To Be Argued By:
Cheryl F. Korman
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Case 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 DEPORT 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 PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

In an action to determine ownership interests in various corporate entities, plaintiff-respondent Patrick Quadrozzi, individually and as a shareholder of various corporate entities ("Patrick"), submits this brief in response to the appeal filed by defendants-appellants, which are comprised of the estate of his older brother John Quadrozzi, Sr., ("John Sr."), its heirs and numerous other corporate entities. The appeal is from a Judgment of the Supreme Court, Queens County (Grays, J.) dated June 23, 2010, which, following a bench trial, inter alia, awarded Patrick a constructive trust in his favor to the extent of a 25% ownership interest in companies collectively known as the Certified Acquisition Companies ("Certified") and Gowanus Industrial Park ("Gowanus").

Patrick demonstrates below that the Supreme Court properly imposed a constructive trust on his behalf in connection with these companies. The evidentiary proof adduced at trial revealed a course of dealing between Patrick and his older brother, wherein assets of the various corporate entities were used interchangeably and for the benefit of the family businesses as a whole, and that it was understood that Patrick was entitled to a 25% share of each of these entities. A review of the financial transactions, business practices, general ledgers and testimony adduced at trial reveals this to be the clear understanding between the brothers. It was only when John Sr. became ill that his wife, son and daughter

sought to deny Patrick his rightful ownership interest in the family business, leading to the instant lawsuit.

The fact that certain corporate and legal formalisms were not always followed within the family-owned and operated Quadrozzi companies, is of no moment. A review of the evidence reveals that both Certified and Gowanus were founded with income from other family-owned businesses in which Patrick indisputably has an equity interest. These brothers worked together for more than 40 years, and it is beyond dispute that all of the family assets were products of these brothers' lifetime joint efforts.

The evidence at trial established that Patrick expected to own 25% of all family companies. John Sr. repeatedly advised, assured and represented to Patrick that each of the transactions was undertaken for the benefit of the Quadrozzi companies and for the benefit of Patrick as a shareholder thereof. It was made clear that Patrick was a participant in each acquisition to the same extent that he was a shareholder of the other Quadrozzi companies.

In light of the fact that the trial court's award to Patrick of a constructive trust in his favor to the extent of a 25% ownership interest in both Certified and Gowanus was based upon a fair interpretation of the evidence, it must not be disturbed on appeal.

Accordingly, the judgment appealed from should be affirmed, with costs.

QUESTIONS PRESENTED

Whether The Determination That Patrick Was Entitled To the Imposition of a Constructive Trust On 25% Of The Shares Of Certified And Of Gowanus Was Based Upon A Fair Interpretation Of The Evidence?

This question should be answered in the affirmative.

Whether The Determination That The Cause Of Action For The Imposition Of A Constructive Trust Was Timely Commenced Was Based Upon A Fair Interpretation Of The Evidence?

This question should be answered in the affirmative.

Whether the Determination That Patrick Established A Breach of Fiduciary Duty On The Part of John Sr., Was Based Upon A Fair interpretation Of The Evidence?

This question should be answered in the affirmative.

Whether The Determination That The Cause of Action Based Upon A Breach of Fiduciary Duty Was Timely Commenced Was Based Upon A Fair Interpretation Of The Evidence?

This question should be answered in the affirmative.

FACTUAL AND PROCEDURAL BACKGROUND

A. Background Facts

Patrick Quadrozzi is the younger brother of the late John Quadrozzi, Sr. and William Quadrozzi. John Sr. and William formed various corporate entities that

worked together manufacturing and supplying concrete and related products. John Sr. initially had a 51% and William a 49% interest in the companies. William retired in 1981. After William's retirement, John Sr. had a 75% interest and Patrick had a 25% interest in the companies.

These entities were all inextricably intertwined and included Quadrozzi Concrete Corporation ("QCC"), an entity that produces ready mix concrete; Quadrozzi Equipment Leasing Corp. ("QEL"), a transportation company used to deliver concrete and other materials produced and sold by QCC; Beach Channel Drive, a piece of property leased by the Quadrozzi companies as a storage facility; Quadrozzi Realty Corp., an entity holding title to various parcels of real estate utilized by other Quadrozzi companies; Amstel Recycling, an entity formed for the purpose of recycling construction related materials, and which provided labor, equipment and various services to the other Quadrozzi companies; and Quadrozzi Inc., the original company that was started when the family operated a repair shop, and which owned New York Cement Company ("NYCEMCO"), an importer of bulk cement. It is undisputed that Patrick had a 25% ownership interest in these entities ("the original Quadrozzi Companies").

Patrick and John Sr. worked together for over 40 years.[1] Patrick took charge of company operations and John Sr. took charge of the administrative, financial,

[1] Patrick started working for the family businesses at age 12 and never had a job outside the family businesses.

and investment matters. The brothers used the funds and resources from the original Quadrozzi companies to establish other Quadrozzi companies with the understanding that Patrick would have a 25% interest and John Sr. a 75% interest in the newly formed companies. Two of these acquisitions are the subject of this appeal: (1) the acquisition of the assets of the Certified Companies in 1990 and (2) the acquisition of Gowanus Industrial Park in 1997.

Certified Acquisition

Pursuant to an order in a civil forfeiture action in 1990, John Sr., along with an individual named Michael DiBenedetto, purchased Certified Concrete Company and Transit Mix Company.[2] The following seven corporations were formed to hold the assets of the purchased companies: Quad Acquisition Corp., Maspeth Concrete Loading Corp., Harlem Concrete Loading Corp., Manhattan West Concrete Corp., Edgewater Concrete Loading Corp., Red Hook Concrete Loading Corp. and Maspeth Truck Depot ("Certified Companies").

The acquisition was funded entirely by assets of QCC, QEL and Beach Channel Drive Land Enterprises and the forgiveness of a $2,000,000 debt owed by the Certified Companies to NYCEMCO. In fact, QCC mortgaged virtually its entire asset base to obtain a $5,000,000 mortgage from North Fork Bank to

[2] The order provided that John Sr. and DiBenedetto were to be the only shareholders of the purchased companies.

effectuate the purchase. Additionally, Patrick and John Sr. personally guaranteed the mortgage note (55a). Although John Sr. placed the shares of the Certified Companies in his own name, he promised Patrick an interest in the companies either directly or derivatively (55a).

Gowanus

This acquisition involved a parcel of waterfront property located in Brooklyn. John Sr. acquired Gowanus in 1997 and placed all the shares in his name. He promised Patrick an interest either directly or derivatively and used the assets of the original Quadrozzi companies to acquire the property. The purchase price was $3,500,000. The purchase was funded by a $2,000,000 payment from John Sr., which was comprised of $850,000 from QCC, $150,000 from QEL, $150,000 from Quadrozzi Enterprises, $350,000 from other Quadrozzi companies and $500,000 from John Sr.'s IRA.

Beach Channel Drive Land Enterprises, Inc., a corporation in which Patrick had a 25% interest, used its assets to secure a $1,500,000 purchase money mortgage from FCV Consultants, a third party lender, for the remainder of the purchase price, and QCC and QEL guaranteed the loan. Within months of the purchase, the mortgage was paid off with funds obtained from QCC, QEL and Amstel.

John Sr. repeatedly advised, assured and represented to Patrick that each of these transactions was undertaken for the benefit of all of the Quadrozzi corporations and for the benefit of Patrick as a shareholder of each. It was clear that Patrick was a participant in each acquisition to the same extent that he was a shareholder of the original Quadrozzi companies. While the transfer of funds between and among the companies was not an issue when John Sr. was alive, as he never denied Patrick's ownership interest, an issue arose after John Sr. became ill and died.

Specifically, John Sr.'s wife, Theresa Quadrozzi, argued that neither Patrick nor the original Quadrozzi companies had ever owned the Certified Companies or Gowanus and that they had no interest, beneficial or otherwise, in these entities or in their assets (60a, 64a).

After John Sr.'s death, Theresa, acting as a majority shareholder, elected her son (John Jr.) and daughter (Catherine Quadrozzi) as officers and directors of each of the corporations and delegated to them complete authority over the management and affairs of all of the Quadrozzi companies. Not only was Patrick denied any ownership interest in Gowanus and the Certified Companies, he was even removed as an officer of the original Quadrozzi companies.

B. The Instant Action

Patrick commenced the instant action on or about November 10, 2005. The complaint alleged, inter alia, a breach of promise to give Patrick an interest in the Certified Companies and Gowanus, either individually or derivatively through the original Quadrozzi companies, following the death of John Sr. (57a-58a). Patrick also alleged a breach of fiduciary duty and corporate waste by John Sr., Theresa Quadrozzi, John Jr. and Catherine Quadrozzi in connection with the Certified Companies, Gowanus and other realty in New York City (58a-69a). Patrick sought the imposition of a constructive trust, an accounting based on acts of alleged corporate waste and breach of fiduciary duty, and injunctive relief (69a-72a).

Issue was joined by the defendants' service of an answer. The defendants admitted Patrick's ownership interest in Quadrozzi Concrete Corp., Quadrozzi Equipment Leasing Corp., Quadrozzi Realty Corp., Beach Channel Drive Land Enterprises Inc., Amstel Recycling Inc., and Quality Concrete, Inc. (78a, 85a).[3] The defendants denied the remaining substantive allegations in the complaint (76a-91a). Specifically, the defendants denied that Patrick was a shareholder of any other family entity (79a).

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[3] Initially, the defendants denied that Patrick had an ownership interest in Quality Concrete, Inc., which was acquired in 1999. However, they later admitted that he had a 25% interest in that company.

C. The Trial

The matter proceeded to a non-jury trial before Judge Marguerite Grays. Seven witnesses testified at the trial, namely plaintiff Patrick Quadrozzi, Comptroller John Caracciolo, Barrister Michael Cotton, Theresa Quadrozzi, Catherine Quadrozzi, John Quadrozzi, Jr., and accountant Russell Kranzler.

The evidentiary proof adduced at trial, led to the inescapable conclusion that Patrick was, in fact, a 25% owner of each of the disputed companies. All the companies were formed or acquired with the use of QCC assets. Thereafter, QCC used its assets to sustain the companies, all of which may be viewed as one large integrated corporate wheel with QCC at its center. In this respect, QEL is a transportation company used to deliver concrete and other materials produced and sold by QCC. Beach Channel Drive is a piece of property leased by the other Quadrozzi companies as a storage facility (8). Quadrozzi Inc. was the original family repair shop and owned New York Cement Company ("NYCEMCO"), which imported and delivered bulk cement to the Quadrozzi companies and outside concrete producers (8). NYCEMCO operated via a ship, the Aba Loujane, which was docked and used for storage at the pier leased at Sunset Industrial Park (57). Amstel was also part of the Quadrozzi group of companies and was originally

owned by Patrick's sister-in-law, wife and niece.[4] Amstel provided labor, equipment and other services for the other companies, and Quadrozzi Realty Corp. held title to the land utilized by the various Quadrozzi companies (486).

The Certified Companies Acquisition

The Certified Companies were customers of NYCEMCO, which delivered cement to those entities. The Certified Companies went into bankruptcy in the late 1980's (12). QCC agreed to operate the bankrupt entities for a period of time with the intent to purchase. Notably, Patrick was not in favor of this acquisition. He felt acquiring five additional plants across the City was not manageable, which proved to be the case since each was eventually closed (129-130). Additionally, there were union issues involving organized crime and Patrick was afraid his brother would "get himself into some sort of trouble" (136).[5] Nevertheless, Patrick assisted in supplying the Certified Companies with anything they needed to keep the fleet in operation and went along with the transaction, because it was what his brother wanted (131). NYCEMCO continued to sell cement to the Certified Companies during this period. It was estimated that the Certified Companies owed NYCEMCO approximately $2,000,000 at the time of the acquisition. The

[4] This allowed them to take advantage of "women owned minority business" opportunities. Patrick eventually inherited his wife's share.

[5] In fact, several years after the Certified Acquisition, John Sr. was indicted and convicted due to ties to organized crime. As a result of the conviction, all of the Quadrozzi companies were barred from doing any City, State or Federal work for a period of time.

forgiveness of that $2,000,000 debt was utilized as part of the purchase price (14, 23, 29).

In addition to the debt forgiveness, a $5,000,000 mortgage from North Fork Bank was used to fund the purchase of the Certified Companies (29). That mortgage was guaranteed by personal assets of Patrick and John Sr., as well as all the companies in which the two already had an ownership interest (i.e., QCC, QEL, Beach Channel, Quadrozzi Realty, and Quadrozzi Acquisition Corp.) (27, 30-33). Nevertheless, as required by court order, John Sr. put the shares of the Certified Companies into his own name.[6]

After the purchase, Patrick took complete charge of the outside operations of the Certified Companies, just as he had done for the original Quadrozzi companies (i.e., QCC, QEL, Amstel, Beach Channel Drive, and Quadrozzi Realty Corp). Patrick, in conjunction with John Sr., made decisions relating to plant closings and openings for the Certified Companies. Specifically, Patrick elected to close a plant located on Revue Avenue in Maspeth and re-open a plant on West 26th Street in Manhattan. The 26th Street plant, which manufactured concrete, was operated using the crew and staff of QCC (45).

Patrick described how all of the companies functioned collectively, as part of one overall operation. For example, Patrick brought the fleet of trucks acquired

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[6] Patrick was unaware that the bankruptcy order by which the assets of the Certified Companies were acquired limited who could own the entities acquiring the assets (137).

during the acquisition of the Certified Companies to QEL's Rockaway location, where the trucks were reconditioned, so they could be used at the 26th Street operation (40). Patrick also brought some of the Certified mechanics to work alongside the Amstel mechanics in the Rockaway shop (41). The facility where the trucks were refurbished was owned by Quadrozzi Realty Corp. (42). Additionally, cement for both the Revue Avenue plant and 26th Street plant was purchased from NYCEMCO (45). Each company was always administered as "arms" of QCC and personnel worked for all of the companies without regard for which company paid their salary.

The Certified Companies maintained offices on Amstel Boulevard in Rockaway Beach along with QCC's offices (37-38). John Sr., his daughter Catherine, as office manager, and the office staff of QCC performed all office and administrative functions for each of the companies (43). Nevertheless, Catherine's salary was paid by QCC and Amstel (452). Also, the bookkeeper was paid by QCC (452).

The inter-related nature of the companies was further evidenced by the financial documentation which revealed a series of "inter-company" transfers and "inter-company due to/from accounts" which showed how assets flowed freely among the companies. This was necessary since most of the companies had little income to cover their expenses. In fact, virtually all of the expenses of the

companies in the Quadrozzi organization have been covered by QCC assets (1402-1417).

John Caracciolo, a long-time QCC employee who handled the compilation of financial data and tax compliance as Comptroller of the original Quadrozzi companies, also served as the Comptroller of the Certified Companies (219). All books and records were maintained at the Amstel Boulevard offices (43). The same accountant was used for each of these companies (455). These accountants prepared all of the corporate tax returns at the direction of John Sr. (482).

Michael Cotton, a barrister in the United Kingdom, also testified regarding the acquisition of the Certified Companies. Mr. Cotton had worked for NYCEMCO and was a close personal friend and confidant to John Sr., who discussed all his businesses with him (358-359). Mr. Cotton testified that in 1990 the assets of the Certified Companies were acquired by what he viewed as "the Quadrozzi Group" - those companies owned by John Sr. and Patrick (354). Mr. Cotton observed many discussions between Patrick and John Sr. regarding the Certified purchase, as well as all the other Quadrozzi companies (355-356).

According to Mr. Cotton, John Sr. handled the back office and financial aspects of the Certified Companies, while Patrick was primarily out in the yards, looking after operations and equipment that were acquired from the Certified Companies (356-357). In other words, Patrick and John Sr. continued with the

roles they previously had undertaken with regard to the original Quadrozzi companies. In fact, Mr. Cotton noted that it was "all one business" and "one operation" that was owned by John Sr. and Patrick (392-393). It was understood that Patrick was a shareholder in everything (392, 397-398).

Mr. Cotton testified that John Sr. had some legal problems relating to the Certified acquisition, which resulted in an indictment and conviction. As a result, John Sr. and all of the Quadrozzi companies were then precluded from bidding on government jobs. This made it difficult to obtain work and the organization had to suddenly adapt and Patrick was a big part of that change (372-373).

Gowanus Acquisition

Gowanus was a large waterfront property located in Brooklyn. It had large silos, previously used to store grain, which could be retrofitted to store cement and would offer a place to berth NYCEMCO's ship, the Aba Loujane (58). Given the size of the property, John Sr. and Patrick considered moving all Quadrozzi operations to this central location, and operating an asphalt plant and concrete recycling operation at the location as well. Also, it could be used to house all office functions (60). Initially, NYCEMCO offered to purchase the property in July 1996 from the Port Authority (56). It was felt that QCC would benefit from being located in Gowanus, which was more centrally located to new construction

(62). Also, there would be considerable savings in transportation costs, if the sand and stone came in on barges with the QCC concrete plant on site (63).

The purchase price for Gowanus was $3,500,000. The brothers decided to borrow some money and use money from the other Quadrozzi companies to pay for Gowanus. Patrick identified withdrawal slips representing money drawn from companies in which he had a 24% ownership interest, including $850,000 from QCC, $150,000 from QEL, and $150,000 from Quadrozzi Enterprises. Those amounts were placed into John Sr.'s bank account to be used at the closing (70-72). John Sr. also took $500,000 from his IRA (71).[7] Additionally, a $1,500,000 mortgage was taken on the Gowanus property from FCV Consultants ("FCV"), which was guaranteed by Beach Channel Drive Land Enterprises, which was owned by Patrick and John Sr. (67-68, 87).

The acquisition of Gowanus followed the same pattern as each and every other Quadrozzi acquisition. Patrick assumed the same duties for Gowanus as he performed for QCC. Patrick worked to make the property suitable for use. His nephew, John Jr. managed the property. Patrick, using the resources of QCC, QEL and Amstel, helped with all aspects, including removing debris and bringing in material to build walls and fences (75, 626-627). Amstel delivered between four to five thousand cubic yards of fill. QCC delivered three to four thousand concrete

[7] Initially, the money paid in by John Sr. was listed on the Gowanus books as a loan payable to John Sr. Five years later, it was reclassified as paid in capital (600-661, 678).

blocks used to build fences and a wall. QEL trucks made the deliveries (77-78, 628). NYCEMCO employees assisted in the work (76). Work was also done by companies at Gowanus in payment of monies they owed to QCC (79). Additionally, QCC and QEL performed snow removal and brought in a crane to off load and set up a large scale used for a salt operation (80-81).

Following the closing, numerous inter-company transactions, both real and fictional, relating to the financing were done at the direction of John Sr. The transactions created a series of intertwined transfers and entries into the general ledgers of various corporations and reveal how QCC was improperly raided to fund Certified and Gowanus, entities in which defendants seek to preclude Patrick from taking his rightful share.

John Caracciolo, the Comptroller of the all the Quadrozzi companies (including Certified and Gowanus) worked at the direction of top management and handled the compilation of financial data, and described, in detail, these financial transactions. Mr. Caracciolo discussed various entries on the general ledgers, which revealed how money was often transferred between companies. In 1997, just months after the Gowanus closing, QCC paid off the $1,500,000 FCV mortgage used to acquire Gowanus. A corresponding entry on QCC's 1997 general ledger revealed a note receivable of $1,260,000 from Gowanus (222). The remaining $240,000 needed to pay off the FCV mortgage came from QEL (224).

Mr. Caracciolo never recalled seeing a note payable from Gowanus to QCC during this corresponding period (224).

Next, Mr. Caracciolo identified an entry in QCC's general ledger described as a "loan payable John Quadrozzi". It had a beginning balance in January 1997 of $730,630. Additional loans and cash disbursements were made to John Sr. in the amount of $960,000 over the course of the year. The net balance at year end was $1,129,367. Mr. Caracciolo never recalled seeing a note payable from John Sr. to QCC and did not recall that any interest would have been payable on that loan (225-6). In 1997, Gowanus received money from other Quadrozzi companies in which Patrick had a 25% ownership interest. Specifically, Gowanus received $260,000 from QCC, $250,000 from QEL, and $163,000 from Amstel (238).

A review of QCC's 1998 general ledger revealed that nothing was paid on the $1,260,000 note receivable from Gowanus or the $1,129,370 loan payable by John Sr. (227-228). Furthermore, no interest was paid on the loan to John Sr. (228). The accrued interest receivable from Gowanus to QCC by the end of 1999 was $213,802.55 (229). Also, the balance on the note receivable was still $1,260,000, no payment thereon having been made (229).

The $1,121,370 loan payable by John Sr. was reduced by $1,121,370 in December of 1999. This resulted from the loan being "reclassified" as a distribution made to John Sr. on behalf of Quadrozzi, Inc., which owned

NYCEMCO (230, 232). However, QCC made the payment to John Sr. on behalf of Quadrozzi Inc. The result of these transactions was that Quadrozzi, Inc. now owed QCC $1,129,370, instead of that amount being owed to QCC by John Sr. personally (231-232). Moreover, QCC had just paid off the debt owed to it by John Sr. with its own money.

By the end of 2000, Gowanus owed interest to QCC in the amount of $360,064 on the outstanding $1,500,000 mortgage (239). None was paid (244). Despite numerous transactions appearing on the ledgers, including disbursements to purchase the balance of the mortgage, at the end of the year, Gowanus still owed QCC $1,260,000 (243).

The QCC general ledger from 2001 showed additional accrued interest receivable from Gowanus. None was paid. Also there remained the note receivable from Gowanus for $1,260,000, which was similarly not paid. The QCC ledger further revealed shareholder distributions of $275,000 for John Sr. and $91,667 for Patrick (244-245). The distribution listed for Patrick, however, was not paid to Patrick, but became a loan payable from QCC to Patrick (246-247).

The QCC general ledger for 2002 revealed accrued interest receivable from Gowanus of $460,000. Additionally, there was an increase in the mortgage note receivable Gowanus in the amount of $749,900 outlined in one account with a corresponding decrease noted in another account (251-2). In any event, the net

amount due QCC remained the same (252). Additionally, the loan payable to Patrick increased by another $50,000. Specifically, a $50,000 distribution was deemed a loan to QCC. Mr. Caracciolo was unaware whether anyone ever advised Patrick that he was making a loan to the company (253-254).

The 2003 QCC general ledger revealed a beginning balance for accrued interest receivable from Gowanus in the amount of $476,364.53 and an ending balance of $573,082.95. As to the mortgage note receivable, it was reclassified as a note receivable Gowanus with a balance at the end of 2003 of $860,100 owed by Gowanus (255-256).

The loan payable to Patrick was increased, bringing the balance to $157,812.75 (257-258). By the end of 2004, Gowanus owed QCC a total of $641,890 in accrued interest and $860,000 on the note receivable (261).

A review of the Gowanus general ledgers reveals corresponding entries, which demonstrated that QCC and QEL provided Gowanus with the funds to pay the interest on its purchase money mortgage to FCV and, when QCC took the FCV mortgage, QCC accrued interest from Gowanus without any payment whatsoever.

The foregoing demonstrates how QCC acted as the central component of the Quadrozzi enterprise, transferring money to the other companies as needed. All assets were paid for with corporate funds and each of the companies was a

corporate opportunity of QCC. The fruits of these transactions belong to the companies which paid for them.

Critically, in 1999, another transaction took place, which demonstrates the insidious manner in which the affairs of these companies were managed.

A review of the 1999 general ledger from Gowanus revealed a note receivable from Maspeth Concrete in the amount of $1,550,000. Specifically, Gowanus refinanced its mortgage[8] and loaned the money to Maspeth to acquire a certain plant (the Metropolitan Avenue plant in Ridgewood) and equipment that was owned by Quality Concrete of New York (273). Gowanus charged approximately 14% interest on this loan (274). At the time of this loan, Gowanus still owed $1,260,000 to QCC, $250,000 to QEL, $163,000 to Red Hook, and $2,162,000 to John Sr. – plus accrued interest on each of these amounts (272-273). However, these transactions left Maspeth with a loan payable to Gowanus and no ability to repay it and Gowanus with a loan payable to QCC with no ability to repay it. Of course, Gowanus could have simply mortgaged its property and re-paid its debt to QCC. That would have enabled QCC to purchase Quality directly.

A scheme was then devised whereby the assets of QCC, a company that produced concrete and in which Patrick had a 25% ownership interest, would be dissipated to create cash flow for Maspeth and Gowanus. The scheme required

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[8] Initially, QEL received the proceeds relating to the refinance of the Gowanus property and then disbursed the money as directed by senior management (278).

QCC to purchase concrete from Maspeth. QCC, a concrete producer itself, was now purchasing concrete from a company it should have owned outright.

Catherine testified that QCC began purchasing concrete from Maspeth and Red Hook in the late 1990s (471). QCC was the overwhelmingly large purchaser from Maspeth (474). Maspeth's gross sales were $2,400,000 in 1999, $4,078,000 in 2000, $7,600,000 in 2001, $10,500,000 in 2002, $6,800,000 in 2003, $8,500,000 in 2004 and $9,300,000 in 2005 (475-476). These purchases were structured so that Maspeth would derive a profit from its sales to QCC and use that profit to repay its loan to Gowanus. Gowanus would then use that money to pay interest on its loan to QCC. In essence, QCC was repaying its own loan to Gowanus.

The scheme was so effective that it virtually eliminated the profitability of QCC. Faced with QCC's inability to pay its own expenses due to its purchasing of concrete from Maspeth and Red Hook, John Jr. and Catherine agreed to refund millions of dollars to QCC in order for it to show any profit at all. Catherine testified that following a board meeting, it was agreed that Maspeth would refund money to QCC for the tax years 2002 through 2005 (476, 478). Specifically, Maspeth refunded $950,250 to QCC for 2002. Also, Red Hook refunded $374,810 for the same year. Similar amounts were refunded for 2003 and less for 2004 and 2005 (477-478).

In 2003, after John Sr. became ill, FCV assigned its mortgage to Monmouth Ocean Properties (101). Beach Channel Drive was still on these new mortgages (103). Patrick suggested to his niece (Catherine) and nephew (John Jr.) that he and John Sr. consider taking loans against their IRAs to pay off the FCV mortgage rather than seeking out another lender. Patrick even offered to put another mortgage on his home. He felt this was appropriate since the family business needed money and he would be able to borrow at a more favorable rate. Nevertheless, his niece and nephew went ahead with the Monmouth loan (109-110).

Patrick's old tax returns revealed that K-1s were received from certain entities but not others. Also, reference was made to his ownership interest in some of the companies (i.e. QCC, QEL, Beach Channel) but not others (i.e. Red Hook, Maspeth Concrete, Edgewater) (149-161). Patrick testified that he was never given any K-1s or other documents. His tax returns were filled out and given to him by his niece or the accountant and he simply signed what was put in front of him (147, 170). He would get a copy of the return after the fact. Additionally, he testified that he often gave his niece checks and she filled out the amount and paid the taxes for him (147, 198). Patrick testified that he trusted that his brother and niece would do the right thing (171).

Catherine denied filing Patrick's personal tax returns until the late 1990's (479-480). She did not know what Patrick did with his returns once he received them (480). Catherine denied holding back any of Patrick's distribution checks. She testified that all distributions were deposited into his personal account (482-4883). She did testify at her deposition, however, that there were loans from Patrick to the companies on the books, which came about through the "reclassification of distributions" (484). This was done at the direction of an outside accountant (492). Specifically, the company would issue "distributions" to Patrick and then journal them as "loans" from Patrick back to the company (245-246). Patrick was totally unaware of these transactions. John Sr. never had his distributions reclassified as loans (495).

Patrick believed that he and John Sr. owned the Certified Companies as well as Gowanus (50, 85). Specifically, Patrick testified that "every transaction and everything that my brother and myself did, he would say we are going to do this, we are buying ... Certified" (201). Patrick first learned there was a dispute regarding his ownership interest in 2003 when he received documents relating to a guardianship proceeding commenced by John Sr.'s wife, Theresa, when John Sr. became ill. Those documents listed all the corporations and the percentage ownership John Sr. and Patrick were believed to have (50, 85). Patrick

immediately disputed representations made about his lack of ownership interest in some of the companies (51-52).

D. Memorandum Decision

The Court determined, based on the credible evidence, that John Sr. and Patrick had an implied agreement whereby John Sr. would initially place the stock of the Certified Acquisition Companies in his own name but that Patrick, in return for helping to finance the purchase, would have an actual interest in the companies (30a). Specifically, the Court found that an implied agreement between Patrick and John Sr. concerning the real ownership of the Certified Acquisition Companies arose from the resources used to purchase them and the course of the brothers' dealing with each other and with the Quadrozzi companies over many years prior to John Sr.'s death.

The Court further found that the breach of the implied agreement occurred in 2003, at the time of the guardianship proceeding, when Theresa Quadrozzi denied that Patrick had any interest in the Certified Acquisition Companies (30a).

As to Gowanus, the Court determined that John Sr. committed a wrongful act in 1997 when he, without Patrick's knowledge, acquired the Gowanus property through a corporation he solely owned and that he began to hold adversely to the beneficiary's interest in that year. That act was found to have amounted to a

diversion of corporate opportunity and breach of fiduciary duty. The Court further noted, however, that the wrongful acquisition was only the first in a series of significant wrongful acts concerning Gowanus, which continued to at least around the time of the guardianship proceeding when Theresa denied Patrick's interest in the corporation (31a). This, the Court determined, distinguished this case from others that held that the statute of limitations began to run from the date of the acquisition.

Additionally, the Court determined that John Sr.'s longstanding practice of using the assets, resources and personnel of the Quadrozzi companies interchangeably and without proper accounting deceived Patrick into believing that he or QCC had an ownership interest in the disputed corporations and delayed the institution of this action such that defendants are estopped from raising the statute of limitations (32a). The Court specifically credited Patrick's testimony relating to the brothers' practice of disregarding corporate formalities and identities as well as his disregard of formal documents (32a-33a).

By Judgment of the Supreme Court, Queens County dated June 23, 2010, Patrick was awarded, inter alia, a constructive trust in his favor to the extent of 25% ownership interest in companies collectively known as the Certified Acquisition Companies and Gowanus Industrial Park. The instant appeal ensued.

ARGUMENT

POINT I

SUPREME COURT PROPERLY IMPOSED A CONSTRUCTIVE TRUST IN FAVOR OF PATRICK RELATING TO THE CERTIFIED COMPANIES AND GOWANUS

A. General Legal Principles

Where a case is tried without a jury, due regard must be given to the decision of the trial judge, and the trial court's determination will generally not be disturbed on appeal unless the conclusions could not have been reached under any fair interpretation of the evidence. Vitiello v. Merwin, 87 A.D.3d 632, 928 N.Y.S.2d 581 (2d Dep't 2011); Matter of Wong v. Cooke, 87 A.D.3d 659, 928 N.Y.S.2d 365 (2d Dep't 2011).

This Court has explained that the "fair interpretation" standard "provides a strong cautionary note by stressing to the court that the overturning of the [fact finder's] resolution of a sharply disputed factual issue may be an abuse of discretion if there is any way to conclude that the verdict is a fair reflection of the evidence." Nicastro v. Park, 113 A.D.2d 129, 495 N.Y.S.2d 184, 189 (2d Dep't 1985); Sideris v. Town of Huntington, 240 A.D.2d 652, 659 N.Y.S.2d 1017 (2d Dep't 1997) (issues concerning credibility of witnesses and accuracy of their testimony is for the fact finder). Only where a trial court's determination cannot be

reached under any fair interpretation of the evidence, will it be set aside. Matter of Allstate Ins. Co. v. Albino, 16 A.D.3d 682, 792 N.Y.S.2d 518 (2d Dep't 2005). In a "close case", it must be remembered that the trial judge had the advantage of seeing and evaluating the credibility of the witnesses. See, Northern Westchester Professional Park Assoc. v. Town of Bedford, 60 N.Y.2d 492, 499, 470 N.Y.S.2d 350 (1983); Parr v. Ronkonkoma Realty Venture I, LLC, 65 A.D.3d 1199, 1201, 885 N.Y.S.2d 522 (2d Dep't 2009).

The elements of a constructive trust are: 1) a confidential relationship; 2) a promise; 3) a transfer in reliance thereon; and 4) unjust enrichment. Bodden v. Kean, 86 A.D.3d 524, 927 N.Y.S.2d 137 (2d Dep't 2011); Abdel-Qader v. Abdel-Qader, 79 A.D.3d 674, 911 N.Y.S.2d 910 (2d Dept 2010); Plumitallo v. Hudson Atlantic Land Co., 74 A.D.3d 1038, 903 N.Y.S.2d 127 (2d Dep't 2010).

Because a constructive trust is an equitable remedy, courts do not rigidly apply these elements, but use them as flexible guidelines. Moak v. Raynor, 28 A.D.3d 900, 814 N.Y.S.2d 289 (3d Dep't 2006). A constructive trust will be imposed to satisfy the demands of justice. It is the formula through which the conscience of equity finds expression and is available to prevent unjust enrichment in a wide range of circumstances. See, Nockelun v. Sawicki, 197 A.D.2d 507, 602 N.Y.S.2d 190 (2d Dep't 1993).

Here, the Supreme Court's determination that a constructive trust should be imposed in favor of Patrick with respect to both Certified Companies and Gowanus, was based upon a fair interpretation of the evidence and as such, should not be disturbed on appeal. See, Henderson v. Thorpe, 73 A.D.3d 978, 900 N.Y.S.2d 668 (2d Dep't 2010) (where this Court affirmed the imposition of a constructive trust after a non-jury trial). Neuhauser v. Polanco, 14 A.D.3d 674, 789 N.Y.S.2d 256 (2d Dep't 2005) (same).

B. The Elements Of A Constructive Trust Were Established With Respect To The Certified Companies and Gowanus

(i) Confidential Relationship

It is beyond dispute that there was a confidential or fiduciary relationship between the brothers in this matter. See, Cinquemani v. Lazio, 37 A.D.3d 882, 829 N.Y.S.2d 265 (3d Dep't 2007). Initially, it has been held that a sibling relationship satisfies the confidential relation requirement. See, Maynor v. Pellegrino, 226 A.D.2d 883, 641 N.Y.S.2d 155 (3d Dep't 1996); see also, Sharp v. Kosmalski, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976), supra. Moreover, Patrick established that he maintained a close personal and business relationship with his older brother over many years and that the relationship was one of trust. Moreover, John Sr., as the majority shareholder in QCC, stood in a fiduciary position toward Patrick as

the minority shareholder. See, Alpert v. 28 Williams Street Corp. 63 N.Y.2d 557, 483 N.Y.S.2d 667 (1984), reh'g denied, 64 N.Y.2d 1041 (1985). As such, the element of a confidential relationship was established with respect to both the Certified Companies and Gowanus.

(ii) Promise

In the flexible spirit of a constructive trust, the "promise" need not be express, but may be based on the circumstances of the relationship and the nature of the transaction. Sharp v. Kosmalski, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976); Moak v. Raynor, supra. A promise may be implied in reliance upon a confidential relationship. Sharp, supra. "Though a promise in words was lacking, the whole transaction, it might be found, was 'instinct with an obligation' imperfectly expressed". Sinclair v. Purdy, 235 N.Y. 245 (1923).

Applying these principles, it is clear that the Supreme Court's determination that Patrick satisfied this element with respect to Certified and Gowanus was based upon a fair interpretation of the evidence and should not be disturbed on appeal.

The acquisition of Certified was funded entirely by assets of QCC, QEL and Beach Channel Drive Land Enterprises, companies that were indisputably owned by both Patrick and John Sr. Additionally, QCC, as debtor, placed a mortgage on its own property to obtain a loan from North Fork Bank used to make the Certified

purchase. Patrick and John Sr. gave personal guarantees on the loan (55a). With regard to the Certified transaction, it was demonstrated that a debt of approximately $2,000,000 owed to NYCEMCO, a company in which Patrick held a 25% interest, was used in partial payment. There was no evidence that NYCEMCO was reimbursed for the forgiveness of this debt. Additionally, QCC, another company in which Patrick held a 25% interest, mortgaged nearly all of its assets to obtain a $5,000,000 loan and mortgage from the bank needed for the purchase. Patrick also guaranteed the loan with his own personal assets, and allowed the assets of QEL, another company in which he held a 25% interest, to be used to guarantee the loan. These factors establish an implied promise to acquire the property for the benefit of both brothers.

As to Gowanus, the evidence established that Patrick and John Sr. decided to purchase the Gowanus property for $3,500,000.00, by borrowing and using funds and assets of other Quadrozzi companies and having Beach Channel, an entity owned by the brothers, mortgage its property. John Sr. made withdrawals of $1,500,000 from other Quadrozzi companies as well as $500,000 from his own IRA account. Patrick actually spoke to Catherine Quadrozzi about borrowing against his IRA or placing a mortgage on his house to pay off the mortgage on the Gowanus site.

Critically, the purchase of Gowanus occurred after discussions with numerous members of the Quadrozzi organization. The thought was to use the property to run all the Quadrozzi businesses out of one central location (374-375). It was discussed that any loan would be secured by companies in which John Sr. and Patrick had interests (379). Additionally, Patrick worked at the Gowanus site. Contractors paid off their debts to QCC by doing work at Gowanus. Also, during 1997-1999, Gowanus did not have enough income to pay its debts and took money from QCC and other Quadrozzi companies.

This evidence demonstrated that the element of promise was sufficiently established by Patrick with respect to both companies. Clearly demonstrated was a pattern of behavior mandating the conclusion that all the assets were utilized as part of an overall scheme and resulted in "joint ventures" in all the family businesses, notwithstanding the often-times absence of corporate formalities. Thus, the fact that Patrick's name did not appear in the legal title of these companies, is of no moment when a careful analysis is undertaken of how the entire Quadrozzi empire was administered and managed. Illustrative are the following cases.

In Gottlieb v. Gottlieb, 166 A.D.2d 413, 560 N.Y.S.2d 477 (2d Dep't 1990), the plaintiff girlfriend argued that she was entitled to have a constructive trust imposed on certain real property. The girlfriend claimed that while she and the

decedent lived together they purchased the subject property and constructed a home thereon. The girlfriend claimed that although the deed contained the decedent's name alone and the mortgage loan was made only to him, she and the decedent jointly purchased the land and planned the physical layout and construction. Additionally, she contributed financially to the improvement, maintenance and upkeep of the home. The girlfriend also alleged that she invested her labor and money in reliance upon the decedent's promise to put the deed in both their names. The Supreme Court dismissed the girlfriend's claim for a constructive trust, finding that the deed and mortgage contained the decedent's name alone.

In reinstating the constructive trust claim, this Court noted that although the deed contained the decedent's name alone and the mortgage loan was made only to him, the plaintiff sufficiently established entitlement to equitable relief. Specifically, this Court noted that the girlfriend invested her labor and money in reliance upon the decedent's promise that he would put the deed in both of their names. See also Reisman v. Reisman, 46 N.Y.S.2d 335 (Sup. Ct. Kings Cty. 1944) (court found implied promise where husband and wife bought a home for which husband's parents cosigned as a condition of the loan and were listed as co-owners on deed. When parents sought half interest in house, this Court found an implied promise that the parents would not assert an ownership interest in the home).

The foregoing demonstrates that a court sitting in equity is not required to limit its review solely to the content of documents when imposing a constructive trust. In the cases cited above, although the plaintiffs did not have a documented legal ownership interest in the subject property, the Courts still found an entitlement to equitable relief. The same result is warranted here. Clearly, Patrick would not have funded the Certified and Gowanus companies and burdened other companies in which he had an ownership interest with debt without a promise of an ownership interest in these companies.

The case of Scull v. Scull, 94 A.D.2d 29, 462 N.Y.S.2d 890 (1st Dep't), appeal dismissed, 60 N.Y.2d 586 (1983), aff'd, 67 N.Y.2d 926, 502 N.Y.S.2d 135 (1986), is particularly illustrative. There, the defendant husband embarked upon several unsuccessful business ventures at the beginning of his marriage. The plaintiff wife obtained financial assistance from her father who owned a small fleet of medallion taxicabs. Defendant entered his father-in-law's business, and after 6 years, the business expanded considerably to almost 100 cabs. Defendant was actively involved in its management and operation under a newly formed corporation. The stock of this company was divided among various entities of a complex corporate structure designed to minimize tort liability. Plaintiff left all the financial and management decisions to her husband and never personally received a corporate dividend. In all the years of their marriage, plaintiff never signed a tax

return and never even had her own bank account, leaving all financial matters to her husband.

After the marriage ended, the defendant claimed that the plaintiff had no interest in the corporations, or any of the properties that were purchased using the corporate assets, including several residences. Defendant argued that plaintiff's name did not appear on any of these assets and as such, she should not be considered an owner. The Court disagreed and imposed a constructive trust in plaintiff's favor.

Despite the fact that none of the assets were in the plaintiff's name, that plaintiff never signed any documents reflecting ownership and never paid taxes on many of these assets, the Court nevertheless found that there was evidence of a "pattern" or a "life-style" that indicated that the parties were to be considered "joint venturers". The Court noted that although many of the assets and their proceeds ended up solely in the defendant's name, its derivation was the income from what was basically a family business. The Court concluded that the bulk of the assets were the product of the parties' "lifetime joint efforts".

Similarly at bar, there is evidence of a decades long pattern and life-style between these brothers demonstrating that they were joint venturers in all of the family businesses. Although Patrick did not have legal title to the Certified and Gowanus companies, both of these companies were founded upon the income and

assets from other family businesses in which he had an ownership interest. These brothers worked together as a team for more than 40 years and it is beyond dispute that all of the family assets were products of these brothers' lifetime joint efforts.

In Janke v. Janke, 47 A.D.2d 445, 336 N.Y.2d 910 (4th Dep't 1975), aff'd, 39 N.Y.2d 786, 385 N.Y.S.2d 286 (1976), the husband and wife purchased real property with a restaurant business. Although the real property was placed in both names, the restaurant business was only in the husband's name, as was the liquor license. The wife was aware of these facts and also admitted that all insurance, permits and licenses pertaining to the business were in the husband's name alone.

The wife worked at the restaurant, cooking, cleaning, waiting on tables, keeping books and acting as general manager. When the marriage deteriorated, the husband claimed that the restaurant business belonged to him, citing the fact that the wife's name did not appear on any legal document. The Court rejected the husband's argument and imposed a constructive trust on the restaurant. The Court noted that the wife contributed services and cash to the business, and these elements were sufficient to satisfy the element of a promise. The Court noted that it would be "unnatural" to have any type of express promise in that type of relationship. See, Watson v. Pascal, 65 A.D.3d 1333, 886 N.Y.S.2d 440 (2d Dep't 2009) (although plaintiff signed deed transferring ownership to defendant despite promise that they would both own the property, court imposed constructive trust in

favor of plaintiff since plaintiff paid down payment and obtained mortgage financing together); See also Djamoos v. Djamoos, 153 A.D.2d 871, 545 N.Y.S.2d 596 (2d Dep't 1989) ("in confidential family relationships, mutual understanding does not always depend upon words expressly uttered, and silence in the presence of conditional assertions may constitute tacit consent and a promise to comply with conditions").

Here, the evidence establishes that there was an implied promise to acquire Certified and Gowanus for the benefit of both brothers. This was evidenced through the manner of financing the initial purchase, the use and exchange of assets, the satisfaction of the debts, and the interrelationships among these companies.

Just as in the foregoing cases, Patrick demonstrated the element of a promise. The evidence at trial established that Patrick expected to own 25% of Certified and Gowanus. John Sr. repeatedly advised, assured and represented to Patrick that each of the transactions was undertaken for the benefit of the original Quadrozzi companies and for the benefit of Patrick as a shareholder thereof. It was made clear that Patrick was a participant in each acquisition to the same extent that he was a shareholder of the other Quadrozzi companies. As noted by the Court of Appeals, in equity cases such as this, courts should not rely heavily on "formalisms" and should instead focus more on equitable principles. See, Simonds

v. Simonds, 45 N.Y.2d 233, 408 N.Y.S.2d 359 (1978). Thus, the fact that certain corporate "formalisms" were inconsistent with the brothers' everyday business practices should not be a determinative factor in this matter.

(iii) Transfer

Courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no actual transfer occurred. Moak v. Raynor, supra.

Here, the Supreme Court, which had the benefit of observing and evaluating the witnesses, found that Patrick offered credible evidence concerning the contribution toward the purchase price of Certified that he made directly and indirectly through other Quadrozzi companies in which he held an interest. This included the use of the $2,000,000 NYCEMCO debt as part of the initial payment without any evidence of reimbursement. QCC mortgaged nearly all its assets to obtain a $5,000,000 loan and mortgage needed for this purchase. More indicia of ownership is shown by Patrick's guarantee of the loan with his personal assets. Also, he allowed the assets of QEL to be used to guarantee this loan.

The Supreme Court also determined that after the purchase, the assets, facilities and personnel of the Quadrozzi companies in which Patrick had an interest were used to operate and develop the new companies without proper

accounting practices in place. Indeed, Patrick played the same role in the Certified Companies as he had with QCC, QEL and other family owned businesses.

As to Gowanus, the Supreme Court found that that Patrick offered credible evidence concerning the original source of the funds used in the payment. Patrick and John Sr. decided to purchase Gowanus for $3,500,000. They were going to borrow some money and use money from the other companies to pay for it. A mortgage was taken on the Gowanus property, which was guaranteed by Beach Channel Land Enterprises, which was owned by Patrick and John Sr. (67-68, 87). Additionally, Patrick identified withdrawal slips representing money drawn from other companies he owned, including $850,000 from QCC, $150,000 from QEL, and $150,000 from Quadrozzi Enterprises. Patrick also established contribution toward the value of Gowanus after the purchase. Patrick, using the resources of QCC, QEL and Amstel, was involved with all aspects of improving the property, including removing debris and bringing in material to build walls and fences (75, 626-627). Amstel delivered between four to five thousand cubic yards of fill. QCC delivered three to four thousand concrete blocks used to build fences and a wall. QEL trucks made the deliveries (77-78, 628). NYCEMCO employees assisted in the work (76). Work was also done by companies that worked at Gowanus in payment of billing from QCC (79).

The foregoing satisfies the element of transfer in reliance. The case of Washington v. Defense, 149 A.D.2d 697, 540 N.Y.S.2d 491 (2d Dep't), appeal denied, 74 N.Y.2d 609, 545 N.Y.S.2d 105 (1989) supports this finding. In Washington, supra, the wife sought to impose a constructive trust on real property titled in the husband's name. After a non-jury trial, the court denied the husband's motion to set aside his conveyance of the subject property.

On appeal, this Court affirmed, finding that the elements of a constructive trust were all satisfied. In connection with the "transfer" element, the plaintiff testified that she paid $1,000 toward the down payment on the property. In addition, she obtained a loan on her own home, the proceeds of which she contributed to the construction of a house on the subject property. Additionally, she received a gift of $8,000 from her father which she also invested in the subject property. The plaintiff painted, laid tile and installed insulation in the house. She testified that she invested her labor and money in reliance upon the husband's promise that he would transfer the deed to both of their names. See, Maynor v. Pellegrino, 226 A.D.2d 883, 641 N.Y.S.2d 155 (3d Dep't 1996) (contribution of money toward the purchase of the property satisfied the transfer in reliance element); See also, Djamoos v. Djamoos, supra (transfer in reliance on defendant's promise to reconvey property was supported by withdrawal of all the family money and the placement of title solely in the defendant's name); Gottlieb v.

Gottlieb, supra (contribution of money and work toward purchase of the land and the construction of the home were sufficient to satisfy "transfer in reliance" element); Spodek v. Riskin, 150 A.D.2d 358, 540 N.Y.S.2d 879 (2d Dep't 1989) (constructive trust imposed where plaintiff tendered check and promissory note, bearing interest, which defendants accepted, plaintiff commenced duties as managing agent and thereafter furnished additional checks to the defendants in furtherance of the oral agreement).

In Cinquemani v. Lazio, 37 A.D.3d 882, 829 N.Y.S.2d 265 (3d Dep't 2007), the action similarly arose out of a family business. The plaintiff was the wife of the deceased brother of the defendants. The parties had emigrated from Italy to operate pizzerias in New York. Following Cinquemani's death, the defendants sought to exclude his wife from the existing pizzeria businesses. Plaintiff commenced an action to impose a constructive trust based on, among other things, an alleged promise by defendants to convey the pizzeria to plaintiff. Following a non-jury trial, the court found for the plaintiff and awarded her the pizzeria. This determination was affirmed.

In connection with the element of "transfer", the Appellate Division found that, in order to "earn her right" to the pizzeria, plaintiff made the requisite monthly payments, made repairs and improvements to the premises and did so while operating the business exclusively and continuously for more than 10 years.

See also, Eickler v. Pecora, 12 A.D.3d 635, 785 N.Y.S.2d 126 (2d Dep't 2004) (plaintiff demonstrated that he contributed time and money to the purchase and maintenance of the subject property, making a $16,000 down payment in reliance on the defendants' promise. This was sufficient to satisfy the "transfer in reliance" element).

The evidence adduced at trial was that this family customarily dispensed with corporate and legal formalities and instead, operated on a more informal, flexible and casual basis.

For example, William Quadrozzi was, "on paper", the legal owner of Quality Concrete, one of the family businesses. It was undisputed however, that ownership by William was merely a facade to get around the ban on municipal concrete business following John Sr.'s indictment. It was understood that despite the fact that legal documents indicated that William was the owner, in actuality and practice John Sr. had an ownership interest in this company (406-407). Similarly, it was understood that although John Sr.'s name may appear as "owner" of Certified and Gowanus, in reality, Patrick too had an ownership interest.

(iv) Unjust Enrichment

A person will be deemed to be unjustly enriched when retention of the benefit received would be unjust considering the circumstances of the transfer and

the relationship of the parties. Sharp v. Kosmalski, supra; Johnson v. Lih, 216 A.D.2d 821, 628 N.Y.S.2d 458 (3d Dep't 1995). It does not require a showing of a wrongful act by the person enriched. Hornett v. Leather, 145 A.D.2d 814, 816, 535 N.Y.S.2d 799 (3d Dep't 1988), appeal denied, 74 N.Y.2d 603, 543 N.Y.S.2d 396 (1989). For the purposes of unjust enrichment, a person receives a benefit where his debt is satisfied or where he is saved an expense or loss. Electric Insurance Company v. Travelers Insurance Company, 124 A.D.2d 431, 507 N.Y.S.2d 531 (3d Dep't 1986).

The Supreme Court found that Patrick established that John Sr. was unjustly enriched with respect to both the Certified Companies and Gowanus. Because the Supreme Court was in the best position to assess all of the evidence, this determination should not be disturbed.

In Cinquemani v. Lazio, supra, where the family members operated pizzerias in New York, the court found the element of unjust enrichment was satisfied. There, the evidence established that plaintiffs obtained their green cards as requested by defendants, and made all requested payments, including $250 per week. Plaintiffs also made additional payments intended to cover the pizzeria's sales tax receipts, income tax withholding and workers' compensation fees. However, because defendants never reported the income or sales taxes from the pizzeria or obtained workers' compensation coverage for its employees, plaintiffs

derived no benefit from those payments. The Court also found that plaintiffs made payments totaling more than the amount defendants paid for the premises. Upon this evidence, the Court concluded that the defendants would unfairly benefit if they were allowed to retain the pizzeria. The Appellate Division noted the due deference they were affording to the Supreme Court's factual findings since it was in the best position to assess the evidence presented.

In Hornett v. Leather, 145 A.D.2d 814, 816, 535 N.Y.S.2d 799 (3d Dep't 1988), appeal denied, 74 N.Y.2d 603, 543 N.Y.S.2d 396 (1989), the plaintiff girlfriend and defendant boyfriend were involved in an extramarital affair. They bought a home together in both of their names. Defendant testified that it was understood by the parties that if the relationship ended, the girlfriend would convey her portion back to the boyfriend. The relationship ended, and the girlfriend refused to convey her portion back to the boyfriend, claiming that since her name was on the deed, she was a rightful owner. The Appellate Division disagreed and imposed a constructive trust in favor of the boyfriend. In connection with the element of unjust enrichment, the Court found that the plaintiff received one-half ownership in a valuable piece of property.

Here, the Supreme Court found that John Sr. was unjustly enriched with respect to both Certified and Gowanus. The evidence at trial demonstrated that the brothers used the debt owed to NYCEMCO to pay part of the purchase price for

Certified, as well as Patrick's personal assets, and the assets of other Quadrozzi companies in which Patrick had an interest. After the purchase, the assets, facilities and personnel of other Quadrozzi companies in which Patrick had an interest were used to operate and expand the new companies. Patrick contributed his services toward Certified without receiving commensurate compensation.

In connection with Gowanus, the evidence established that John Sr. diverted a corporate opportunity which belonged to QCC when he formed this new corporation owned solely by him to acquire and operate the Gowanus property. John Sr. was able to quickly pay off the FCV mortgage with funds lent by QCC. The evidence established that John Sr. used assets, facilities and personnel of other Quadrozzi companies in which Patrick had an interest in order to operate Gowanus. Thus, it is clear that the finding that John Sr. was unjustly enriched was based upon the evidence and should not be reversed.

C. Patrick's Claim For The Imposition Of A Constructive Trust Was Timely Commenced

The cause of action seeking the imposition of a constructive trust was timely commenced with respect to both Certified and Gowanus.

A cause of action based upon a constructive trust is governed by the six year statute of limitations provided by CPLR §213 (1), which "commences to run upon the occurrence of the wrongful act giving rise to a duty of restitution". Bodden v.

Kean, 86 A.D.3d 524, 927 N.Y.S.2d 137 (2d Dep't 2011); Ponnambalam v. Sivaprakasapillai, 35 A.D.3d 571, 829 N.Y.S.2d 540 (2d Dep't 2006). A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of the acquisition, or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property. Morris v. Gianelli, 71 A.D.3d 965, 897 N.Y.S.2d 210 (2d Dep't 2010); Sitkowski v. Petzing, 175 A.D.2d 801, 572 N.Y.S.2d 930 (2d Dep't 1991). For statute of limitations purposes, a wrong is continuous or recurring and a cause of action accrues for each injury when the wrong is not referable to the day when the original tort was committed. Lucchesi v. Perfetto, 72 A.D.3d 909, 899 N.Y.S.2d 341 (2d Dep't 2010) Kearney v. Atlantic Cement Company, 33 A.D.2d 848, 306 N.Y.S.2d 45 (3d Dep't 1969).

Contrary to defendants' allegations on appeal, John Sr.'s act of failing to name Patrick as a shareholder of the Certified Companies in 1990 was not a wrongful act for the purpose of triggering the statute of limitations. The evidence at trial established that the brothers had an implied agreement whereby John Sr. would initially place the stock of Certified in his own name, as required by the

Court, but that Patrick would be given an interest in the company in return for helping to purchase and operate the company. Thus, the claim is not that John Sr. acquired the property wrongfully, but rather that he breached the agreement at some later date by refusing to convey plaintiff's interest in the property. This occurred in 2003 at the time of the guardianship proceeding and as such, the commencement of this action in 2005 clearly was not violative of the Statute of Limitations.

In connection with Gowanus, the Supreme Court found that John Sr. committed a wrongful act in 1997, when he, without Patrick's knowledge, acquired the Gowanus property through a corporation solely owned by John Sr. However, the Court found that this wrongful acquisition was only the first in a series of significant wrongful acts concerning Gowanus, which continued until at least the time of the guardianship proceeding. This finding is based upon a fair interpretation of the evidence and there is no basis to disturb it. Thus, the claim for a constructive trust against Gowanus was also timely.

In Morris v. Gianelli, supra, the plaintiff commenced an action against her two brothers regarding two parcels of real property formerly owned by their father. The complaint alleged that the father executed deeds conveying the properties to the defendants and that the transfer was only discovered by plaintiff after the

father's death when a notice of pendency was filed against the properties by another of the father's children.

The cause of action to impose a constructive trust alleged that the defendants promised to carry out the testamentary wishes of the father and divide the interest in the subject properties equally among the parties. This cause of action alleged that when the plaintiff demanded the conveyance by the defendants of the properties to the father's estate, the defendants refused. The Supreme Court found that the claim based upon a constructive trust was barred by the statute of limitations. This Court reversed, holding that the constructive trust claim was timely interposed because the wrongful act that triggered the running of the statute of limitations did not occur until after the death of the parties' father. See also, Ponnambalam v. Sivaprakasapillai, supra (statute of limitations for actions based on constructive trust did not commence until property was wrongfully transferred to sole owner after the decedent passed away).

In Bodden v. Bodden, supra, the plaintiff commenced an action to impose a constructive trust upon certain real property. The defendant moved to dismiss the claim based upon, inter alia, the statute of limitations. This Court held that where the plaintiff alleges that the defendant wrongfully withheld the subject property after lawfully acquiring it, the date of the wrongful act triggering the running of the statute of limitations is the date the defendant allegedly breached or repudiated the

agreement to transfer the property to the plaintiff. This Court dismissed the defendant's argument that the statute of limitations began to run in 2001 when, without the plaintiff's knowledge or consent, the defendant obtained a loan which was consolidated with, and increased the outstanding balance of, the original purchase money mortgage on the property. This Court concluded that this act did not constitute a repudiation or breach of the defendant's agreement with the plaintiff.

In Augustine v. Szwed, 77 A.D.2d 298, 432 N.Y.S.2d 962 (4th Dep't 1980), at issue was the timeliness of the deceased's former wife's action seeking to impose a constructive trust on the proceeds of life insurance on her husband's life which were received by his sister. The sister argued that the action was barred by the statute of limitations because the wife's claim accrued when decedent breached the separation agreement by changing the beneficiaries on the insurance policies in 1968. The Fourth Department held that although the decedent may have breached the separation agreement in 1968, there were no insurance proceeds then and no property rightfully belonging to plaintiff was adversely possessed by anyone until after his death. The Court held that the date that the decedent died was the date when defendant's inchoate rights as beneficiary of the policies vested and when the property was held adversely to the plaintiff. Thus, that was the date when the plaintiff's cause of action to impose a constructive trust arose.

In Dombek v. Reiman, 298 A.D.2d 876, 748 N.Y.S.2d 630 (4th Dep't 2002), the brother alleged that he had named his sister to certain joint bank accounts and agreed to allow her to use $80,000 from the accounts to buy a home and that the sister promised that the brother could reside rent-free in the home's upper apartment for the rest of his life. The brother later learned that only the sister and the brother-in-law were named as joint tenants on the deed. In December 2000, the sister began to seek rent from the brother, who was evicted in early 2001. The brother commenced an action and the brother-in-law argued that the complaint was time-barred.

The Fourth Department rejected this claim. The Court held that the statute of limitations began to run when the brother was evicted and was thereby deprived of the benefit of his agreement with decedent that, for the remainder of his life, he could reside rent-free in the apartment.

In the matter at bar, the Supreme Court's determination that the statute of limitations was first triggered in 2003, when the guardianship proceeding was commenced is based upon a fair interpretation of the evidence and must not be disturbed on appeal.

POINT II

SUPREME COURT PROPERLY DETERMINED THAT PATRICK ESTABLISHED THAT JOHN SR. BREACHED HIS FIDUCIARY DUTY TO PATRICK

A. General Legal Principles

An officer or director of a corporation stands in a fiduciary relationship to it, and thus must discharge his duties diligently and in good faith. See, Business Corporation Law § 717. Those duties include a duty of undivided loyalty to the corporation. Foley v. D'Agostino, 21 A.D.2d 60, 66-67, 248 N.Y.s.2d 121 (1st Dep't 1964). An officer or director is not permitted to derive a personal profit at the expense of the corporation. See, Bertoni v. Catucci, 117 A.D.2d 892, 498 N.Y.S.2d 902 (3d Dep't 1986). Furthermore, his dealings with respect to corporate assets are subject to close scrutiny and must be characterized by absolute good faith; he may not appropriate corporate assets or opportunities to himself or to a new corporation formed for that purpose. See, Alexander & Alexander, Inc. v. Fritzen, 147 A.D.2d 241, 542 N.Y.S.2d 530 (1st Dep't 1989); Schacter v. Kulik, 96 A.D.2d 1038, 1039, 466 N.Y.S.2d 444 (2d Dep't 1983), appeal dismissed, 61 N.Y.2d 758 (1984).

A corporate opportunity is defined as any property, information, or prospective business dealing in which the corporation has an interest or tangible

expectancy or which is essential to its existence or logically and naturally adaptable to its business. Alexander & Alexander v. Fritzen, supra, at 247-248.

Applying these principles to the case at bar, it is clear that the trial court properly concluded that John Sr. breached his fiduciary duty with respect to both Certified and Gowanus.

B. The Elements of Breach of Fiduciary Duty Were Established

At trial, it was established that John Sr. utilized both assets and personnel of QCC and QEL to operate the Certified Companies without proper compensation. Specifically, John Sr. conferred benefits upon the Certified Companies, which he placed in his own name, thereby gaining a personal profit at the expense of QCC and QEL, companies in which Patrick had an ownership interest.

There was evidence that the corporate assets of QCC and QEL were wasted by virtue of the utilization of Maspeth Concrete and Red Hook Concrete instead of QCC. The evidence at trial established that unknown to Patrick, QCC, a producer of concrete itself, began purchasing concrete from Maspeth and Red Hook in the late 1990s (471). In fact, QCC was the overwhelmingly large purchaser from Maspeth (474). Gross sales of Maspeth were $2,400,000 in 1999, $4,078,000 in 2000, $7,600,000 in 2001, $10,500,000 in 2002, $6,800,000 in 2003, $8,500,000 in 2004 and $9,300,000 in 2005 (475-476). Following a board meeting with John Sr.,

Catherine and Patrick, it was agreed that Maspeth would refund money to QCC for the tax years 2002 through 2005 (476-478). Specifically, Maspeth refunded $950,250 to QCC for 2002. Also, Red Hook refunded $374,810 for the same year. Similar amounts were refunded for 2003 and less for 2004 and 2005 (477-478).

The evidence also established that John Sr. devised a scheme to further benefit Gowanus at the expense of QCC. The evidence showed that Gowanus lent Maspeth Concrete money at a high interest rate and the debtor repaid the loan from income derived from sales of concrete to QCC, which could have manufactured the concrete itself. In essence, QCC was repaying its own loans to Gowanus. These factors established a breach of fiduciary duty. See, Young v. Chiu, 49 A.D.3d 535, 853 N.Y.S.2d 575 (2d Dep't 2008) (breach of fiduciary duty found where defendant acquired real property in violation of "tangible expectancy" of corporation in which she was officer).

C. The Cause of Action For Breach of Fiduciary Duty Was Timely Commenced

As stated above, the statute of limitations in an equity action is six years and is not a bar to this action with respect to Certified or Gowanus. See, Point I C, infra.

In any event, the doctrine of equitable estoppel should preclude defendants from raising the defense of the Statute of Limitations. It is established that a

wrongdoer should not be able to take refuge behind the shield of his own wrong. The courts have the power, both in law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing which produced the delay between the accrual of the cause of action and the institution of the legal proceeding. General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 272 N.Y.S.2d 337 (1966); Corsello v. Verizon New York, Inc, 77 A.D.3d 344, 908 N.Y.S.2d 57 (2d Dep't 2010). Where a fiduciary relationship exists and there are allegations of concealment, the doctrine of equitable estoppel may apply to toll the statute of limitations. Watson v. Dissolution of Watson, 8 A.D.3d 1092, 778 N.Y.S.2d 658 (4th Dep't 2004).

Here, the evidence discussed above establishes John Sr.'s affirmative wrongdoing and as such, the doctrine of equitable estoppel applies in this matter to toll the statute of limitations.

The defendants' arguments in their brief are not compelling. Defendants claim that any promise made by John Sr. to Patrick with respect to an interest in the Certified Companies 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. Defendants claim that this promise would have been breached in 1997, when the restriction on ownership of the Certified

Companies expired and as such, the statute of limitations would have began to run at that time. This argument has no support.

There was clearly an implied agreement between Patrick and John Sr. concerning the ownership of Certified arising from the resources used to purchase it and the course of the dealings with each other and the other Quadrozzi companies. The breach of this implied agreement occurred in 2003, at the time of the guardianship proceeding when it was denied that Patrick had any interest in this company. Possession at the time of acquisition was not adverse and it did not become adverse until 2003.

Further, as to Gowanus, since the six year statutory period applicable to a cause of action for breach of fiduciary duty does not begin to run until the fiduciary has openly repudiated his or her obligation, the statute of limitations did not begin until the commencement of the guardianship proceedings in 2003.

CONCLUSION

The Judgment of the Supreme Court, Queens County (Grays, J.) dated June 23, 2010, which, following a bench trial, inter alia, awarded Patrick Quadrozzi a constructive trust in his favor to the extent of a 25% ownership interest in companies collectively known as the Certified Acquisition Companies and Gowanus Industrial Park, should be affirmed in its entirety, with costs.

Dated: Uniondale, New York
December 28, 2011

Yours, etc.,

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies, pursuant to 22 NYCRR §670.10.3(f), that the foregoing brief was prepared on a computer using Microsoft© Word2000 as following:

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Dated: Uniondale, New York
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