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

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

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

-against-

RAKIA ASSOCIATES, 2701 BROADWAY ASSOCIATES,
Defendants-Appellants,

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

RUTH SHOMRON,
Defendant-Appellant,

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

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

and LINDA GOLDSTEIN,
Defendant.

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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

THE LAW FIRM OF
GUY S. HALPERIN, PLLC
Attorneys for Defendants-Appellants
27 East 21st Street - Ninth Floor
New York, New York 10010
(212) 751-7555
guy.halperin@halperinlaw.com

Supreme Court, New York County, Index No. 122768/1996

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases *Page(s)*

Statutes/Regulations/Miscellaneous

PRELIMINARY STATEMENT

This brief is in reply to the Brief for Plaintiff-Respondent Mali Fuks ("Fuks), dated April 17, 2024 ("Respondents' Brief"). This Appellants' Reply Brief addresses two of the issues in this appeal that are discussed in the Respondent's Brief, namely, the erroneous finding below that Fuks sustained $375,000.00 in damages as a result of Ruth Shomron's ("Shomron") breach of fiduciary duties, and the lower court's dismissal of Shomron's eighth counterclaim concerning the repayment of loans she and others made to R&L. For the remaining issues in this appeal, the Court is respectfully referred to the Appellants' Brief.

The Lower Court's Repeated Rebuke of Fuks's Litigation Tactics Which Caused Delays It Called "Unparalleled"

To garner sympathy from this Court, Fuks, who was found to have committed fraud against Shomron, outrageously seeks to cast herself in her Respondent's Brief as a victim of a long-running dispute "opposed at every step by" Shomron who, she claims, "used her great financial resources to delay" this case. (Respondent's Brief, p.1) As she has done many times throughout this litigation, Fuks turns the truth on its head.

Clearly, the length of this case should have no bearing on the merits of this case. But since Fuks emphasizes its duration and given that the lower court's repeated references to its duration suggests that this fact may have influenced the orders and judgment on appeal, Appellants have been compelled to set the record

straight. The facts concerning just some of Fuks' abusive litigation tactics which have added many years to this dispute are discussed in the Appellants' Brief, pp.25-29, and in Point VI therein, at pp. 58-60. It was shown therein, as reflected in numerous court transcripts and decisions, that Fuks's outrageous litigation tactics are the primary reasons this case has taken as long as it has and that her tactics have been repeatedly rebuked by the courts, including this Court in *Shomron v. Fuks*, 286 A.D.2d 587 (1st Dept. 2001), mot. for lv. to appeal denied, 97 N.Y.2d 607 (2001) (finding early in this dispute that, when the parties were in the middle of their arbitration proceeding, Fuks "tainted the proceeding" by firing her third attorney in the case in July 2000 and hiring a fourth attorney whose relationship with the arbitrator's accounting firm created, at a minimum, the "appearance of improper 'Judge-shopping.'").[1]

[1] This issue alone, which resulted in this Court's reinstatement of the arbitrator, and the removal of Fuks's attorney, delayed the resolution of this case for more than a year and a half. After this Court ordered his reinstatement, Fuks then commenced her frivolous lawsuit against the arbitrator to induce him to recuse himself. Fuks' disingenuously claims in her Respondent's Brief that the defendants abandoned the arbitration proceeding. In truth, when Fuks' lawsuit against the arbitrator did, in fact, induce him to resign, it meant that the parties were going to have to start the arbitration all over again before a new arbitrator. By this time, it was obvious to defendants that the American Arbitration Association was not equipped to deal with Fuks's abusive litigation tactics, which not only included her constant change of attorneys, but her refusal to timely pay her arbitration fees so that the case would be suspended for non-payment. Rather than start all over again before a new arbitrator, where Fuks would have surely continued to abuse the arbitration process, defendants reluctantly agreed to return the case to the court. Had Fuks not abused that process, this case would have been over many years ago.

Indeed, Fuks's contemptible litigation tactics have added so many years to this dispute, that Justice Friedman was compelled to issue an extraordinary order on February 21, 2017 that "prohibited [Fuks] from bringing any motions by notice of motion," and which directed that she bring her motions only by order to show cause, warning her that "if any notices of motion are filed, this Court will impose sanctions." Justice Friedman explained, "this procedure of requiring motions to be brought by order to show cause is put in place due to the fact that Ms. Fuks has repeatedly brought repetitive motions throughout this litigation." (App. Vol. IV, at 1275.470-471).

When Justice Friedman subsequently granted yet another motion by one of Fuks's other attorneys to withdraw, she made it very clear that Fuks was to blame for the length of this dispute when she stated as follows on the record:

> The Court emphasizes that Ms. Fuks' repeated replacement of counsel throughout the course of these proceedings as well as their re-litigation or attempt to re-litigate issues that have already been decided, have caused delays that in this Court's experience have been unparalleled.

(App. Vol. IV, 1275.469).

Fuks's Baseless Attacks on Shomron's Counsel

In her Respondent's Brief, Fuks also reprises her strategy that recalls the adage: "If the facts are on your side, argue the facts. If the law is on your side, argue the law. And if neither the facts nor the law are on your side, attack your opponent."

Fuks and, as Justice Marcy Friedman coined it, Fuks's "long, long, long line" of attorneys in this case, have repeatedly attacked Appellants' counsel throughout this dispute as one of their discredited litigation tactics. Some of the attacks in her Respondent's Brief are the same ones she made, without success, earlier in this case.

For example, although irrelevant to the issues on appeal, in her Respondent's Brief Fuks advances her discredited claim for a third time that Appellants' counsel has a conflict of interest. (Respondent's Brief, pp.45-47). Fuks neglects to mention that her cross-motion below (App. Vol. IV,1275.174-175) for an order "precluding [Appellants's counsel] from continuing to represent adverse parties in these actions" because of this alleged conflict of interest, and for sanctions, was denied by Justice Crane. (App. Vol. I, 24.19). Fuks has not taken an appeal from this order.

Fuks also neglects to mention in her Respondent's Brief that she previously submitted a proposed order to show cause on May 4, 2011 to disqualify Appellants' counsel for the same alleged conflict of interest, which she withdrew when Justice Friedman questioned its merits. (App. Vol. IV, 1275.293-296). Upon the withdrawal, Justice Friedman stated on the record that "there's never been any suggestion of any impropriety" by Appellants' counsel. (App. Vol. IV,1275.325, [line 25] to 1275.326 [line 7]).

In another baseless attack made by Fuks against Appellants' counsel for which she sought sanctions, Justice Friedman stated on the record on January 25, 2013:

"Ms. Fuks's request for sanctions against Mr. Halperin [Appellants' counsel] and his clients is also denied. Sanctions would be entirely inappropriate. Mr. Halperin has always conducted himself throughout this painfully protracted litigation in a completely professional manner and he has litigated in a very restrained and measured fashion … and given the tactics that he has faced over the years, sanctions would be completely unwarranted." (App. Vol. IV, 1275.351 [lines 2-5]).

Under this backdrop, it is respectfully submitted that the court should look at Respondent's Brief, and Justice Crane's characterization of Appellants' counsel and the reasons for the length of this case, with a jaundiced eye.

APPELLANTS' RESPONSE TO RESPONDENT'S COUNTERSTATEMENT OF THE CASE

The Referee's Decision Denying, in Part, Defendants' Motion to Dismiss the Complaint at the Close of Fuks's Direct Case

In her "Counterstatement of the Case," Fuks references the Referee's Decision, dated June 6, 2017, which granted, in part, and denied, in part, defendants' motion pursuant to CPLR §4401 for judgment as a matter of law at the close of Fuks's direct case. (App. Vol. I, 70-88). Fuks specifically references portions of the Referee's decision which denied Shomron's motion for judgment as a matter of law with respect to Fuks's conversion, accounting, and fraud causes of action. Her reliance, though, on the Referee's denial of these causes of action is inapposite.

Civil Practice Law and Rules §4401 provides, in relevant part, that "[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue. …" In interpreting CPLR §4401, it has been held as follows:

> A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party *(see, Blum v Fresh Grown Preserve Corp*., 292 N.Y. 241 [1944]). In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant (*cf.*, *Cohen v Hallmark Cards*, 45 N.Y.2d 493, 499 [1978] [holding that standard of review in assessing motion for judgment notwithstanding the verdict is whether there is "simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial"]).

Szczerbiak v. Pilat, 90 N.Y.2d 553, 556 (1997).

By design, defendants' motion for judgment as a matter of law at the conclusion of Fuks's direct case was rendered *before* the Referee heard any of the evidence subsequently presented by the defendants. Given that such a motion afforded Fuks "every inference which may be properly drawn from the facts presented," had to be "considered in a light most favorable" to her, and was based on the standard that there had to be "no rational process by which the fact trier could base a finding in [her] favor," the Referee's denial of portions of defendants' motion

for the reasons stated in his decision, especially since he had yet to hear the opposing evidence, has no preclusive effect. See, Nassar v. Macy's, Inc., 2023 N.Y. Misc. LEXIS 301 (Sup. Ct. N.Y. County 2023) (holding that the denial of a defendant's motion for a directed verdict pursuant to CPLR §4401 was not the law of the case).

The Gutman Report

Fuks grossly distorts and relies upon the testimony and reports of her expert witness Zvia Gutman ("Gutman") even though neither the Referee nor the lower court relied upon any of Gutman's opinions or indicated that they found her to be credible on any issue. (Respondent's Brief, pp. 9-12).

Gutman was a former property manager who, other than the purchase of her own cooperative apartment, had no experience whatsoever in the conversion of a building to cooperative ownership, as R&L had been undergoing during the period of time relevant to this case. (App. Vol. IX, A3629, lines 20-25).

After eliciting Gutman's testimony on direct examination concerning her experience and qualifications, Fuks's counsel moved that she be "declared as an expert in real estate management, preparing budgets, maintaining books and records of residential properties and J-51 program … and [m]ajor capital improvement program." (App. Vol. VIII, A3084, lines 2-6).

Fuks's counsel acknowledged that Gutman was "not a forensic accountant" and was not being offered as one. Nor was she being offered as a "tax expert," or as an "expert on the preparation of K-1 statements … or partnership returns" or "on the classification of monies on taxes to be considered as a loan or a contribution" to a partner's capital account. (App. Vol. VIII, A.3235, line 26 to A3236, line 8). Yet, several of the reports Gutman prepared, and which were admitted into evidence, contain numerous calculations and opinions more appropriate for a forensic accountant, a certified fraud expert, a tax attorney or accountant.

The Referee qualified Gutman in the areas sought by plaintiff's counsel. (App. Vol. IX, A.3244, lines 17-23, and see, App. Vol. VIII, A.3237, line 8 to A.3239, line 8).

Most of Gutman's testimony concerned her reports admitted into evidence as Plaintiff's Exhibits 149 (App. Vol. XXII, A.9833-A.10013) supplemented by Plaintiff's Exhibit 149A (hereinafter referred to as the "Gutman's Main Report") (App. Vol. XXII, A.10014-A.10015), and Plaintiff's Exhibit 148 (App. Vol. XXII, A9818-A9832).[2] Gutman's Main Report (Plaintiff's Exhibit 149) consists of dozens of sub-reports. Plaintiff's Exhibit 148 is a narrative report summarizing the opinions set forth in Gutman's Main Report.

[2] In the section of Plaintiff's Exhibit 148 entitled "II. Documents Reviewed," the Special Referee redacted paragraphs 12, 13, 15, 17, 18 and 19. (2-23-12 Tr. 74).

In connection with her purported investigation of the facts and circumstances upon which her reports and testimony are based, Gutman admittedly did not speak, nor make any effort to speak, to any of R&L's tenants, vendors, contractors, accountants, managing agents, or attorneys. (App. Vol. IX, A.3605-A.3606, A.3610-A.3611).

Gutman, who only testified in Fuks's direct case, did not offer any testimony to rebut any portion of defendants' direct case. As a result, she did not testify or render any opinion about, among other things, the binders of cancelled checks, bank statements and other documents admitted into evidence during Shomron's direct case which supported each of the loans that are the subject of Shomron's eighth counterclaim, which the lower court summarily dismissed for lack of proof.

Neither the Referee in his Report (App. Vol. I, A112-A196), nor the lower court in any of the orders on appeal (App. Vol. I, A24-A24.12, A24.13-A24.15, and A24.19-A24.23) adopted any of Gutman's opinions or indicated that they found her to be credible on any issue. To the contrary, the Referee did an extensive analysis of the opinions in Gutman's report concerning the proceeds of the sale of R&L's apartments (see, Referee's Report, pp. 57-66 at App. Vol. I, A168-A177) and found that it was "substantially inaccurate and incomplete." (App. Vol. I, A177).

Fuks grossly distorts Gutman's opinions in her Respondent's Brief and misleadingly provides references to the hearing record that do not say what she

claims they say, apparently hoping that no one will check those references. For example, Fuks writes, "Shomron used phantom checks, mostly certified, that were used for a whole host of ploys, in some cases being allegedly made payable to tenants for relocation. A9822." (Respondent's Brief, p.10). However, nothing at A9822 refers to "phantom checks."

Fuks claims, "Gutman found that IRS form 1099s were never issued by Shomron for any of these alleged relocation transactions despite the legal requirement to do so for any amount over $600. A9827-9828." (Respondent's Brief, p.10). Nothing at A9827-9828 (in Appendix Volume XXII) supports this. Moreover, while issuing 1099s is something an accountant would typically do, there is no evidence that Shomron, an equal partner in R&L with Fuks, was any more responsible for this than Fuks.

Fuks baselessly claims, without any citation to the record, that "Gutman reviewed all of R&L's financial records that Shomron made available. However, during the course of the hearing, it became apparent that Shomron failed to produce all of R&L's records that she had in her possession." (Respondent's Brief, 11). Fuks neglects to mention that, incredibly, throughout the entire history of this case, neither Fuks, nor any of her many attorneys, ever served a single discovery demand upon any of the any of the defendants, a factor which complicated and lengthened the hearings since they were hearing testimony and reviewing documentary evidence for

the first time without the benefit of pre-trial discovery.[3] Instead, Fuks's attorneys relied primarily upon the R&L records that Fuks provided, including those Fuks had improperly removed from the office of R&L's managing agent and refused to return. (App. Vol. II, A863-864).

Fuks claims: "Gutman's report reconstructed an accounting for the rent received and diverted, the improvements claimed and the reasonable costs of such improvements, the unaccounted-for cash and certified checks and circular checks, the lost rent due to failure to obtain major capital improvement rent increases, the lost tax savings from failure to obtain J-51 benefits and other monies diverted from R&L. See A164-168, ¶¶ 13-26; A9818-9832; A9833-10013." However, as indicated above, not only did Fuks's own counsel acknowledge that Gutman was not being offered as a forensic accountant, but the Referee "significantly" found that "Preston M. Faro, Ms. Fuks' expert witness, who gave his opinion with respect to the books and records of R&L as a forensic accountant, did not testify with any reasonable degree of certainty that Ms. Shomron engaged in a wrongful diversion of funds or commingling of funds among entities in which she had a partnership interest." (App. Vol. I, A185, § 91).

[3] For example, as indicated above, none of Fuks's attorneys, or her witness, had ever reviewed the binder of documents that Shomron produced in support of the loans made to R&L that are the subject of Shomron's eighth counterclaim. Had they done so, it is likely that the hearings would have been streamlined, the same way counsel, during the hearings, ultimately entered into the stipulation marked into evidence as Court Exhibit X concerning the accuracy of many of the entries in Shomron's schedules for her own loans to R&L.

In short, neither the Referee nor the lower court credited any aspect of Gutman's opinions and, it is respectfully submitted, neither should this Court.

POINT I

THE RESPONDENTS FAIL TO CITE ANY EVIDENCE IN THE RECORD TO SUPPORT THE REFEREE'S CONCLUSORY FINDING THAT FUKS SUSTAINED $375,000.00 IN DAMAGES AS A RESULT OF SHOMRON'S PURPORTED BREACH OF FIDUCIARY DUTIES.

There is no dispute that to sustain a cause of action for breach of fiduciary duties a plaintiff must prove, among other things, that plaintiff suffered damages caused by the defendant's misconduct. (Appellants' Brief, p. 38).[4]

Respondents do not cite in their Respondents' Brief even a scintilla of evidence adduced at the hearings to support the Referee's conclusory finding that

[4] Specifically, the Referee found that Shomron's purported misconduct included: "(1) Ms. Shomron's failure to advise Ms. Fuks that she had authorized Kahn to utilize the 2701 Broadway petty cash account for R&L business purposes, which resulted in misleading and inaccurate information being entered into the R&L monthly management reports, as well as her failure to advise Ms. Fuks that certain entries made by Kahn incorrectly and inaccurately identified certain expenses paid by R&L as rental income received by R&L, and that Ms. Shomron failed to advise Ms. Fuks that she had authorized Kahn to pay certain of her personal expenses with R&L funds; (2) Ms. Shomron's failure to file timely tax returns with the IRS and local tax authorities for the years 1994 through 1999, thus requiring Ms. Fuks to file such delinquent tax returns for the tax years 1995, 1996, 1997, 1998 and 1999, at the direction of an arbitrator who conducted an arbitration proceeding involving the parties, and thereafter also filing returns for the years 2000 and 2001. I find that given Ms. Shomron' s years of experience as a partner in R&L, she was in a superior position to Ms. Fuks with respect to the manner and timing in which such tax returns were prepared and filed and; (3) Ms. Shomron's failure to advise Ms. Fuks about the execution of an "Exclusive Listing Agreement" dated May 4, 1991, between herself and Harry Salon of Salon Realty, an agreement that granted Salon Realty the exclusive right to sell cooperative apartments in the subject premises. I find that even though R&L was not a party to this one-year agreement, the agreement effected Ms. Fuks' rights as a partner in R&L." (App. Vol. I, A185-A186).

Fuks sustained $375,000 in damages, much less any damage, for any of the purported incidents of misconduct found by the Referee.[5]

The only purported misconduct by Shomron where the monetary amounts were discussed in some degree of detail in the Referee's Report was the finding that R&L's managing agent, Hamid Kahn, purportedly paid "certain of [Shomron's] personal expenses with R&L funds." The only finding made by the Referee in his Report regarding this was, "[i]n 1993 Kahn also paid some of the personal expenses of Ms. Shomron with R&L checks." (App. Vol. I, A128, ¶34 and fn.39). These payments consisted of four checks out of hundreds, if not thousands, in the combined nominal sum of $702.36, paid to Citibank Ready Credit (App. Vol. I, A128, at ¶34, and A186 at ¶95) representing the carrying charges on a loan that Shomron undisputedly procured in her own name for the benefit of R&L on July 27, 1992 in the amount of $6,000.00 (App. Vol. XXVI, A.11592, App. Vol XXIII, A.10312, A.101308, and A.10295); on June 29, 1994 in the amount of $2,500.00 (App. Vol. XXVI, A.11627, App. Vol. XXIII, A.10478, App. Vol. XXIV, A10541); and on March 14, 1995 in the amount of $1,800.00 (App. Vol. XXVI, A.11635, App. Vol. XXIV, A10537). The documentary evidence undisputedly shows that these amounts were deposited by Shomron directly into R&L's accounts, as reflected in Shomron's

[5] Contrary to Respondent Fuks' assertion, Shomron has disputed the lower court's determination that she engaged in the incidents of alleged misconduct set forth in the Referee's Report. (See, App. Vol. I, A359, and Appellants' Brief, p. 39).

Citibank Ready Credit statements, R&L's management reports, and R&L's bank statements. Shomron's testimony that she deposited these advances from her personal Citibank Ready Credit account directly into R&L's account for R&L's benefit was not rebutted by any countervailing evidence. (App. Vol. XVIII, A.7636.84 to A.7636.88).

There is no evidence that Fuks paid any penalties or interest to any tax authority for Shomron's purported failure to timely file tax returns.[6]

With respect to the Salon Realty exclusive brokerage agreement, there is no evidence that R&L paid any commissions pursuant to that agreement. Nor is there any evidence as to how or why this brokerage agreement "effected Ms. Fuks' rights as a partner in R&L" in any way.

There is no evidence that Fuks suffered any injury when Mr. Kahn used defendant 2701 Broadway's petty cash account for R&L's benefit.

There is no evidence that Fuks suffered any injury by the mere fact that, out of thousands of entries, Mr. Khan made some inaccurate entries in his management reports.

[6] It should be noted that the Referee found that Fuks, after she commenced her arbitration proceeding, filed several years of R&L's tax returns (App. Vol. I, A.129), clearly indicating that she not only understood that tax returns had to be filed, but that Shomron was not in any superior position as an equal partner in R&L to file the returns. (App. Vol. I, A.185).

In short, there is no evidence to support the $375,000 damage award in the Amended Judgment which, with interest, is now more than $1.27 million.

Respondents cite case law, as did the lower court, for the proposition that a court is granted "significant leeway" in making a fair approximation of the loss occasioned by a breach of fiduciary duty. In none of those cases did the leeway extend to a court when there was a complete absence of proof of damage, as there is in the present case.

For example, in *Oshrin v. Hirsch*, 6 A.D.3d 352, 353–54 (1st Dept. 2004), cited at p.36 of Respondents' Brief, although this Court held that "significant leeway is granted to a court in making a fair approximation of the loss sustained by a breach of fiduciary duty," it also found that the lower court had employed an acceptable methodology to determine the damages.

In the present case, neither the Special Referee nor the lower court employed any methodology to determine damages. Instead, the Referee lumped all the disparate purported incidents of misconduct together and simply stated, with no reason given, that Fuks sustained $375,000.00 in damages.

At page 37 of its Brief, Respondents cite *Wolf v. Rand*, 258 A.D.2d. 401, 402-03 (1st Dept. 1999) (also cited by the lower court) for the proposition that "when a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated." In the present case, assuming *arguendo* there

were any damages, there is no proof that Fuks or the Court were hampered in any way in their ability to ascertain damages by anything Shomron did.

In *Wolf*, *supra* this Court held that the lower court employed a methodology for establishing that profits were diverted over the course of five years by basing it on "evidence of the gross amounts of unrecorded inventory during the relevant time period," and then by applying "the corporation's usual profit margin on legitimately inventoried goods as a benchmark to approximate the profits on the unrecorded inventory as a measure of loss." In other words, the lower court's determination of damages in *Wolf* was not just "pulled out of a hat," as the Referee in the present case appears to have effectively done, but had some basis in the evidence.

Clearly, the leeway granted to a court in making a fair approximation of a loss sustained by a breach of fiduciary duties requires some modicum of evidence, such as the employment of a reasonable methodology rooted in the evidence. In the present case, there is none.

This Court need look no further for proof that there is not a scintilla of evidence of damages than at one particularly revealing argument in Respondents' Brief. Desperate to the avoid the dismissal of Fuks' breach of fiduciary duties claim, Fuks attempts to mislead this Court into believing that she sought damages for the alleged incidents of misconduct in her post hearing brief. Relegated to footnote 4 in Respondent's Brief at page 35, Fuks baselessly claims, without any supporting

evidence, that the $375,000.00 damage award, or at least some portion of it, was sought in her post hearing brief as follows: "('Khan wrongful payment" – $11,000); *id*. ("Office expense diversions" – $60,580); id. ("Bank charges for bounced checks" – $12,536); *id*. ("Misc. other wrongful items" – $117,515)." Clearly, none of these categories mentioned in Respondents post-hearing brief (App. Vol. III, A.1194), correspond to any of the alleged incidents of misconduct set forth in the Referee's Report.

In Respondents' post-hearing brief, "Khan wrongful payment" is based on the Gutman Report and refers to "Hamid Kahn's Relocation Commissions" on the ground that he allegedly "[d]oes not have a Real Estate Broker's License." (Gutman Report, at App. Vol. XXII, A.9834). "Office expense diversions" is based on the Gutman Report and refers to the payment of telephone bills, Con Edison bills, insurance payments and other office expenses. (App. Vol. XXII, A.9834-9835). "Bank charges for bounced checks," a category which is self-explanatory, is also based on the Gutman Report, (App. Vol. XXII, A.9835). And "Misc. other wrongful items," also based on the Gutman Report (App. Vol. XXII, A.9836), refers to various categories of checks paid or cashed, none of which involves the incidents upon which the Referee found a breach of fiduciary duty.

As argued in Appellants' Brief, even if all the specific categories mentioned above from the Fuks's post-hearing brief corresponded to the alleged incidents of misconduct purportedly engaged in by Shomron, they only add up to $201,631, well short of the $375,000 erroneously found by the Referee. But the fact that Fuks has stooped so low as to portray these categories as corresponding to the alleged incidents of misconduct the Referee found against Shomron compels the conclusion that there is no evidence to support the Referee's damage finding.

POINT II

THE LOWER COURT DISMISSAL FOR FAILURE OF PROOF OF SHOMRON'S EIGHTH COUNTERLCLAIM FOR THE REPAYMENT OF LOANS WAS ERRONEOUS AND UNJUST.

Primarily relying upon and quoting the lower court's statements in the April 11, 2023 and May 11, 2023 orders on appeal, Fuks contends that the lower court correctly dismissed Shomron's eighth counterclaim seeking the repayment of certain loans made to R&L.

As it pertains to the Shomron loans, Fuks does not deny that most of the entries the Referee inexplicably found to be inaccurate or incorrect in Shomron's schedules were either not objected to by Fuks or were stipulated by the parties in Court Exhibit X to be supported by the evidence. (App. Vol. II, A899-A910). Fuks does not even acknowledge in the Respondent's Brief the import, much less the existence, of Court Exhibit X, which the parties' attorneys painstakingly negotiated over the course of

days during the hearings to eliminate disputes concerning the accuracy of Shomron's loans. In Court Exhibit X the parties' stipulated that many of the entries in Shomron's loan schedule were not only supported by the evidence, but "represent[ed] (i) funds received either directly by R&L, or by others for the benefit of R&L, from the Lenders specified therein, or (ii) funds paid directly by R&L, or by others for the benefit of R&L, in full and partial satisfaction of each Lenders' respective Loans." (Appellants' Brief, pp.44-45). By any fair and reasonable interpretation, Court Exhibit X is an acknowledgement by the parties as to the accuracy of many of the entries in Shomron's loan which the Referee failed to properly consider and inexplicably found to be inaccurate.

The May 10, 2023 hearing was ordered by the lower court in the April 11, 2023 order on appeal. (App. Vol. I, A24). In the April 11, 2023 order, the Court indicated that the purpose of the additional hearing was "to determine the amounts due on the balance of the remaining loans," after considering the entries in Shomron's schedules which the Referee found to be "incorrect" or "inaccurate." The court declared that "No new evidence will be allowed at the hearing on these loans whatsoever." (App. Vol. I, A24.4-24.5).

There is no dispute that the lower court, like the parties, had previously interpreted the Referee's Report to mean that the entries in Shomron's schedules which the Referee did *not* find to be "incorrect" or "inaccurate," were correct and

accurate. It is undisputed that the lower court previously directed the parties, based on this interpretation, to provide it with their respective contentions as to the balance of the Loans after eliminating the entries in Shomron's loan schedules that the Referee inexplicably found to be inaccurate. There is no dispute that each of the parties provided the lower court with their respective calculations as to the balance of the loans based on the correct or accurate entries (meaning those other than the ones the Referee found were "incorrect" or "inaccurate"), and that Shomron's calculations were supported by the affidavit of an accountant (and not an attorney) (App. Vol. IV, A1252-A1262).

In his supplemental affirmation below, attached to which was Fuks's proposed calculations, Fuks's counsel stated, "Pursuant to direction of the Court, this supplemental affirmation is submitted as part of the initial pleadings of Plaintiff's motion to give to the Court a table of the lenders to R&L Realty Associates ("R&L"), setting forth only those payments from the lenders to R&L and repayments from R&L to those lenders, *as identified as correct by the Referee's Report*." (App. Vol. III, A1007, emphasis added).

It is not disputed that the lower court previously adopted, in part, Fuks's calculations and ruled (before it was reversed on appeal on other grounds) that the

balance of the loans to be repaid, based on the correct entries, was $512,731.00. (See Appellant's Brief, pp.46-48).[7]

Going into the May 11, 2023 hearing to determine the balance due on the loans, Shomron had no reason to believe that the lower court's interpretation of the Referee's Report, i.e., that the entries in her loan schedules which the Referee did not find to be "incorrect" or "inaccurate" were correct and accurate, had changed. Yet surprisingly, as indicated in its May 11, 2023 decision dismissing the eighth counterclaims for failure of proof, the lower court abandoned its previous interpretation and stated that the Referee's Report was "silent on the remaining entries," and that the purpose of the inquest was not just to determine the balance of the loans, as stated in its April 11, 2023 order (App. Vol. I, A24.5), but to also "to determine the *accuracy* of the remaining entries in an effort to quantify damages." (App. Vol. I, A24.13, emphasis added). The lower court did not notify counsel prior to the May 11, 2023 hearing, that it was abandoning its prior interpretation of the Referee's Report and was now expecting Shomron's counsel to prove the accuracy of entries that, until then, everyone agreed the Referee implicitly found to be

[7] Fuks incorrectly claims that the $2,839,036.35 figure that Appellants claim is owed is based on assertions that the Referee found to be inaccurate." (Respondent's Brief, p.42). It is not clear what "assertions" Fuks is referring to that the Referee "found to be inaccurate," but the $2,839,036.35 figure is based solely on the entries the Referee found to be correct in accordance with the lower court's direction.

accurate. This unannounced change of interpretation by the lower court undoubtedly contributed to a contentious and unfair hearing.

The transcript of the hearing/inquest is just 42 pages long, evidencing how quickly the lower court disposed of the eighth counterclaim, not on the merits, but for "failure of proof" (App. Vol. IV, A1275.187-A1275.229). The transcript reveals that before Shomron's counsel was even given an opportunity to present its arguments and the evidence adduced at the hearings before the Referee, the lower court told the parties "to get on with" the inquest because "[t]his case is old enough." At the outset, the lower court stated, "I bet there is not sufficient evidence," effectively prejudging the outcome (App. Vol. IV, A1275.189).

Even when asked the simple question by Shomron's counsel whether the lower court preferred that he present its case from the podium, it retorted, "I don't care. I just want this case done, okay. I don't know why the referee didn't address [the amount of the balance of the loans]. But my bet is he didn't have any evidence and he forgot. So what is the evidence and where is it and I hope that you're ready to give me stuff … . I don't want anything that wasn't in the trial. …" (App. Vol IV, A1275.189).

Minutes into the inquest the lower court stated to Shomron's counsel, "You have taken up so much of my time and several other judges', okay. There are cases that need my attention. This one is over" (App. Vol. IV, A1275-191).

It is undisputed that all the evidence was in the courtroom. In addition, there is no dispute that at the lower court's direction prior to the inquest Shomron's counsel provided the lower court and opposing counsel with a flash drive of the documentary evidence. Nonetheless, the lower court accused Shomron's counsel of "just more delay and more delay and more disorganization" for also not also bringing hard copies for the court and opposing counsel. The lower court said it was "sick of it" (App. Vol. IV, A1275.192). Just minutes into the inquest, the lower court threatened Shomron's counsel, "you get your act together or I'm dismissing the case because I've had enough, I really have" (App. Vol. IV, A1275.203).

In furtherance of its determination as to the balance of the loans, the lower court refused to consider the parties' prior submissions that it previously requested as to the balance of the loans based on the correct entries, and which was already part of the court record (App. Vol. III, A1015-A1016 and A1246-A1248).

Fuks argues that a trial court has broad discretion to, among other things, control the courtroom, expedite proceedings, and admonish counsel. (Respondent's Brief, p. 40). However, the trial court's discretion to, among other things, control its courtroom, is not unlimited. A trial judge should at all times maintain an impartial attitude and exercise a high degree of patience and forbearance. *General Fire & Casualty Co. v. Mackpat Corp.*, 33 A.D.2d 765, 766 (1st Dept. 1969) (where this Court "regrettably" ordered a new trial where it was found that the lower court

"frustrat[ed] the presentation of defendant's evidence," even though the issue did not ultimately go to the jury); *Levy v. Reilly*, 18 A.D.2d 632 (1st Dept. 1962) (where this Court ordered a new trial after finding, that the trial court in a case tried without a jury, found plaintiff was deprived of a fair trial and an unprejudiced consideration by, among other things, "the injection of intemperate remarks – perhaps provoked by the parties"); *see also*, *Lyons v. New York*, 29 A.D.2d 923 (1st Dept. 1968) (ordering a new trial "where trial court failed to 'maintain an impartial attitude and exercise a high degree of patience and forebearance' necessary to assure plaintiff a fair trial").

There can be little doubt that the lower court prejudged and was predisposed to dismiss the eighth counterclaim even before the inquest began. When informed by Appellants' counsel that he was going to start with the presentation of evidence for Shomron's loans, the court quickly interjected, "Somebody whose credibility is basically zero. Okay, let's start with it" (App. Vol. IV, A1275.193). In her Respondent's Brief, Fuks does not deny that in the April 11, 2023 order directing the May 10, 2023 inquest, the lower court, among other things, falsely accused Shomron of being a "thief" who "pilfered from the company," even though Fuks's claims for conversion and misappropriation of funds was dismissed.

As frustrated as the lower court may have been regarding the length of this dispute, a fact which it hammered over and over again in its decisions and on the

record (and off), it is respectfully submitted that if he lower court exercised a modicum of patience and forebearance at the May 11, 2023 hearing, maintained an impartial attitude, and informed counsel ahead of time that it was changing its interpretation of the Referee's Report with respect to the entries the Referee did not expressly find to be "inaccurate" or "incorrect," the likelihood of a resolution on the merits, and one not based on a purported "lack of proof," would have been rendered.

Finally, Fuks argues that the Appellants are somehow not "aggrieved parties" with respect to the lower court's decision concerning the Loans since they allegedly "lack standing to represent" the interests of non-parties, i.e., Harry Salon, Michael Kaplan and Moti Zilber. (Respondents' Brief, pp.42-43). Clearly, Shomron, a partner in R&L which is duty bound to repay the partnership's debts, is an aggrieved party who specifically sought a judgment in her eighth counterclaim, granted by the lower court, declaring that the loans are valid, enforceable and should be paid. There can be no doubt that Shomron has a legal interest in the repayment of R&L's debts and would be adversely affected by any order which erroneously determines and directs the payment of an incorrect amount of those debts.

Dated: May 3, 2024
New York, NY

THE LAW FIRM OF GUY S. HALPERIN, PLLC

_____

By: Guy S. Halperin, Esq.
Attorneys for Appellants
27 East 21st Street, 9th Floor
New York, NY 10010
Tel. No.: (212)751-7555

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

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

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 6,369.