135 Bowery LLC v Sofer
2016 NY Slip Op 31012(U)
June 2, 2016
Supreme Court, New York County
Docket Number: 108020/2011
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
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135 BOWERY LLC, STEVEN SEITZMAN and
JUDITH SEITZMAN,

Plaintiffs,

-against-

MERIDITH YOUNG SOFER and CHRISTOPHER YOUNG, as Co-Executors of the Estate of Alan Young, LINDENBAUM & YOUNG, and its successors in interest; CHARLES PETRI, 10717 LLC BLOCK HOUSE LLC; 3D ASSOCIATES LLC; RAYMOND LIEBMAN; ROBERT YOUNG; LINDENBAUM & YOUNG, P.C., and ANN CATHERINE MOSQUERA,

Defendants.
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DECISION AND ORDER

Index No.: 108020/2011
Motion Sequence No.: 005 & 006

O. PETER SHERWOOD, J.:

I. BACKGROUND[1]

This is one of two cases based on the same set of facts. Steven Seitzman and Judith Seitzman (the Seitzmans) are the sole members of 135 Bowery, LLC (135 Bowery). 135 Bowery owned the property located at 135 Bowery, New York, New York (the Property). In 2007, the plaintiffs sold the Property with the assistance of their attorney, Alan Young (Young, now deceased), a partner at Lindenbaum & Young, to fund the Seitzmans' retirement. Plaintiffs claim that Young diverted the proceeds of the sale, sent some of it to entities he controlled, used other monies to buy real property for his own benefit, and lied to the Seitzmans about the status of their investments.

In the related case, *135 Bowery LLC, Steven Seitzman, and Judith Seitzman v Beach Channel Shoppers Mart Co. LLC*, Index No. 156014/2013, the plaintiffs sued one of Young's companies. According to the complaint in that case, $1,600,000 from the sale of the Property was diverted from the Lindenbaum & Young Interest on Lawyer Trust Escrow Account (LY IOLA Account) into a bank account of defendant Beach Channel Shoppers Mart Co., LLC (Beach Channel). A decision

[1]This Decision and Order replaces the decision rendered from the Bench following oral argument on April 25, 2016.

on the summary judgment motion in that case was held in abeyance so that decisions in both cases could be rendered at the same time.

In this action, the defendants are:

(1). The estate of Alan Young (Young), plaintiffs' prior attorney who allegedly stole money from plaintiffs;

(2). Lindenbaum & Young (LY), Young's law firm;

(3). Charles Petri (Petri), a real estate broker, and Young's business partner;

(4). 10717 LLC (10717), an entity owned and controlled by Young and Petri;

(5). Block House LLC (Block), an entity owned and controlled by Young and Petri;

(6). 3D Associates (3D), an entity owned and controlled by Young and Petri;

(7). Raymond L. Liebman (Liebman), an attorney who served as plaintiffs' Section 1031 Exchange Trustee. Claims against Liebman have been discontinued (NYSCEF Doc. No. 54);

(8). Robert Young (Robert), brother of Young and sole shareholder of Lindenbaum & Young, P.C. Plaintiffs claim Robert held himself out as Young's partner;

(9). Lindenbaum & Young, P.C. (LYPC), a law firm controlled by Robert; and

(10). Anne Mosquera (Mosquera), Petri's daughter.

The claims in this case are listed below. In the First, Second and Third Causes of Action, plaintiffs allege as against Robert and LYPC only "aiding and abetting" the conduct complained of.

Claim #	Claim Type	Defendant
1	fraud	Young, Petri, 10717, Block, 3D, Liebman, LY, Robert, and LYPC
2	breach of fiduciary duty	Young, Petri, Liebman, LY, and Robert
3	constructive fraud	Young, Petri, 10717, Block, 3D, Liebman, LY, Robert, and LYPC
4	conversion	Young, Petri, 10717, and 3D

5	unjust enrichment	Young, Petri 10717, 3D, and LY
6	legal malpractice	Young, LY, Robert, and LYPC
7	negligence	Liebman
8	gross negligence	Liebman
9	breach of contract	Liebman
10	negligent misrepresentation	Young, Petri, Robert, and LY
11	unjust enrichment	Mosquera

In motion sequence number 005, plaintiffs move for summary judgment against Young, Robert, and LYPC for $3,672,533.64, with interest from December 28, 2007. Plaintiffs also seek a default judgment pursuant to CPLR 3215 against Petri, 10717, LY, Block, and 3D in the same amount and for a default judgment against Mosquera for $875,000, with interest from January 15, 2008. Plaintiffs also seek costs, fees, and disbursements. In motion sequence number 006, defendants Robert and LYPC move for summary judgment seeking to dismiss all claims against them. Although not raised by any party, some claims must be dismissed as they are duplicative of other claims asserted in the complaint.

II. FACTS

The facts are taken from the undisputed facts set forth in the statement of undisputed material facts (SUMF)[2] submitted by Robert and LYPC and plaintiffs' response thereto (*see* NYSCEF Doc. Nos. 191 [Robert SUMF] and 200 [Plaintiff Response to Robert SUMF]), except as noted.

Steven Seitzman (Steven) and Judith Seitzman (Judith) are owners of 135 Bowery Street, LLC. In April of 2007, they hired attorney Alan Young to represent them in connection with the sale of the Property. Young counseled them in the attempt of an United States Internal Revenue Code § 1031 exchange (by which taxes would be deferred if the proceeds are invested in other, similar, real estate within a specified time after the sale). Liebman was the exchange trustee. The sale of the

[2]Although each side filed a SUMF, neither included the required citations to evidence. The responding defendants objected to plaintiffs' SUMF on this ground, and largely failed to provide substantive responses (*see* NYSCEF Doc. No. 210 and 203). Plaintiffs provided substantive responses to Robert and LYPC's defective SUMF (*see* NYSCEF Doc. No. 200).

building closed on December 28, 2007. At the closing, plaintiffs received net proceeds of $4,513,711. This sum was deposited in the LY IOLA Account and eventually $4,672,553.64 was transferred to Liebman, the Section 1031 Exchange Trustee (Steven aff at ¶ 10-12, NYSCEF Doc Nos. 106, 114, 115, 119).

A. Property Purchases

On January 3, 2008, Young sent Liebman a letter instructing him to transfer $3,500,000 to LY to be used for down payments on the purchase of two parcels of land in Sullivan County, New York (NYSCEF Doc. No. 116). Young attached unsigned draft contracts which purportedly provided a basis for the transfer (*id.*). One contract was for an 83.19 acre parcel (the "83 Acre Property," *id.*). The other was for a single family home (the "Mosquera Property," *id.*). Young was listed as counsel for the seller on both contracts (*id.*). Patrick Lucas, an associate at LY, appears on the draft contracts as representing the purchaser in both transactions *(id.; Robert tr.*, NYSCEF Doc. No. 112, p.26*)*. 10717 is named in the contract as the seller of the 83 Acre Property, with provision for Petri signing on behalf of that entity. According to the Sullivan County Tax Map and Records System, the 83 Acre Property was owned by a George Bagely (NYSCEF Doc. No. 117). Liebman transferred $3,500,000 to the LY IOLA account that day (NYSCEF Doc No. 118).

On January 4, 2008, a wire transfer was sent from the LY IOLA Account to the Ricciani & Jose LLP Attorney Escrow Account in the amount of $ 1,738,664.10 (NYSCEF Docs. No. 123, 124). That money was used to purchase a different property from Robert Green in the name of 10717 (the "18 Acre Property") (NYSCEF Docs. No. 125, 126). Young is listed as the attorney for 10717. Additionally, $1,600,000 was transferred from the LY IOLA account to Beach Channel, which, as noted above, is the subject of the related litigation (NYSCEF Doc. Nos. 129-31). Beach Channel then transferred $1,200,000 to 10717 and $355,00 to LY (NYSCEF Doc. No. 130). Additional facts relating to the diversion of funds to Beach Channel are set forth in the Decision and Order filed this day in the related case.

B. Dissipation of Remaining Funds

Some of the money transferred to the LY IOLA Account was used as a down payment for the Mosquera Property on behalf of 135 Bowery. That transaction, in the amount of $875,000, closed on January 15, 2008. At the closing, Leibman made the following additional payments from

the 135 Bowery trust account: $625,000 as the remaining payment for the property,[3] $7,387 to 222 Abstract Company, $2,500 to LY,[4] and $1,000 to Liebman (NYSCEF Doc. No. 115). An additional $299 was paid to 222 Abstract the next day (*id.*).

Defendant Mosquera purchased the Mosquera Property in September 2005 for $340,000 and took out a $264,000 mortgage through Walden Savings and Loan Association (NYSCEF Docs. No. 120-22). Upon the sale to 135 Bowery, Mosquera did not satisfy the mortgage (NYSCEF Docs. No. 116 and 138). Walden Savings and Loan subsequently foreclosed on the Mosquera Property (Steven aff, ¶ 40), leaving the plaintiffs with no value for the purchase.

A second property consisting of 1.3 acres of vacant land in Sullivan County was purchased for 135 Bowery that summer (the "One Acre Property"). Block House purchased the One Acre Property from Robert Green in March 2008 (NYSCEF Doc. No. 128). Plaintiffs claim the purchase was made with $200,000 of their money (Steven aff, ¶ 46). On June 24, 2008, Block House transferred the property (executed by Block House member Petri) to 10717 for no consideration (Recording Instrument, attached as Plaintiffs' Exhibit GG). On the same day, 10717 (with Petri signing for that entity) transferred the One Acre Property to 135 Bowery with a purported sale price of $4,000,000 (Recording Instrument, attached as Plaintiffs' Exhibit HH). Plaintiffs claim no money actually changed hands that day and that the transaction was a sham designed to show the illusion of the purchase of a similar property as required by the federal tax code (Steven aff, ¶ 47).

In June of that year, Liebman paid out an additional $100,502.82 to LY, and $1,500 to himself (NYSCEF Doc. No. 115). These payments constituted the last of the 135 Bowery funds held by Liebman.

C. Involvement of Robert Young and LYPC

Robert is the sole shareholder of LYPC. He formed the law firm, which was registered with the New York State Department of State on January 26, 2009, with an address of Suite 2107, 16

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[3]Thus, a total of $875,000 was paid, even though the draft contract listed a purchase price of $850,000.

[4]Similar to the contract for sale of the 83 Acre Property, the draft contract identified Young as attorney for Mosquera and Patrick Lucas, an LY associate, as attorney for 135 Bowery (NYSCEF Doc. No. 116).

Court Street, Brooklyn, New York (NYSCEF Doc. No. 148), the same address as the office of LY (NYSCEF Doc. No. 116). Shortly thereafter, both offices relocated to 1164 Manhattan Ave., Brooklyn, New York. Young resigned from the practice of law in April 2009 (NYSCEF Doc. No. 149). Robert then took over the office occupied by LY, continued to use the same telephone number, and assumed representation of at least 75 of LY's clients (*see* NYSCEF Doc. No. 201, at 21). Prior to Young's death on March 28, 2011 (NYSCEF Doc. No. 72, ¶ 3), Robert had one phone conversation and held a meeting with Steven. He had no contact with Judith. In the winter of 2009, Robert called Steven, at Steven's request. The content of that call is disputed (NYSCEF Doc. Nos 191 and 200, ¶ 21). In the winter of 2010, Steven received a check drawn against an LYPC account and signed by Robert. The check was to pay a debt owed by Young. Robert and LYPC claim the money was from a distribution to Young from a family trust (*id.* ¶ 22).

D. Involvement of 10717

The Seitzmans were granted a constructive trust on 18 acres of real property by a Sullivan County court. 10717 appeared in the action, but failed to oppose a motion for summary judgment. 10717's motion to vacate that decision failed. On February 9, 2015, 10717 brought an as-yet unperfected appeal from denial of the motion to vacate.

III. ARGUMENTS

The two motions cover the same issues and advance many of the same arguments. The court will treat them as one motion.

A. As to Alan Young

Plaintiffs argue that summary judgment should be granted against Young on the claims for common law fraud, breach of fiduciary duty, constructive fraud, conversion, unjust enrichment, legal malpractice, and negligent misrepresentation. The Estate of Alan Young filed an opposition brief, arguing only that plaintiffs' motion should fail because statements made by Steven Seitzman and his attorney, Gerard Riso, are inadmissible against Young due to the "Dead Man's Statute," CPLR 4519 (Young Opp at 2). That statute provides:

> "[u]pon the trial of an action . . . , a party or a person interested in the event . . . , shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . , concerning a personal transaction or communication between the witness and the deceased person . . . , except where the

> . . . testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication"

(CPLR 4519). Accordingly, "a person who is disqualified under CPLR 4519 cannot testify about anything that was gleaned by any of this witness's senses in the presence of the decedent" *(In re Estate of Hamburg*, 151 Misc 2d 1034, 1039 [Sur Ct 1991]). According to Young, this makes the Steven and Riso statements totally inadmissible against Young. Young does not argue that the submitted documentary proof is barred for this reason.

Robert and LYPC join in Young's arguments. They add that there was no underlying fraud and describe the transaction as a risky investment entered into by the plaintiffs, despite the cautionary recommendation of plaintiffs' accountant. They assert that there are several disputed issues of material fact.[5] Robert and LYPC describe the accountant's advice as counseling plaintiffs "not to enter into such a risky investment" (Robert and LYPC Opp Memo at 4, citing *Liebman tr*, NYSCEF Doc. No. 181 at 16-17). Robert and LYPC also claim that Steven saw the property before the transaction closed, and should have known its value and that the Section 1031 Exchange transaction was fraudulent (Robert and LYPC Opp Memo at 5 citing Judith aff, without a page citation). Steven responds that he visited a property before entering into an exchange, but it was not the property that was purchased for plaintiffs (*Steven tr*, NYSCEF Doc. No. 179, at 46-47, 73-74).

Robert and LYPC also argue that, possibly in addition to the Section 1031 Exchange, plaintiffs believed themselves to be entering into a partnership with 10717 and gaining an interest in a final project (Robert and LYPC Opp Memo at 5; Young email to Seitzmans, NYSCEF Doc. No. 189 [confirming plaintiffs' payout will include 6.5% of profits "derived from the sale, financing, or reinvestment of the property"]). As counsel conceded at oral argument on these motions, no documentary evidence has been presented to support this speculation.

B. As to Robert Young

Plaintiffs move for summary judgment against Robert on the aiding and abetting fraud, constructive fraud, legal malpractice, and negligent misrepresentation claims.

1. <u>Aiding and Abetting Fraud and Constructive Fraud</u>

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[5]The dispute between Steven and Robert over whether the power of attorney used by Young was forged is not material, as it is not one of the elements of an alleged fraud.

Plaintiffs claim Robert knew of the fraud perpetrated by Young and provided substantial assistance to him when, in the winter of 2009, Robert falsely reassured Steven that the casino project was "progressing as planned" in order to conceal and prolong the fraud (Plaintiffs Memo at 11). To support the element of knowledge, plaintiffs point out that Robert was aware Young was the subject of a disbarment proceeding in "the end of 2008, beginning of 2009" for misuse of the LY IOLA account (*Robert tr*, NYSCEF Doc. No. 112, p. 131). Plaintiffs also argue that, even if Robert did not have actual knowledge of the fraud, his conscious avoidance of the facts of the fraud make him liable (*see In re Agape Litigaton*, 773 F Supp 2d 298 [EDNY 2011]). Plaintiffs also rely on the complaint in the 3D Associates litigation against the Seneca Indians in which Robert (as 3D Associates' attorney) accused the Seneca Indians of bad faith and intentionally stalling the casino project (NYSCEF Doc. No. 144 at p. 4-5, 8). Robert was hired by 3D Associates for the litigation in late 2010 or early 2011(*Robert tr* at 214).

Robert emphasizes that all of the events that plaintiffs contend link him to Alan's misdeeds are alleged to have occurred a year prior to the time he returned to New York from California and established LYPC. (*see* Robert and LYPC Opp, NYSCEF Doc. No. 207, ¶ 42). Robert argues that he learned of the problems between Young and plaintiffs after his second conversation with Steven Seitzman, which occurred at about the time that the 3D complaint was filed, in March of 2011. Defendants do not dispute that Robert was aware of disciplinary proceedings against Young for the misuse of client funds at the time he gave reassurance to Steven. Plaintiffs also point out that entities in which Robert held interests received some of the misappropriated funds (006 Opp, NYSCEF Doc. No. 201 at 17).

2. Negligent Misrepresentation

In the Tenth Cause of Action, plaintiffs argue that, while Robert may not have known of the fraud during his conversations with Steven, he must have been aware of the problems with the development of the Seneca Indian project in 2010, as he had filed a complaint against the Seneca Indian Nation on behalf of 3D, alleging the Nation's bad faith and delays on the project. The allegations in the Seneca Indian litigation were inconsistent with Robert's representations to Steven that all was well. Defendants dispute that the statements Robert made to Steven were false. Defendants also dispute whether Robert and plaintiffs had the "special or privity-like relationship"

required to support this claim, and whether there could have been reasonable reliance on Robert's statements, as Robert only spoke with Steven after the transactions were consummated (Defendants' Memo at 18)..

3. Legal Malpractice and Aiding and Abetting Breach of Fiduciary Duty

Plaintiffs assert claims against Robert for aiding and abetting Young's breach of fiduciary duty (Second Cause of Action) and for legal malpractice (Sixth Cause of Action) (*see* Complaint, ¶¶ 192, 214). As discussed above, the parties dispute whether Robert held himself out to be Young's partner, and thus had a fiduciary duty to plaintiffs. Plaintiffs rely on *Ginsburg Dev. Companies, LLC v Carbone*, which allowed a malpractice claim against a party not in privity to the plaintiff to survive a motion to dismiss when the allegations fell "within the narrow exception of fraud, collusion, malicious acts or other special circumstances" (85 AD3d 1110, 1111 [2d Dept 2011], quoting *Aranki v Goldman & Assoc., LLP*, 34 AD3d 510, 512 [2006]). Plaintiffs argue that Robert's actions in (1) receiving funds from the LY IOLA account in June and July 2008 through an entity controlled by him, Little Fox Productions and (2) paying Seitzman from his LYPC account on or about October 25, 2010, constitute involvement sufficient to overcome any deficiency.

C. As to LYPC

Plaintiffs allege that LYPC is liable for fraud as its account was used to pay plaintiffs a portion of the advances promised by Young, and for malpractice because it is a mere continuation of LY, which is liable because of Young's actions as described above (Plaintiff's Memo at 16). Robert established LYPC in January 2009. Plaintiffs claim that, at that time, Robert already knew of Young's disbarment proceedings, and that Young was in the process of resigning as an attorney. Plaintiffs add that LY would have ceased to operate upon Young's disbarment, and that LYPC used the same office and represented LY's clients, at least initially (*id.* at 17, *Robert tr* at 379, 383). Robert admitted that the purpose of LYPC was to "continue the certiorari work that had been [his] father's" (*Robert tr* at 368).

D. Default Judgments Concerning Petri, 3D, 10717, LY, Block House, and Mosquera

Plaintiffs argue that a default judgment should be granted against Petri, 10717, LY, 3D, and Block House on the claims of fraud, constructive fraud, conversion, and unjust enrichment.

Plaintiffs also argue that a default judgment should be granted against Petri for breach of fiduciary duty and negligent misrepresentation; against 10717 and LY for negligent misrepresentation; and against LY for legal malpractice. Finally, plaintiffs seek a default judgment against Mosquera for unjust enrichment.

The record contains affidavits of service of the summons and complaint on these defendants (Plaintiffs Exhibits CCC-HHH). None of them has appeared. Most have actual notice of this action, as Robert and Petri represent or act for 10717, 3D, and Block House. Moreover, Robert and Petri both participated in the Sullivan County action (Robert as counsel for 10717 and Petri as an affiant), and the complaint in that action referenced this case. LY knows about this action because Young's estate is aware of it. Plaintiffs' evidence to support allegations against these defendants include the following:

(1). Petri signed off on several of the fraudulent deeds, including the deed for the $4,000,000 One Acre Property. Additionally, in January 2010, Steven met with Petri to check on the status of his investments. Petri reassured him that the casino deal (which would make the value of the properties rise) was proceeding and that Petri would arrange for $10,000 to be paid to Steven. The payment was made about a week later (Steven aff, ¶¶ 72-74).

(2). 3D Associates sued the Seneca Nation of Indians related to transfer of an 18 acre property to them by 3D Associates' "nominee," 10717 (*3D Assoc. v Seneca Nation of Indians*, Verified Complaint, attached as Plaintiffs' Exhibit KK, ¶ 5). A "nominee" is "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others" (Black's Law Dictionary). Accordingly, argue plaintiffs, 3D is liable, as is 10717 (005 Memo at 22).

(3). 10717 received funds taken from 135 Bowery. 10717 took title to the 18 Acre Property using 135 Bowery funds.

(4). Young acted through his law firm, LY, to engage in the acts described above, including directing 135 Bowery funds from the LY IOLA account in an unauthorized fashion and representing opposite sides of transactions without client consent.

(5). Petri is a member of Block House. That entity, with Petri acting for it, participated in fraudulent transactions involving the One Acre Property. Block House obtained the property from a third party and transferred it, gratis, to 10717 before the property was transferred to 135 Bowery for no consideration in a fraudulently-papered transaction.

(6). Mosquera, Petri's daughter, sold the Mosquera Property to 135 Bowery at an inflated price

and failed to satisfy the existing mortgage, thus receiving benefits to which she was not entitled.

IV. DISCUSSION

A. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.,* 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver,* 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.,* 65 NY2d 625 [1985]), and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.,* 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "'[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

B. Claims Arising From the Attorney-Client Relationship

Where the complaint against an attorney alleges breach of fiduciary duty, fraud, aiding and abetting fraud, and negligent misrepresentation, and the claims are all predicated on the same allegations and seek identical relief to the legal malpractice claim, the former claims should be dismissed as redundant of the malpractice claim (*see Ulico Casualty Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 14 [1st Dept 2008][dismissing breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty and tortious interference with contractual relations claims as duplicative of the malpractice cause of action]; *Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [1st Dept 2002][dismissing claims for breach of contract and breach of fiduciary duty as those claims were "predicated on the same allegations and seek relief identical to that sought in the malpractice cause of action"] *Sitar v Sitar*, 50 AD3d 667, 670 [2d Dept 2008] [affirming dismissal of causes of action alleging fraudulent misrepresentation and negligent misrepresentations "insomuch as those causes of action arise from the same facts as the cause of action alleging legal malpractice and do not allege distinct damages"]; and *Sage Rlty Corp. v Proskauer Rose*, 251 AD2d 35, 39 [1st Dept 1998] [breach of contract and fraudulent misrepresentation claims dismissed as redundant of malpractice claim]).

In *Ulico Casualty Co.*, the Appellate Division, First Department observed that

> "the relationship of the client and counsel is one of the unique fiduciary reliance and the relationship imposes on the attorney the duty to deal fairly, honestly and with undivided loyalty, including maintaining confidentiality avoiding conflicts of interest, operating competently, safeguarding client property and honoring the client's interests over the lawyer's. Thus, any act of disloyalty by counsel will also comprise a breach of the fiduciary duty owed to the client"

(56 AD3d at 9 [internal citations and quotation marks omitted]). That court also noted that an action for breach of fiduciary duty is governed by a considerably lower standard of recovery than the strict "but for" test for attorney negligence. In the former, plaintiff need only identify "a conflict of interest which amounted merely to a substantial factor in the plaintiffs loss" (*id.* at 10). However, in the context of an action asserting attorney liability, the claims of malpractice and breach of fiduciary duty are both governed by the "but for" standard *(see id.)*. In the Second Department, the

"but for" causation standard requires no more than a showing that the malpractice was a proximate cause of the claimed loss (*see Barnett v Schwartz*, 47 AD3d 197 [2d Dept 2007]).

The Sixth Cause of Action alleges legal malpractice against Young, LY, Robert, and LYPC based on the same facts that are alleged against these parties for fraud (First Cause of Action), breach of fiduciary duty (Second Cause of Action), and constructive fraud (Third Cause of Action). The same facts are also asserted in support of the Fourth (conversion), Fifth (unjust enrichment), and Tenth (negligent misrepresentations) Causes of Action against Young and LY. The damages claimed in these Causes of Action are all essentially the same. In the malpractice claim, plaintiffs demand $4,500,000, arising from the misappropriation of funds entrusted to the lawyers and their law firms. In the First, Second, Third, Fourth and Tenth Causes of Action, plaintiffs seek to recover the same amount (*see* Amended Complaint, NYSCEF Doc. No. 18 at pp. 49-52). In the Fifth Cause of Action, plaintiffs seek a portion of that amount, specifically $3,000,000. Accordingly, the First (fraud), Second (breach of fiduciary duty), Third (constructive fraud), Fifth (unjust enrichment) and Tenth (negligent misrepresentation) Causes of Action shall be dismissed as against Young and LY. The Fourth Cause of Action (conversion) shall be dismissed as against Young. All of these claims are duplicative of the malpractice claim asserted against these defendants. The above analysis cannot be applied to the claims against Robert and LYPC because plaintiffs have not established that an attorney client relationship existed between themselves and Robert or LYPC.

As is discussed below, the plaintiffs' motion for summary judgment on the legal malpractice claim must be granted against Young and LY. It must be denied as against Robert and LYPC.

C. Legal Malpractice Claim Against Young and LY

An action for legal malpractice requires proof of the attorney's failure to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal profession, and actual damages (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 [1st Dept 1991] *affd*, 80 NY2d 377 [1992]; *Reibman v Senie*, 302 AD2d 290, 290 [1st Dept 2003], *Between the Bread Rlty. Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380 [1st Dept 2002], *lv denied* 98 NY2d 603 [2002]). To show causation, a plaintiff must demonstrate that "but for" the attorney's negligence, the plaintiff would either have prevailed in the underlying matter or would not have sustained damages (*Reibman*, 302 AD2d at 290, *Senise v*

Mackasek, 227 AD2d 184 [1st Dept 1996]; *Stroock Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]).

Rule 1.15 of the Rules of Professional Conduct provides that:

> A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

The Comment published along with Rule 1.15 makes clear that "[a] lawyer should hold the funds of others using the care required of a professional fiduciary. Misappropriation or conversion of client funds is strictly prohibited" (*see In re Sato*, 77 AD 3d 30 [1st Dept 2010]; *In re Devine*, 34 AD 3d 1178 [3d Dept 2006]).

> Rule 1.7 (a) (2) provides that a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

This rule is based on the fundamental tenet that "[l]oyalty and independent judgment are essential aspects of a lawyer's relationship with a client" (Comment 10 to Rule 1.7).

It is undisputed that there was an attorney-client relationship between plaintiffs on the one hand and Young and LY on the other. Defendants argue however, that the Dead Man's Statute (CPLR 4519) makes any testimony by an interested party about Young's actions or statements inadmissible against Young's estate. Accordingly, any testimony by Steven about statements Young made to him are inadmissible against Young's estate. While the defendants argue that Riso's affirmation is also inadmissible, the Riso affirmation merely provides the procedural history of the action and attaches exhibits. Documentary evidence is not barred by the Dead Man's Statute, as long as the authentication is not based on a personal transaction with the deceased (*William L. Mantha Co. v De Graff*, 266 NY 581, 582 [1935]; *Acevedo v Audubon Mgt., Inc.*, 280 AD2d 91, 95 [1st Dept 2001]). Defendants do not point to any statements made by Riso about his observations of Young, or statements about what Young said to him. At oral argument on these motions, defendants' counsel conceded that nothing in the Riso affirmation is barred by the Dead Man's Statute.

Plaintiffs have presented documentary evidence in support of their legal malpractice claims against Young and LY, e.g., a letter informing Liebman of the properties which had been identified for the Section 1031 exchange and attaching unsigned contracts (NYSCEF Doc. No. 116), resulting in Liebman releasing plaintiffs' funds to LY, and the Sullivan County property records showing that the purported seller named in the contract did not own the property (NYSCEF Doc. No. 117).

Based on such evidence, plaintiffs have made out a prima facie case of legal malpractice, specifically, multiple acts of misappropriation of client funds and divided loyalty in breach of the fiduciary duty owed to the client. The misappropriations include but are not limited to (1) $3,500,000 taken without authorization in January 2008 in connection with a sham purchase of the 83 Acre Property, (2) $1,738,664.10 taken in January 2008 in connection with the purchase of the 18 Acre Property in the name of 10717, (3) $1,600,000 diverted to Beach Channel on January 4, 2008, (4) diversion of $200,000 to purchase a one acre parcel and thereafter "selling" it to 135 Bowery in a purported $4,000,000 Section 1031 exchange transaction; and (5) use of over $875,000 of plaintiffs' funds to purchase a small property at a grossly inflated price from Ann Mosquera, daughter of defendant Petri. The acts of divided loyalty include serving as counsel on both sides of the 83 Acre Property and Mosquera transactions. Young also used the position of trust he enjoyed as plaintiffs' lawyer to defraud them, including retention of $1,227,350, which sum remains unaccounted for (*see* Compl. ¶173).

D. Claims Against Robert

1. Legal Malpractice

Regarding Robert and LYPC, it is undisputed that no attorney-client relationship was ever formed independently of the attorney-client relationship plaintiffs had with LY. Plaintiffs allege LYPC is liable for the torts of LY as LY's successor. Generally, a corporation that acquires the assets of another is not liable for the torts of its predecessor (*see Schumacher v Richards Shear co.*, 59 NY 2d 239, 244 [1983]). However, an acquiring company may be responsible as a successor if it is a "mere continuation" of its predecessor corporation (*see id* at 245). Plaintiffs claim that LYPC is a "mere continuation" of LY. This issue is discussed in the section of this Decision and Order relating to the claims against LYPC. Regardless, successor liability would only make LYPC liable for LY's tort. It would not make Robert the plaintiffs' attorney. There is a disputed issue of material

fact as to whether Robert held himself out to be Young's partner. However, none of the conduct alleged to support this claim predates the disposition of the plaintiffs' funds. Plaintiffs have shown that the funds held by Liebman were exhausted by June 2008. The funds retained by Young in the LY IOLA account were disbursed before the end of 2008. The unauthorized land purchases were all completed in 2008. The actions attributed to Robert which are alleged to constitute the aiding and abetting claim occurred in 2009, after the misappropriations were completed. Accordingly, even if Robert and plaintiffs shared an attorney-client relationship, the undisputed facts show that Robert's malpractice could not have caused plaintiffs' damages.

2. *Aiding and Abetting Fraud and Constructive Fraud*

The elements of a claim for aiding and abetting fraud are (1) the existence of an underlying fraud, (2) knowledge of the fraud on the part of the aiding and abetting party and (3) substantial assistance by the aiding and abetting party in achieving the fraud (*see Oster v Kirscher*, 77 AD 3d 51 [1st Dept 2010]). As to the underlying fraud, "[t]o state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], *lv denied* 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). Fraud must be proven by clear and convincing evidence (*Valenti v Trunfio*, 118 AD2d 480, 484 [1st Dept 1986]).

The elements of constructive fraud are: "(1) a representation was made, (2) the representation dealt with a material fact, (3) the representation was false, (4) the representation was made with the intent to make the other party rely upon it, (5) the other party did, in fact, rely on the representation without knowledge of its falsity, (6) injury resulted and (7) the parties are in a fiduciary or confidential relationship" (*Del Vecchio By Del Vecchio v Nassau County*, 118 AD2d 615, 617-18 [2d Dept 1986] citing *Brown v Lockwood*, 76 AD2d 721, 730 [2nd Dept 1980]). Distinguishing this claim from fraud itself, a claim for constructive fraud does not require proof of "actual knowledge of the falsity of the representation by the defendant" (*id* at 617-18).

Robert and LYPC deny that they were parties to the fraud committed by Young. They argue that the plaintiffs were in cahoots with Young in a scheme to create a fraudulent Section 1031

exchange. Other than a vague e-mail from Young to Steven Seitzman mentioning a percentage of profits "derived from the sale, financing, or reinvestment of the property" (NYSCEF Doc. No. 189), there is no evidence to support that narrative. Robert and LYPC also argue the plaintiffs should have been aware of the risks of the investment, pointing to the counsel received from the accountant. The accountant's testimony was that, given that the Seitzmans were of retirement age, and had a reasonable expectation that their resources, invested conservatively, would provide them with $150,000 to $180,000 annually to live on, his advice to them was "don't play around with anything that you don't understand," as the Section 1031 exchange is complicated (*Liebman tr* at 17-18). He did not opine on the specific proposed transaction. Nor does this advice support an argument that perhaps plaintiffs did not understand the transaction in which they were engaging. In any event, investment risk is not what caused plaintiffs' damages. The misappropriation did.

The undisputed admissible evidence shows that an underlying fraud occurred. Young diverted plaintiffs' cash for his own benefit, misrepresented the uses to which funds entrusted to him were being put and used plaintiffs' resources to purchase properties for plaintiffs at inflated prices with the excess profits pocketed by Young.

The knowledge element requires a showing of actual knowledge of the fraud (*see CTR Investments, Ltd v BDO Seidman, LLP*, 85 AD 3d 470 [1st Dept 2011]). Substantial assistance exists where, first, the aiding and abetting party affirmatively assists, helps conceal, or by virtue of failing to act when required to do so, enables the fraud to proceed, and second, the actions of the aiding and abetting party proximately caused the harm on which the primary liability is based (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD 3d 472 [1st Dpt 2009]).

As discussed above, plaintiffs have not shown substantial assistance because they cannot show that the actions of Robert proximately caused the harm on which the primary liability is based. Accordingly, the claims of aiding and abetting fraud and constructive fraud against Robert must be dismissed.

3. Breach of Fiduciary Duty

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]). A fiduciary relationship is grounded

in a higher level of trust than exists between those engaged in arms-length transactions in the marketplace (*Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584 [2012]). A fiduciary is "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v Salmon*, 249 NY 458 [1928]). The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]). Plaintiffs claim that there was a fiduciary relationship between themselves and Robert because there existed an attorney-client relationship. As discussed above, issues of fact exist as to the existence of an attorney-client relationship. However, as also discussed above, Roberts' actions could not have caused plaintiffs' damages. The breach of fiduciary duty claim against Robert must be dismissed.

4. Negligent Misrepresentation

The elements of a claim for negligent misrepresentation are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011]; see *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007], *Hudson Riv. Club v Consol. Edison Co. of New York, Inc.*, 275 AD2d 218, 220 [1st Dept 2000]). As discussed above, there is an issue of fact as to whether Robert had a fiduciary duty to plaintiffs, but the plaintiffs have not made a prima facie case that they relied on information he provided, or that such information damaged them. This claim must be dismissed.

E. Claims Against LYPC

Because all of the misconduct alleged against LYPC allegedly took place after the harms complained of occurred, the aiding and abetting claims against LYPC must be dismissed for the same reasons such claims must be dismissed as against Robert.

As to the legal malpractice claim under the successor liability theory, generally, an entity that acquires the assets of another entity is not liable for the torts of its predecessor. However, "a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]). The standard for determining

whether an entity is a mere continuation is "flexible" and the court should "ask [ ] whether, in substance, it was the intent of [the successor] to absorb and continue the operation of [the predecessor]" (*Societe Anonyme Dauphitex v Schoenfelder Corp.*, 2007 WL 3253592, *5, 2007 U.S. Dist. LEXIS 81496, *13-14 [SDNY 2007], quoting *Miller v Forge Mench Partnership, Ltd.*, 2005 WL 267551, *7, 2005 US Dist LEXIS 1524, *23 [SDNY 2005] [internal quotations and citations omitted]). Factors to be considered include transfer of management, personnel, physical location, good will and general business operations (*see NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 411 [1st Dept 2010] citing *Societe Anonyme Dauphitex*, 2007 WL 3253592 at *5-6, 2007 U.S. Dist. LEXIS 81496 at *14-16 [SDNY Nov. 2, 2007]).

Young was disbarred on April 21, 2009 (*see* NYSCEF Doc. No. 190). Upon disbarment, LY could not continue to exist as an operating law firm and LYPC apparently assumed representation of at least some LY clients. Robert formed LYPC in January 2009 and gave 16 Court Street, Brooklyn New York as his office address (NYSCEF Doc. No. 116; *Robert tr*, p. 375, NYSCEF Doc. No. 112). He later rented office space at Suite 300, 1164 Manhattan Avenue, Brooklyn, New York, which space was shared with LY at least until Suite 100 in that building was built out (*id* at p. 379). From its inception, LYPC used the LY telephone number and continued to use it after LY ceased operations. LYPC also took over representation of at least 75 former LY clients. Robert claims that these were former clients of his father, not Young. However, his father retired from the practice of law in 2005, leaving Young as the sole partner of LY. Robert began representing these clients in early 2009, shortly before Young surrendered his license to practice law. Robert did not give notice to the former clients of LY that a different law firm had replaced LY.

Although the record reveals a close relationship between the two law firms and aquisition by LYPC of LY assets, plaintiffs have not established as a matter of law (as is required on a motion for summary judgment) that LYPC is a mere continuation of LY. The extent of LYPC's assumption of the business of LY has not been established, e.g. personnel, office systems, general business operations, good will and receivables. Issues of fact remain for determination at trial.

F. Petri, 3D, 10717, LY, Block House, and Mosquera

Petri, 3D, 10717, LY, Block House and Mosquera did not respond to the complaint in this action, even though they were properly served with the summons and complaint. Plaintiffs seek a

default judgment against all of these parties. A default judgment cannot be awarded unless plaintiffs make out a prima facie showing of liability as to each defaulting defendant.

Plaintiffs assert claims against Petri, 10717, and 3D for conversion. The elements of conversion are (1) plaintiff's possessory right or interest in certain property and (2) defendant's dominion over the property or interference with it in derogation of plaintiff's rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see also Employers' Fire Ins. Co. v Cotton*, 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff's right to possess the property. The defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 [4th Dept 2014]).

Plaintiffs have shown with admissible documentary evidence that they had a right to the money which represented the proceeds from the sale of the property located at 135 Bowery Street and that Petri, along with Young, defrauded plaintiffs in multiple ways and wrongfully converted their funds. Plaintiffs are entitled to entry of a default judgment against Petri as to the First, Third, Fourth, and Fifth Causes of Action. Plaintiffs have not established that there was a fiduciary, special, or privity-like relationship between them and Petri. The breach of fiduciary duty and negligent misrepresentation claims must be dismissed.

10717 and Block House took title to property paid for with plaintiffs' funds and were principal vehicles used by Young and Petri to defraud plaintiffs. A default judgment will be entered against 10717 and Block House as to the First and Third Causes of Action and against 10717 as to the Fourth and Fifth Causes of Action.

In their brief, plaintiffs charge 3D Associates with "knowledge" of the frauds of Young and Petri. Mere knowledge is insufficient to establish a prima facie case of fraud or constructive fraud. The claims of conversion and unjust enrichment against 3D Associates have not been established as it did not have possession of plaintiffs' funds.

Having made out a prima facie case of legal malpractice against LY, plaintiffs' motion will be granted against LY as to the Fifth Cause of Action.

Plaintiffs assert a claim for unjust enrichment against Mosquera. "Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v*

Rieder, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). Plaintiffs have shown that their funds were used without authorization to purchase property owned by Mosquera at an inflated price. Mosquera also failed to discharge the mortgage on the property at the closing, thereby receiving more than the purchase price of the property. The motion will be granted as to the Eleventh Cause of Action against Mosquera.

V. SUMMARY and DAMAGES

In summary, plaintiffs' motion for summary judgment is granted as against Young and LY as to the Sixth Cause of Action; as against Petri and 10717 as to the First, Third, Fourth and Fifth Causes of Action; as against Block as to the First and Third Causes of Action and as against Mosquera under the Eleventh Cause of Action. The Motions for Summary Judgment of Robert and LYPC to dismiss the complaint as to them is granted except the Sixth Cause of Action against LYPC shall survive as there are material issues of fact based on the theory of successor liability. The Second and Tenth Cause of Action are dismissed in their entirety. The complaint is dismissed as to 3D. Accordingly, this Decision and Order disposes of all remaining claims except the Sixth Cause of Action against LYPC.

Damages shall be awarded against Young, LY, Petri, and 10717 in the amount of $3,672,553.64 jointly and severally. Net proceeds of $4,235,203.64 from sale of the Property was transferred to the Section 1031 Exchange Trustee. Virtually all of those funds were used in an unauthorized manner. As damages, plaintiffs seek recovery in the amount of $3,672,553.64 representing the net proceeds from sale of the Property less $562,560 ($200,000 for the One Acre Property, plus $362,650 paid to plaintiffs as advances between March 2008 and March 2011).

As to the unjust enrichment claim against Mosquera, plaintiffs shall recover the amount of $875,000 paid to her on or about January 15, 2008.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of plaintiffs (motion sequence number 005) is GRANTED in part and judgment in the amount of $3,672,553.64 shall be entered jointly and severally against defendants, Estate of Alan Young, Lindenbaum & Young, Charles Petri, Block House LLC, and 10717 LLC and in favor of plaintiffs 135 Bowery LLC, Steven Seitzman, and Judith Seitzman together with interest from January 3, 2008, until the date judgment is entered as calculated by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion for summary judgment of plaintiffs as against Ann Catherine Mosquera is GRANTED and judgment in the amount of $875,000.00 shall be entered against Ann Catherine Mosquera and in favor of plaintiff 135 Bowery LLC, together with interest from January 15, 2008, until the date judgment is entered as calculated by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion for summary judgment of plaintiffs is DENIED in its entirety as against defendants Robert J. Young and Lindenbaum & Young, PC; and it is further

ORDERED that the motion for summary judgment of Robert J. Young and Lindenbaum & Young, PC (motion sequence number 006) is GRANTED to the extent that the complaint is dismissed as against defendants Robert J. Young and Lindenbaum & Young, PC as to the First, Second, Third and Tenth Causes of Action; and the Sixth Cause of Action against Lindenbaum & Young, PC, based on the claim that Lindenbaum & Young, PC is the successor to Lindenbaum & Young shall continue; and it is further

ORDERED that judgment shall be entered dismissing the entire complaint as to Robert J. Young; and it is further

ORDERED that the Second and Tenth Causes of Action are DISMISSED; and it is further

ORDERED that the Sixth Cause of Action is severed as to the Estate of Alan Young and Lindenbaum & Young; the First, Third, Fourth and Fifth Causes of Action are severed as to Charles Petri and 10717 LLC; the First and Third Causes of Action are severed as to Block House LLC; and the Eleventh Cause of Action is severed as to Ann Catherine Mosquera.

The court has considered all of the other claims asserted on the motions and finds them to be without merit. This constitutes the decision and order of the court.

DATED: June 2, 2016

E N T E R,

O. PETER SHERWOOD
J.S.C.