erred in determining (i) that any claim for breach of fiduciary duty in connection with the Gowanus Transaction was timely asserted within the applicable limitations period and/or (ii) that defendants are estopped from asserting the statute of limitations with respect to such transaction?

PRELIMINARY STATEMENT

This is a family dispute that has more to do with conflicting personalities than any legally actionable wrongdoing. Plaintiff Patrick Quadrozzi ("Patrick") was given an ownership interest in certain companies which his older brother John Quadrozzi, Sr. ("John Sr.") owned and managed. Thereafter, John Sr. formed new companies, in which Patrick did *not* have any ownership interest, to acquire other assets. Years later, after John Sr. died, Patrick filed this action claiming an interest in those later-formed companies and/or the assets which they own.

Patrick's claims against defendants herein (his sister-in-law, niece and nephew and the companies in which he has no ownership interest) are founded on his alleged perceptions, understandings and beliefs based on some ambiguous, non-specific statements attributed to his deceased older brother, and his after-the-fact objections to the manner in which the businesses controlled by John Sr. were managed. Patrick's excuse for not asserting his claims within the applicable limitations periods -- and in fact waiting until after his brother's death -- is that he could not be bothered to read the K-1 forms he received or the tax returns he signed. Patrick, who was essentially a mechanic, was made a rich man by virtue of his older brother's largesse and business acumen, so he enjoyed his good fortune and

did not question John Sr.'s management and control of the various companies. Then, after John Sr.'s voice was stilled by illness and eventual death, Patrick took the position that he had not been given enough. Like Patrick's interest in the original companies, the interests in the later-formed companies which the trial court awarded him was essentially a gift.

STATEMENT OF FACTS

The Parties

Patrick commenced this action individually and derivatively on behalf of a number of companies that were in existence prior to the transactions which are at issue in this action.[1] The Original Quadrozzi Companies are named as nominal defendants in Patrick's complaint herein; the other defendants are the estate of John Sr. ("Estate"), Theresa Quadrozzi, individually and as executrix of the Estate ("Theresa"), Catherine Quadrozzi ("Catherine," John Sr.'s daughter), John Quadrozzi, Jr. ("John Jr.," John Sr.'s son), and thirteen other companies, twelve of which were formed in

[1] Those companies are: Amstel Recycling, Inc. ("Amstel"), Quadrozzi Concrete Corp. ("QCC"), Quadrozzi Enterprise Corp. ("QE"), Quadrozzi Equipment Leasing Corp. ("QEL"), Quadrozzi Inc. d/b/a NYCEMCO ("NYCEMCO"), Quadrozzi Realty Corp. ("QRC") and Beach Channel Drive Land Enterprises, Inc. ("Beach Channel") (collectively referred to herein as the "Original Quadrozzi Companies"). There is currently no dispute between the parties regarding Patrick's 25% ownership of the Original Quadrozzi Companies as well as Bay 32nd Place Development Corp., one of the other defendants named in Patrick's complaint.

connection with or as a result of the transactions at issue in this action.[2] Those transactions are: (i) the acquisition in 1990, by John Sr. and Michael DiBenedetto, pursuant to federal court order, through and/or for the Certified Companies and/or of the assets of Certified Concrete Corp. and Transit Mix Concrete Corp. (hereinafter, the "Certified Transaction"); (ii) the acquisition in 1997, by John Sr., using his own assets and the proceeds of a loan, of certain real property off of Columbia Street (the "Columbia Street Property") in the Gowanus section of Brooklyn (hereinafter, the "Gowanus Transaction"); and (iii) the acquisition in 1999, by certain of the Original Quadrozzi Companies and certain of the Certified Companies, of the assets of the Quality Companies (hereinafter, the "Quality Transaction").[3]

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[2] Those twelve companies are Edgewater Concrete Loading Corp. ("Edgewater"), Harlem Concrete Loading Corp. ("Harlem"), Manhattan West Concrete Loading Corp. ("Manhattan West"), Maspeth Concrete Loading Corp. ("Maspeth"), Maspeth Truck Depot Corp. ("Maspeth Truck"), Quadrozzi Acquisition Corp. ("Quad Acquisition"), Quadrozzi, LTD ("Quad LTD"), Red Hook Concrete Loading Corp. ("Red Hook Concrete") and Red Hook Truck Depot Corporation ("Red Hook Truck") (collectively referred to herein as the "Certified Companies"); Quality Concrete Corp. of New York ("Quality"), Quality Assurance Concrete Corp. ("QAC"), Queens (Concrete) Delivery and Leasing, Inc. ("Queens Delivery") (collectively referred to herein as the "Quality Companies"); and Gowanus Industrial Park, Inc. ("Gowanus").

[3] The Quality Transaction, while the subject of Patrick's complaint herein, did not really factor into the trial court's decision in this case. It will therefore not be discussed at any length in this brief.

The Complaint

Patrick alleges in his complaint with respect to the Certified Transaction and the Gowanus Transaction[4] that, although John Sr. acquired those assets in his own name, Patrick was informed that he, directly or through the Original Quadrozzi Companies, was a "beneficial" shareholder of the Certified Companies and Gowanus. According to Patrick, John Sr. agreed that shares reflecting such ownership "would be" issued to Patrick or the Original Quadrozzi Companies. (Compl't, ¶¶ 23, 24, 30, 31, 37, 38; R., pp. 55a, 56a, 57a).[5]

In his complaint, Patrick seeks various forms of relief based upon: (i) John Sr.'s failure to comply with his alleged "agreement" to issue shares of the Certified Companies and Gowanus to either Patrick or the Original Quadrozzi Companies; (ii) Theresa's refusal, as the executrix of John Sr.'s estate, to issue such shares to Patrick or the Original Quadrozzi Companies; and (iii) alleged breaches of fiduciary duty by Theresa, Catherine and John Jr., as directors and officers of all of the companies, following the death of John Sr. in 2004. Notably, the only affirmative conduct by John Sr. alleged in Patrick's complaint is John Sr.'s consummation of the Certified and

[4] Similar allegations were made with respect to the Quality Transaction; however, as noted above, that transaction is not in issue on this appeal and is therefore not included in this discussion.

Gowanus Transactions in his own name, and his alleged "agreements" with respect to the "beneficial" ownership of the assets acquired in those transactions.[6] (Compl't, ¶¶20, 23, 24, 35, 37, 38; R., pp. 55a-57a).

The Trial Court's Decision

In its decision following the trial in this action, the trial court held that, based on the evidence adduced at trial, Patrick had established claims for the imposition of a constructive trust and for breach of fiduciary duty by John Sr. in connection with both the Certified Transaction and the Gowanus Transaction (R., pp 34a, 35a, 43a-50a). The trial court also found that such claims were asserted within the applicable limitations period and/or that defendants were estopped from asserting a defense based on the statute of limitations (R., pp. 28a-33a, 40a, 41a).

The Certified Transaction

As to the Certified Transaction, the trial court found that the "promise" element of a claim for constructive trust had been established because (i) an implied promise by John Sr. to act in the best interests of Patrick and the Original Quadrozzi Companies arose from John Sr.'s role as a corporate fiduciary, and (ii) the use of the assets and/or credit of the

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[5] (R., p.__) refers to the page number of the record on appeal.

[6] In its decision denying the parties' summary judgment motions , the trial court also attributed the alleged wrongdoing following the asset acquisitions themselves to Theresa, Catherine and John Jr., not John Sr.

Original Quadrozzi Companies to secure the purchase price of the assets acquired in the Certified Transaction and the use of the personnel and assets of the Original Quadrozzi Companies and the Certified Companies interchangeably, as well as the course of dealing between/among John Sr., Patrick, and the Original Quadrozzi Companies over the years, gave rise to an implied promise that the Certified Companies were acquired for the benefit of both Patrick and John Sr. The trial court further found that John Sr. had been "unjustly enriched" by the Certified Transaction based largely on the same findings used to infer an implied promise -- the use of the assets and/or credit of the Original Quadrozzi Companies to fund the purchase and to develop the Certified Companies -- and a finding that Patrick had contributed services to the Certified Companies without compensation. In addition, the trial court found that Patrick's claim for the imposition of a constructive trust with respect to the Certified Transaction had been asserted within the applicable limitations period -- notwithstanding that the transaction occurred in 1990, and Patrick did not sue until 2005 -- because the "promise" made by John Sr. was not repudiated until 2003, when Theresa refused to acknowledge Patrick's claim to a 25% ownership interest in the Certified Companies, as John Sr. lay on his death bed. (R., pp. 30a, 31a).

The trial court further found that the use of the assets and personnel of the Original Quadrozzi Companies to operate the Certified Companies, without proper compensation, and the use of Certified Companies instead of QCC to produce concrete, also constituted a waste of the corporate assets of the Original Quadrozzi Companies and a breach of fiduciary duty. And although the trial court made no reference to any evidence that the foregoing activities were conducted in secret, for purposes of determining when the statute of limitations began to run with respect to Patrick's claim for breach of fiduciary duty in connection with the Certified Transaction, the trial court found that there was no evidence that John Sr. had openly repudiated his fiduciary obligations to the Original Quadrozzi Companies more than 6 years before Patrick commenced this action in 2005. (R., pp.30a, 31a).

The Gowanus Transaction

As to the Gowanus Transaction, the trial court found that Patrick had also established a claim for the imposition of a constructive trust with respect to the Columbia Street Property which was the subject of that transaction. As in the case of the Certified Transaction 7 years earlier, the trial court found an implied promise by John Sr. to acquire the Columbia Street Property for the benefit of both himself and Patrick because an implied promise to act in the best interests of Patrick and Original Quadrozzi

Companies arose from John Sr.'s role as a corporate fiduciary. The trial court further found that an implied promise by John Sr. to convey an interest in Gowanus to Patrick could be inferred from the circumstances surrounding the Gowanus Transaction, to wit: the diversion of a corporate opportunity, the manner in which John Sr. paid for the acquisition of the property, and the use of the assets and personnel of Gowanus and the Certified Companies and the Original Quadrozzi Companies interchangeably. Patrick established a transfer in reliance upon the implied promise by John Sr. regarding the Gowanus Transaction, according to the trial court, because Patrick offered credible evidence concerning the "original source" of the funds used to purchase the Columbia Street Property.[7] The court also noted the mortgage by Beach Channel, a company in which Patrick had an interest, as additional security for the loan from a third-party lender, as well as his contribution toward the value of Gowanus after the purchase of the property, either directly or through the Original Quadrozzi Companies, as additional evidence of Patrick's "reliance" on John Sr.'s implied promise. John Sr. was

[7] Based on the trial court's ultimate finding that the monies paid from accounts in the names of certain Original Quadrozzi Companies constituted distributions to John Sr. from those companies -- which were matched by comparable, pro rata distributions to Patrick, (R., pp. 665-668). -- the "original source" of the cash portion of the purchase price for the Columbia Street Property is irrelevant. The cash portion of the purchase price consisted of $1,250,000 of distributions to John Sr. from the Original Quadrozzi Companies for which Patrick received corresponding distributions, $500,000 which John

unjustly enriched by the Gowanus Transaction, the trial court found, because he had diverted a corporate opportunity belonging to the Original Quadrozzi Companies by acquiring the Columbia Street Property through a corporation owned solely by him, paid off the loan from the third-party with funds lent to Gowanus by QCC, and used the assets, facilities and personnel of the Original Quadrozzi Companies to operate Gowanus. (R., pp. 39a, 40a).

Although 8 years had elapsed between the Gowanus Transaction and the commencement of this action, the trial court found that Patrick's claim for a constructive trust with respect to the Columbia Street Property was timely asserted because John Sr.'s wrongful act in acquiring the Columbia Street Property in his own name was just the first in a series of wrongful acts relating to the property, and that Patrick based his claim for a constructive trust in connection with the Gowanus Transaction on those "continuing wrongful acts." In any event, according to the trial court, defendants were estopped from asserting the statute of limitations with respect to Patrick's claim for the imposition of a constructive trust on Gowanus because of John Sr.'s practice of using the assets of the various companies interchangeably and without proper accounting, which lulled Patrick into believing he had an interest in Gowanus -- notwithstanding that the Form K-1s issued to Patrick,

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Sr. withdrew from his IRA, and another $250,000 that John Sr. withdrew from other

and the tax returns he signed, clearly reflected that he had no ownership interest in Gowanus. Holding that, where a "fiduciary conceals facts" upon which a claim could be based a tolling of or estoppel to assert the statute of limitations is appropriate, and crediting Patrick's testimony that he was surprised to learn much later that John Sr. was the sole owner of Gowanus, the trial court found that John Sr. had breached his fiduciary duty by "concealing" from Patrick the acquisition of the Columbia Street Property in his own name -- and defendants were therefore estopped from asserting the statute of limitations against Patrick's claim for a constructive trust with respect to such property. (R., pp. 31a-33a).

The trial court also found that John Sr. had breached a fiduciary duty by appropriating to himself a corporate opportunity -- the opportunity to purchase the Columbia Street Property -- by purchasing that property through a company solely owned by him. The opportunity to purchase that property was a corporate opportunity (a "tangible expectancy"), the trial court found, because (i) it was originally intended that NYCEMCO would be the purchaser of the property, not John Sr. individually, and NYCEMCO had made the initial offer and had obtained commitments from a title insurance company, and (ii) there was a business plan which contemplated

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accounts in his name.

use of the property as a base of operations for the Original Quadrozzi Companies and the Certified Companies, with Gowanus renting parts of the property to the other companies. According to the trial court, John Sr. also breached his fiduciary duties: (a) to Beach Channel, when he mortgaged its assets in connection with the Gowanus Transaction; (b) to the Original Quadrozzi Companies, by permitting their assets, resources and personnel to be used to develop and operate the Columbia Street Property without proper accounting; and (c) to the Original Quadrozzi Companies, when he devised a scheme in 1999 to benefit Gowanus at the expense of QCC, by having Gowanus make a loan, at a high interest rate, to Maspeth (a Certified Company) so that Maspeth could manufacture and sell concrete to QCC. (R., pp. 44a-46a).

The trial court determined that Patrick's claims based on John Sr.'s breaches of fiduciary duty in connection with the 1997 Gowanus Transaction, as with the Certified Transaction 7 years earlier, were timely asserted, based on its finding that there was no evidence that John Sr. had openly repudiated his fiduciary obligations as a director, officer and majority shareholder of the Original Quadrozzi Companies prior to 1999. In any event, according to the trial court, defendants were estopped from asserting

the statute of limitations as a defense because of John Sr.'s concealment of his breaches of fiduciary duty. (R., pp. 32a, 33a).

The Remedies

Based on its various findings regarding the Certified Transaction and the Gowanus Transaction discussed above, many of which were applied interchangeably to fashion and sustain Patrick's claims, the trial court concluded that Patrick had proved his cause of action for the imposition of a constructive trust (on the assets of the Certified Companies and the Columbia Street Property) by clear and convincing evidence, and that he had proved his cause of action for breach of fiduciary duty (in connection with both transactions) by a preponderance of the evidence. In fashioning its remedies, however, the court made no mention of any actual or implied promise by John Sr. to Patrick, but rather noted that the imposition of a constructive trust is a remedy for the breach of a fiduciary duty, and that the impression of a constructive trust on the diverted assets is among the remedies for the diversion of a corporate opportunity. Stating that the wrongs were done to Patrick as a minority shareholder and to companies in which he had an interest, the trial court held that the constructive trust -- on 25% of the shares of the Certified Companies and 25% of the shares of Gowanus -- should be imposed in favor of Patrick individually. (R., p. 49a).

Additionally, the trial court found that John Sr. had used $2 million of his own funds to purchase the Columbia Street Property (the remainder of the purchase price having come from a third-party loan secured by a mortgage on the property). And although the court held that Patrick was entitled to an accounting of distributions (excluding inter-company distributions) made to John Sr. or his heirs (the individual defendants herein) dating back to the formation of the Certified Companies and Gowanus (due to the tolling of the statute of limitations), it also found that Patrick had not proven the amount of any damages flowing from the inter-company loans, the use of personnel of the Original Quadrozzi Companies to develop and/or operate the Certified Companies and Gowanus, or other similar alleged wrongdoing. (R., pp. 49a, 50a).

The Facts

John Sr. was the founder, president and majority shareholder of most of the Original Quadrozzi Companies,[8] the first of which, Quad, Inc., was formed in 1956. Until 1981, the sole shareholders of the Original Quadrozzi Companies then in existence were John Sr. and his brother

[8] The two exceptions were: Amstel, which was established as a minority-owned business and owned 25% by Patrick's wife, Loretta Quadrozzi, 50% by Theresa and 25% by Catherine; and NYCEMCO, which was originally only partly owned by Quad, Inc., with independent third-party interests owning 75% of the company. (R., pp. 112, 113). Patrick succeeded to his wife's 25% interest in Amstel upon her death; and Quad, Inc. is now the sole owner of NYCEMCO.

William Quadrozzi. In or about 1981, William Quadrozzi sold his interests in those companies to John Sr., and John Sr., in turn gifted a 25% interest in the companies to his younger brother Patrick (R., pp. 6, 564). John Sr. retained a 75% ownership interest in the Original Quadrozzi Companies (other than Amstel) until his death in 2004, and managed the companies. Patrick attended to the outside work -- concrete production and delivery, equipment maintenance and similar activities. (R., pp. 356, 357, 626, 627).

The Certified Transaction

In 1990, John Sr. formed the Certified Companies and they purchased the assets of the Certified and Transit Mix companies, from the trustee in the bankruptcy proceedings involving those companies, pursuant to an order issued by the United States District Court for the Southern District of New York in an action captioned *United States of America v. Anthony Salerno, et al.*, dated March 27, 1990 (Plaintiffs' Trial Exhibit 4; R., pp 727-736). That order stated in pertinent part:

> "Ownership Of Business: [John] Quadrozzi and [Michael] DiBenedetto shall be the sole shareholders of each of the Quad [Certified] Companies for the period defined in paragraph (1) of this Order, unless the following conditions are met. Quadrozzi and DiBenedetto shall be permitted to transfer or bequeath their stock or authorized issuance of new stock during that period only with the approval of the United States, which approval may be withheld for reasonable

causes relating to law enforcement..."

The period set forth in paragraph 1 of the order was seven years from the date of the sale of the assets (R., p. 728). Therefore, Patrick's claim that he was always an owner lacks credibility and was, in fact, impossible -- John Sr. could not have transferred an interest in the Certified Companies to Patrick until the expiration of the seven-year period -- March 27, 1997 -- absent approval from the federal court.[9] Thus, had John Sr. promised Patrick that he would have an interest in the Certified Companies, such an interest could have been conveyed after that date. There is no evidence, and particularly no documentary evidence, that any such conveyance was ever discussed.

Prior to approving the Certified Transaction, the federal court required the purchasers' principals to undergo formal background investigations (see Plaintiffs' Trial Exhibit 1, R., pp. 698-716). Patrick was aware of this requirement, and of the terms of the federal court order generally (R., pp. 135-137, 559-561). Largely for that reason, Patrick opposed the Certified Transaction and was concerned about John Sr.'s involvement (R., pp. 559-561, 135-137). Not only was Patrick aware beginning in 1990 that he did not (and could not) have an ownership interest in the Certified Companies,

[9] No such approval was ever sought (R., pp. 167, 168) or obtained.

he also was aware that no action was taken during the years after 1997 to convey an interest in those companies to him. Patrick's personal tax returns and the K-1s issued to him during those years specifically reflected ownership interests in QCC, QEL, QRC and NYCEMCO, but failed to reflect an ownership interest in any of the Certified Companies (see Defendants' Trial Exhibits C, D, E, F, G, H, I, J, K, L, M and N (R., pp. 1551 - 1811)). Additionally, the Certified Companies' tax returns reflected that their sole shareholder was John Sr. (see Defendants Trial Exhibits W, Y, and Z R., R. pp. 1865, 1875, 1884), and Patrick admittedly had readily available access to the books and records of those companies. Yet, it was not until sometime in 2003, when John Sr. was on his deathbed that Patrick pressed for recognition of his perceived ownership interest in the Certified Companies (R., pp. 50-52).

Patrick may have performed services for the Certified Companies which were similar to those he performed for the Original Quadrozzi Companies. However, those services were not gratuitous on Patrick's part. Patrick, like all of the other employees who performed services for the Original Quadrozzi Companies, and later for the Certified Companies, was employed by Amstel, which functioned as a labor company, billing and

receiving payment from the other companies for the services of its employees (R., p. 486). Patrick was compensated by or through Amstel for the services he rendered to the Certified Companies, just as he was paid for his services to the Original Quadrozzi Companies (R., pp. 173, 486).

The Gowanus Transaction

On February 27, 1997, Gowanus purchased the Columbia Street Property for $3.5 million. John Sr. took distributions from certain of the Original Quadrozzi Companies,[10] and withdrew $500,000 from his IRA and $250,000 from other bank accounts in his name, and paid $2.0 million to Gowanus for the cash portion of the purchase price (R., p. 661 – 665, 669 – 670). FCV Consultants ("FCV"), a third-party lender, loaned $1.5 million to Gowanus to fund the remainder of the purchase price (see Plaintiffs' Trial Exhibit 29A, 1066 - 1067 and R., p. 669-670, 1066- 1067). Patrick paid no part of the purchase price for the Columbia Street Property. The loan from FCV was secured primarily by the Columbia Street Property with an additional mortgage being given on real property owned by Beach Channel. QCC ultimately paid off the loan to FCV, resulting in a loan from QCC to

[10] As noted above, the trial court found that comparable distributions (based on his percentage ownership of the Original Quadrozzi Companies) were made to Patrick, and held that the portion of the purchase price which did not come from a third-party loan was personally paid by John Sr. (R., p. 48a).

Gowanus, which was interest bearing and tracked "to the penny" in the books and records of both QCC and Gowanus (R., pp. 669-671).

It was originally contemplated that the acquisition of the Columbia Street Property might be effected through NYCEMCO, the company at which John Jr. worked.[11] John Jr. had first learned of the availability of the property and brought it to the attention of his father, and it was envisioned that John Jr. would be responsible for the development of that property -- which consisted of grain silos and a loading dock on the Brooklyn waterfront (R., pp. 538-540). It was ultimately determined, however, that a new company (Gowanus) would be formed to acquire the property.

Aside from supervising some clean-up work, Patrick had little to do with the development -- such as there has been -- of the Columbia Street Property (R., pp. 555-558, 574-576). The business plan initially prepared for the development of the property (see Plaintiff's Trial Exhibit; R., pp. 833-896) -- although it was never implemented -- reflects the limited role that Patrick was to play in that development. Clearly, it was to be John Jr.'s project.

[11] John Jr. worked at, and effectively ran, NYCEMCO, which owned a permanently-moored ship that stored cement (the adhesive component of concrete) to be sold to QCC, the Certified Companies and other unrelated concrete companies (R., pp. 45, 57, 58). Patrick on the other hand, was involved in the concrete operations (R., pp. 356, 357, 626, 627). That arrangement kept Patrick and John Jr., who did not get along, apart from one another (R., p. 539).

Inter-Company Transactions

There were various loans and other transactions between and among the Original Quadrozzi Companies, the Certified Companies and Gowanus. Those transactions were each properly recorded in the respective companies' books and records. As defendants' financial expert, Russell Kanzler testified, each of the companies he reviewed kept separate books and records, and great attention to detail was paid to ensure that those books and records were accurately kept (R., pp. 672-673). Such transactions were hardly outside the norm for closely-held companies, whether such companies are wholly or only partially commonly owned.

The Certified Companies and Gowanus have always been subchapter S corporations, and the books and records of those companies -- which were readily available to Patrick -- as well as their tax returns and Form K-1s, have always indicated that John Sr. was the sole shareholder (R., pp. 656-659). Although Patrick admittedly received K-1s from the Original Quadrozzi Companies, he never received K-1s from any of the Certified Companies or Gowanus (R., pp. 145-161). The tax returns that Patrick signed each year, to which his K-1s were attached, clearly reflected his ownership interests in the Original Quadrozzi Companies, and his lack of any ownership in interest in the Certified Companies or Gowanus (see

Defendants' Trial Exhibits C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, and S (R., pp. 1551-1858)).

ARGUMENT

The trial court's decision to impose a constructive trust in favor of Patrick on the shares of the Certified Companies and Gowanus was clearly erroneous. The implied promise by John Sr. to convey an interest in those companies was created from whole cloth, based on Patrick's belated musings about what he thought should have occurred, and some insinuations about statements made by John Sr. that could not be explored at trial. In any event, if there was any such promise, it was breached no later than 1997 -- 8 years before this action was commenced -- when the supposedly promised transfers did not occur. Patrick's excuse for not knowing that he did not have an interest in the Certified Companies or Gowanus, and for not seeking his claim to such interests until 2005 -- that his habit was not to read documents that he signed -- simply does not hold water, and is no basis for the tolling of the statute of limitations.

Similarly, any breach of fiduciary duty by John Sr. in connection with the Gowanus Transaction occurred when that transaction took place in 1997. Any subsequent conduct by John Sr. that was not a natural consequence of his acquisition of the Columbia Street Property in his own name was

separate conduct independent of the Gowanus Transaction itself. That independent conduct, if it was wrongful, carried its own statute of limitations, but any relief would be limited to the damages flowing from that specific conduct; that would not include relief that may have been warranted by the transaction itself -- such as the imposition of a constructive trust on the acquired assets. Furthermore, neither the Gowanus Transaction itself nor John Sr.'s subsequent management of Gowanus was kept secret from Patrick, or anyone else. The transactions between Gowanus and the Original Quadrozzi Companies were conducted openly and accurately documented in the books and records of the respective companies -- and those books and records were readily available to Patrick. The fact that Patrick did not avail himself of the information at his disposal -- and chose not to read what he signed -- is no basis for a tolling of the statute of limitations with respect to the Gowanus Transaction, and it certainly does not warrant a finding of fraud on the part of John Sr.

Point I

The Trial Court's Imposition of a Constructive Trust in Favor of Patrick on 25% of the Shares of the Certified Companies was Clear Error

Although the trial court makes mention of the Certified Transaction in its discussion of breaches of fiduciary duty, the imposition of a constructive

trust on the shares of the Certified Companies was based primarily on the finding that John Sr. had made an implied promise to convey an interest in the Certified Companies to Patrick. However, not only was such a promise distilled from the ethereal, if any such promise was made, it was made 15 years before this action was commenced. The imposition of a constructive trust on 25% of the shares of the Certified Companies was clearly not founded on any solid evidentiary base, and it was barred by the applicable statute of limitations.

A. The Elements of a Constructive Trust Were Not Established Here

The constructive trust doctrine serves as a "fraud-rectifying" remedy rather than an "intent-enforcing" one. *Bankers Sec. Ins. Society v. Shakerdge*, 49 N.Y.2d 939, 940, 406 N.E.2d 440, 441 (1980) ("*Bankers Security Life*"). The equitable remedy of a constructive trust is only warranted where there is "clear and convincing evidence" of (i) a confidential or fiduciary relationship, (ii) an express or implied promise, (iii) a transfer in reliance on such promise and (iv) unjust enrichment of the transferee. *Martha Graham Sch. & Dance Found. v. Martha Graham Ctr.*, 380 F.3d 624, 646, 2004 U.S. App. LEXIS 17452, 57 (2d Cir. 2004). Here, there was no fraud to be rectified; nor was there clear and convincing evidence of the elements of a constructive trust.

According to the trial court, Patrick "formed the belief" that he had an ownership interest in the Certified Companies because of the interaction between those companies and the Original Quadrozzi Companies following the Certified Transaction (R., pp.18a-19a). The court also based its finding on the testimony of Michael Cotton, a British barrister and former advisor and allegedly close friend of John Sr. ("Cotton"),[12] who testified that John Sr. had "told him" that Patrick was a "shareholder in everything," and that it was his (Cotton's) "understanding" of the Certified Transaction that QCC had acquired the assets of the Certified and Transit Mix companies (R., pp. 392, 396-398).[13] A person's impressions based on another's conduct or vague remarks are not sufficient to establish an implied promise, *Bankers Security Life*, 49 N.Y.2d at 940 (statements by decedent's brother that he would "do the right thing" and "take care of" decedent's wife not specific enough to prove a promise to apply certain insurance proceeds), and no such promise was proved by Patrick here.

[12] Cotton was paid $1,000 a day to attend the trial in this action, and the uncompleted trial in the prior dissolution proceeding, as well as his travel and substantial lodging expenses to attend both trials (R., pp. 412-417). Nevertheless, the trial court found that he was not an "interested" witness for purposes of the Dead Man Statute (R., pp. 346-347).

[13] Apparently, Cotton never bothered to read the documentation pertaining to the Certified Transaction, much of which was introduced into evidence at trial, which clearly belied his professed "understanding."

Moreover, as Patrick well knew, John Sr. could not have made a promise -- express or implied -- to convey an interest in the Certified Companies to Patrick immediately following the Certified Transaction, because any such promise would have violated the terms of a federal court order, and thus been void as illegal. *See Itskov v. New York Fertility Institute, Inc.*, 813 N.Y.S.2d 844, 11 Misc.3d 68, 69, (2d Dep't 2006). Nor could Patrick have "formed the belief" that that he had an ownership interest in Certified Companies during the seven-year period following the entry of the federal court order, unless he assumed that John Sr. had violated the terms of that order. No such suggestion was made at trial; nor was there any evidence at trial from which a promise by John Sr., to transfer an interest in the Certified Companies to Patrick or one of the Original Quadrozzi Companies after the expiration of the seven-year period set forth in the federal court order, could be inferred. Simply stated, the trial court's finding of an implied promise by John Sr. in connection with the Certified Transaction flies in the face of the facts.

The trial court also erred in its finding that John Sr. was unjustly enriched by Patrick's performance of duties on behalf of the Certified Companies. As noted above, Patrick's work for the Certified Companies was not gratuitous. Patrick was employed by Amstel, as were other

employees who did work for the other Original Quadrozzi Companies, and Amstel was compensated for work done by its employees for the other companies (R., pp. 485-487). Such inter-corporate transactions among companies that are commonly-owned, in whole or in part, are certainly not unusual; nor are they inherently unlawful (*see Kutik v. Taylor*, 364 N.Y.S.2d 387, 390, 80 Misc. 2d 839, 841 (Sup. Ct. Kings Cty. 1975)). In any event, John Sr. did not have an ownership interest in Amstel, but Patrick did (after the death of his wife; so, if ownership is the factor used to determine benefit derived from financial transactions between companies, Patrick, not John Sr., presumably benefited from increased income to Amstel. In fact, to the extent that any of the Original Quadrozzi Companies benefited from the Certified Transaction, Patrick would have shared in that benefit through the distributions made to him as a 25% owner of the Original Quadrozzi Companies. Notable in that regard is the trial court's holding that Patrick had proven no damages resulting from the inter-company transactions between the Original Quadrozzi Companies and the Certified Companies (R., pp. 49a-50a). That holding operates to preclude any finding that John Sr. was unjustly enriched by the Certified Transaction -- as does the fact that Patrick consented to John Sr.'s consummation of the Certified Transaction without Patrick's participation, by choosing not to become a qualified buyer

of the Certified and Transit Mix assets (R., pp. 135-137, 559-561). If a party consents to his exclusion from a transaction, he cannot be heard to assert that those who benefited from the transaction were unjustly enriched. *Edelman v. Starwood Capital Group, LLC,* 70 A.D.3d 246, 250-251, 2009 NY Slip Op 9309 (1st Dep't 2009).

B. **Patrick's Claim for the Imposition of a Constructive Trust Was Not Timely Asserted**

The six-year statute of limitations for a claim for the imposition of a constructive trust begins to run at the time of the wrongful conduct or the event giving rise to a duty to convey the property. *Maric Piping, Inc. v. Maric*, 705 N.Y.S.2d 684, 685, 271 A.D.2d 507, 508 (2d Dep't 2000). When the property has been rightfully acquired but wrongfully withheld, the statute begins to run when the agreement or promise to transfer the property to the promise is breached or repudiated. *Id.* at 685. Here, the trial court found that John Sr.'s implied promise that Patrick or QCC would have an interest in the Certified Companies was not breached until 2003, as John Sr. lay on his death bed, when Theresa disputed Patrick's claim to an interest in the Certified Companies. That finding serves to demonstrate the danger in distilling from vague testimony a promise that is the glaringly ambiguous and totally lacking in substance. *See Bankers Security Life*, 49 N.Y.2d at 940; *see also New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 662 N.E.2d

764 (1995). If the nature of the promise and when it is to be fulfilled are never delineated, it leaves the door open to a nullification of the statute of limitations. That is what happened here.

Any promise made by John Sr. to Patrick with respect to an interest in the Certified Companies necessarily must have been to the effect that, once the seven-year restriction on ownership of the Certified Companies expired, he would transfer an interest in those companies to Patrick (or one of the Original Quadrozzi Companies). Thus, the promise would have been breached in 1997, when the restriction on ownership of the Certified Companies expired, and the statute of limitations would have begun to run at that time. The trial court's finding that the promise wasn't breached until 2003 was based on Patrick's testimony that he believed he had an ownership interest in the Certified Companies[14] and didn't know otherwise until Theresa disputed his assertion of such an interest. The court gave credence to that testimony because Patrick further testified that he "just signed what was put in front of him" and didn't read the tax returns he signed, or the K-1s he was given, which would have apprised him otherwise (R., pp. 145-161).

[14] There is an obvious inconsistency between Patrick's professed "belief" that he already had an interest in the Certified Companies and his "understanding" that such an interest "would be" given to him (R., pp. 50, 51). If he already owned an interest, there was no need for a promise to give him one.

It is axiomatic that a person is charged with knowledge of the contents of documents that he signs. *Consolidated Edison Co. of New York v. United States*, 221 F.3d 364, 371, 2000 U.S. App. LEXIS 18283 (2d. Cir. 2000); *Slater v. Fidelity & Casualty Co.*, 277 A.D. 79, 81, 98 N.Y.S.2d 28 (1st Dept. 1950); *Metzger v. Aetna Ins. Co.*, 227 N.Y. 411, 416, 125 N.E. 814 (1920). Accordingly, Patrick's denial of knowledge that neither he nor any of the Original Quadrozzi Companies were shareholders of any of the Certified Companies -- for 13 years after the Certified Transaction -- is not only incredible, it is ineffective as a matter of law. Patrick's failure to assert his claim to an interest in the Certified Companies until after his brother's death -- 15 years after the Certified Transaction, and 8 years after such an interest could have been conveyed to him -- mandates a dismissal of that claim under the statute of limitations.[15]

[15] The trial court's holding that Patrick's claim for breach of fiduciary duty in respect of Certified Transaction was timely fares no better under the law and facts here. The trial court found that there was no evidence that, prior to 1999, John Sr. had openly repudiated his fiduciary obligations to the Original Quadrozzi Companies -- which he allegedly breached by using the assets and personnel of the companies to operate the Certified Companies, without compensation, and using the Certified Companies instead of QCC to produce concrete (R., pp. 43a-44a). However, there is absolutely no evidence that any of those allegedly wrongful activities were conducted in secret, or were not duly documented in the books and records of the respective companies -- of which Patrick is also charged with knowledge. *See Braitman v. Vasile*, 249 A.D.2d 956, 672 N.Y.S.2d 564 (4th Dep't 1998). The breach therefore occurred when the first of those activities took place, which was in 1990.

Point II

The Trial Court's Imposition of a Constructive Trust in Favor of Patrick On 25% of the Shares of Gowanus was Clear Error

While the trial court based its imposition of a constructive trust on the shares of Gowanus in part on an implied promise by John Sr. to transfer an interest in Gowanus to Patrick, the evidence of such a promise in connection with the Gowanus Transaction is even less plausible and more ethereal than in the case of the Certified Transaction. With respect to the Gowanus Transaction, the trial court essentially based its imposition of a constructive trust on its finding that John Sr. had breached his fiduciary duty to the Original Quadrozzi Companies by diverting a corporate opportunity -- the opportunity to acquire the Columbia Street Property. However, not only does the evidence here demonstrate that no corporate opportunity was diverted, any such diversion -- and the corresponding breach of fiduciary duty -- occurred in 1997, eight years before this action was commenced.

A. <u>There Was No Diversion of a Corporate Opportunity</u>

The trial court found that the opportunity to acquire the Columbia Street Property was a "tangible expectancy" of the Original Quadrozzi Companies because it was originally intended that NYCEMCO would purchase the property and there was a business plan prepared at some point which contemplated that the property would become a new base of

operations for the Original Quadrozzi Companies and the Certified Companies. However, the "tangible expectancy" test should *not* be used to prevent directors from purchasing property which *might be useful* to the corporation, but only to bar the acquisition of property that the corporation *needs* or is seeking, or which the director is otherwise under a duty to the corporation to acquire for it. *Alexander & Alexander v. Fritzen*, 147 A.D.2d 241 542 N.Y.S.2d 530 (1st Dep't 1989). The Columbia Street Property did not fall in that category.

First of all, there is no evidence that any of the Original Quadrozzi Companies were looking for a new home. Moreover, the Columbia Street Property housed a marine grain terminal. There was no inherent synergy between that property and the concrete operations of the Original Quadrozzi Companies; for those companies it was just another piece of real estate. The availability of the Columbia Street Property first came to the attention of John Jr., who ran NYCEMCO (R., pp. 502- 504). NYCEMCO was a floating cement distribution facility which sold cement, not only to the Original Quadrozzi Companies, but to other concrete companies as well (R., pp. 45, 57-58, 552, 553, 595). While the Columbia Street Property may have been a more logical acquisition for NYCEMCO than for the other Original Quadrozzi Companies, there was no evidence that NYCEMCO

needed to move its operation there -- and in fact it never did. (R., pp. 617-618).

In any event, it is QCC and the other Original Quadrozzi Companies, not NYCEMCO, from which Patrick alleges the corporate opportunity was diverted (R., pp. 39a-40a). However, there was certainly no need for the concrete operations of the Original Quadrozzi Companies or the Certified Companies to be relocated to the Columbia Street Property. At the time of the Gowanus Transaction, the Redhook concrete plant acquired in the Certified Transaction was in the process of being retrofitted, and that retrofitting continued after the Gowanus Transaction (R., pp. 174, 542-543). The Redhook plant was a mile and a half from the Columbia Street Property, and any concrete plant relocated to or constructed on the Columbia Street Property would have served the same area as the Redhook plant (R., pp. 542-543). It therefore was not only unnecessary, it simply made no sense (having gone to the expense of retrofitting the Redhook plant) to put a concrete plant on the Columbia Street Property -- and in fact that was never done.

As for the purported business plan, it was the creation of the British barrister Cotton (see Plaintiffs' Trial Exhibit 16, R., pp. 833-896). It was, in fact, never implemented, so it hardly constitutes evidence that the property

was necessary or essential to the Original Quadrozzi Companies. The plan does, however, reflect that Patrick's involvement in the project was contemplated to be -- and it in fact was -- minimal. His professed expectation of an ownership interest in Gowanus or the Columbia Street Property, therefore, is not evidenced by the documents of record. Indeed, as in the case of the Certified Companies, Patrick's lack of an ownership interest in Gowanus was a matter of record, not only in the corporate books readily available to him, but in the K-1s he was given and the tax returns he signed (R., pp. 670-671 1551-1858).

B. **Patrick's Claim for a Constructive Trust Based on John Sr.'s Alleged Breach of Fiduciary Duty Was Not Timely Asserted.**

The trial court held that Patrick's claim for the imposition of a constructive trust and alleged breaches of fiduciary duty by John Sr. in connection with the Gowanus Transaction were asserted within the applicable limitations period because, the court found: (i) John Sr.'s wrongful act in acquiring the Columbia Street Property was just the first in a series of wrongful acts relating to the property; and (ii) there was no evidence that John Sr. had openly repudiated his fiduciary obligations as a director, officer and majority shareholder of the Original Quadrozzi Companies prior to 1999. Alternatively, according to the trial court,

defendants were estopped from asserting the statute of limitations as a defense because John Sr. had further breached his fiduciary duty by "concealing" from Patrick that Gowanus, the corporation through which the acquisition of the Columbia Street Property was effected, was wholly owned by John Sr.

The continuous wrong doctrine is applied in certain cases where the harm sustained by the complainant is not exclusively traceable to the original objectionable act; however, the subsequent injuries or repeated offenses create separate causes of action, and the statute begins to run as to each such cause of action upon the commission of the specific injury or offense. *Covington v. Walker*, 3 N.Y.3d 287, 819 N.E.2d 1025 (2004). On the other hand, where the conduct subsequent to the initial transaction merely relates to or bears on the purpose and nature of that transaction (*Rutkin v. Reinfeld*, 229 F.2d 248, 252, 1956 U.S. App. LEXIS 3570, 7-8 (2d Cir. 1956)), or where the subsequent actions are not independent wrongs but merely actions which flow from the initial wrong (*Korn v. Merrill*, 403 F.Supp. 377, 382, 1975 U.S. Dist. LEXIS 15520, 7-8 (S.D.N.Y. 1975)), or where the actions taken subsequent to the diversion of a corporate opportunity merely reflect damages from the diversion itself (*Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F.Supp. 640, 1964 U.S. Dist. LEXIS

6835 (S.D.N.Y. 1964)), the statute of limitations with respect to the initial wrongdoing is not extended or tolled, and the claim must be asserted within the limitations period measured from the time of the initial, allegedly wrongful, transaction -- here the Gowanus Transaction in 1997. Otherwise, it would make a shambles of the statute of limitations and pervert its salutary purpose. *Rutkin v. Reinfeld*, 229 F.2d at 252. In other words, a plaintiff cannot have it both ways. Either the subsequent conduct flows from the initial conduct, in which case the plaintiff must commence his action within the limitations period measured from the initial conduct, or the subsequent conduct is separate and independent of the initial conduct, in which case the plaintiff is limited to damages attributable to that separate conduct. *See Bussino v. Cont'l Assurance Co.*, 578 F.Supp. 1518, 1983 U.S. Dist LEXIS 10359 (S.D.N.Y. 1983).

It is clear from Patrick's complaint in this action that the conduct of John Sr. about which he complains is the acquisition of the Columbia Street Property by Gowanus, a corporation solely owned by John Sr. The subsequent conduct alleged in the complaint is attributed to Theresa, Catherine and John, Jr., the individual defendants herein. Patrick attempted to present at trial evidence of wrongful conduct by John Sr. subsequent to the Gowanus Transaction itself. However, not only was such alleged

conduct not wrongful,[16] it was separate from and independent of the Gowanus Transaction itself. Therefore, even if such conduct could be deemed to constitute wrongdoing, a separate limitations period would apply, and Patrick would be entitled only to relief relating to that independent conduct. That relief would not include the imposition of a constructive trust on the shares of Gowanus. The imposition of a constructive trust would only be appropriate for wrongdoing in connection with the Gowanus Transaction itself. Moreover, Patrick was entitled to no relief in respect of John Sr.'s alleged conduct subsequent to the Gowanus Transaction, because the trial court held that Patrick proved no damages arising from such conduct.

In awarding Patrick a constructive trust on 25% of the shares of Gowanus, based on alleged conduct by John Sr. after the Gowanus Transaction, the trial court not only disregarded the facts, it misapplied the law. Patrick failed to assert his claim based on John Sr.'s alleged breach of fiduciary duty in connection with the Gowanus Transaction within the applicable limitations period -- *i.e.*, by February 26, 2003 -- and such claim should have been dismissed.

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[16] As Russell Kranzler testified, there is nothing inherently wrongful about the inter-company transactions involved here (R., p. 688-691).

Nor did Patrick establish a basis for the application of the doctrine of equitable estoppel in connection with the Gowanus Transaction. Under the doctrine of equitable estoppel, a "defendant is estopped from pleading a statute of limitations defense if the 'plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action'." *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 491, 868 N.E. 189, 198 (2007) (quoting *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-49, 377 N.E.2d 713 (1978)). The "uncommon remedy of equitable estoppel 'is triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient'." *Id.* (quoting *Zoe G. v. Frederick F.G.*, 208 A.D.2d 675, 675-676, 617 N.Y.S.2d 370 (2d Dep't 1994)). Furthermore, "due diligence on the part of the plaintiff in bringing his action is an essential element for the applicability of the doctrine of equitable estoppel." *Simcuski v. Saeli*, 44 N.Y.2d at 450; *See also Marshall v. Duryea*, 172 A.D.2d 726, 569 N.Y.S.2d 112 (2d Dep't 1991); *Putter v. North Shore Univ. Hosp.*, 7 N.Y.3d 548, 858 N.E.2d 1140 (2006); *Pahlad v. Brusiman*, 8 N.Y.3d 901, 865 N.E.2d 1240 (2007); *Greene v. Abbott Laboratories*, 148 A.D.2d 403, 539 N.Y.S.2d 531 (1st Dep't 1989). Moreover, the plaintiff has the burden of establishing the applicability of the

doctrine. *Pate v. Pate*, 17 A.D.3d 334, 791 N.Y.S.2d 849 (2d Dep't 2005). Patrick fell far short of meeting that burden here.

Patrick produced no evidence that any statements or affirmative conduct by John Sr. misled him into believing that Patrick or any of the Original Quadrozzi Companies had an ownership interest in Gowanus. On the contrary, John Sr.'s sole ownership of Gowanus was a matter of record, and those records were readily available to Patrick (R., pp.189-191), and he is charged with knowledge of those records (*Braitman v. Vasile*, 249 A.D.2d at 956). Moreover, Patrick's lack of any ownership interest in Gowanus was clearly evident from the tax returns he signed and the K-1s he received (R., pp. 1551-1858).

Patrick obviously knew that Gowanus was formed to purchase the Columbia Street Property, and that NYCEMCO had not been the purchaser (R., p. 84-85, 189-191). That change in plans alone should have led to an inquiry by Patrick concerning the ownership of Gowanus. Having buried his head in the sand, and not bothered to read documents which he signed -- and of which he is charged with knowledge (*Root et al. v. Zaller et al.*, 2 N.Y.S. 742, 1888 N.Y. Misc. LEXIS 773 (N.Y. City Ct. 1888); *John-Manville Sales Corp. v. Stone*, 5 A.D.2d 110, 114, 169 N.Y.S.2d 259 (1st Dept. 1957)) -- Patrick cannot be heard to say that he was surprised to learn years later that

John Sr. was the sole owner of Gowanus. His testimony in that regard was simply not credible, as a matter of law.

For the same reasons, the trial court's conclusion that there was no evidence that John Sr. had openly repudiated his fiduciary obligations in connection with the Gowanus Transaction before 1999 is also clearly erroneous. His purchase of the Columbia Street Property through a corporation of which he was the sole owner, to the extent that it was a breach of fiduciary duty, was open and a matter of record (R., pp. 188-191, 1551-1858). There is no evidence that John Sr. took affirmative action to conceal the circumstances surrounding that acquisition. If Patrick was not aware of those circumstances, it was because of his lack of due diligence.

Even if John Sr. had fraudulently misled Patrick into believing that either Patrick or one of the Original Quadrozzi Companies had an ownership interest in Gowanus, by concealing his sole ownership of that company, Patrick's claim that John Sr. had breached his fiduciary duties in connection with the Gowanus Transaction would nevertheless be time-barred. Pursuant to CPLR §213(8), a "cause of action sounding in fraud must be brought within 6 years from the date of the fraudulent act or 2 years from the date the party discovered the fraud or could, with due diligence have discovered it." That discovery accrual rule applies to fraud-based breach of fiduciary

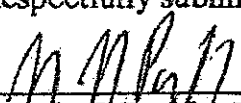
claims. *Ozelken v. Tyree Bros. Envtl. Servs, Inc.*, 29 A.D.3d 877, 878, 815 N.Y.S.2d 265, 267 (2d Dep't 2006); *Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dep't 2003). As discussed above, with a minimum of due diligence Patrick certainly could have discovered the allegedly fraudulently-concealed breach of fiduciary duty -- John Sr.'s purchase of the Columbia Street Property in his own name -- in 1997, when the Gowanus Transaction occurred. However, even crediting Patrick's testimony that he didn't learn of the facts concerning ownership of Gowanus until the summer of 2003, when Theresa disputed his assertion of an interest in Gowanus (R., pp. 50-51, 85-86, 561-562), that was more than two years before his commencement of this action in November 10, 2005. Under any reasonable interpretation of the evidentiary record here, therefore, Patrick's claim for breach of fiduciary duty in connection with the Gowanus Transaction is time-barred, and the imposition of a constructive trust in favor of Patrick on 25% of the shares of Gowanus was clearly erroneous.

CONCLUSION

For the reasons stated above, defendants respectfully urge the court to reverse the trial court's decision dated June 10, 2009, and the interlocutory judgment entered pursuant thereto on July 13, 2010, and direct that judgment be entered dismissing this action in its entirety, with prejudice.

Dated: July 26, 2011
New York, New York

Respectfully submitted,



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APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Office Word 2003.

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