

Matter of Friedman

2009 NY Slip Op 31854(U)

August 18, 2009

Surrogate's Court, Nassau County

Docket Number: 350988

Judge: John B. Riordan

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

X

Estate of

File No. 350988

Dec. No. 577

BERTRAM R. FRIEDMAN, a/k/a
BERTRAM RUBIN FRIEDMAN,

Deceased.

X

RITA FRIEDMAN,

Supreme Court

Index No. 005491/08

Plaintiff,

-against-

CREATIVE LIGHTING FIXTURE CO., INC.,
ESTATE OF BERT FRIEDMAN, and
MARC FRIEDMAN,

DECISION

Defendants.

X

The court has before it a motion to dismiss the amended complaint herein made on behalf of the three defendants on various grounds; and a cross motion seeking partial summary judgment declaring that plaintiff, Rita Friedman (hereafter “plaintiff”, “Rita” or “wife”) owns 100% of the “Mall Property” and that the “Creative Lease” was either void ab initio or terminated upon decedent’s death and is of no further force and effect. The proceeding was initially commenced by the filing of a summons and complaint in Supreme Court, Nassau County and on defendants’ motion, removed to the Surrogate’s Court by order of Thomas A. Adams, acting Supreme Court Justice, dated September 3, 2008. Pursuant to stipulation, the plaintiff filed an amended complaint and defendants thereafter moved to dismiss the amended complaint.

Decedent Bertram R. Friedman (hereafter “decedent” or “Bert”) died on December 20, 2007, a resident of Nassau County. Preliminary letters testamentary were granted to Kenneth Friedman on May 20, 2008 and he is currently the executor of Bert’s estate (the “Estate”).

From plaintiff’s pleading it appears that plaintiff and decedent (her late husband) purchased a parcel of real property located at 460-468 Jericho Turnpike in Mineola, New York (the “Mall Property”) on August 10, 1982, as tenants by the entirety.¹ The primary tenant within this small strip mall was and remains defendant Creative Lighting Fixture Co., Inc. (“Creative”), a corporation that was solely owned by decedent until such time as he transferred his entire stock interest in Creative to his son, defendant Marc Friedman (“Marc”).² After such transfer, Creative was solely owned by plaintiff’s stepson, Marc, and it is alleged that the Mall Property was managed by decedent and/or Marc. In 1999, plaintiff and decedent borrowed \$350,000.00 from Greenpoint Bank secured by a mortgage on the Mall Property (the “Greenpoint Loan”). It is alleged that the loan was to accommodate Creative and the proceeds were turned over to and utilized by Creative, with the understanding that the loan would be repaid by Creative. As a further condition Bert promised that Rita would receive income from Creative after Bert’s death.³ Plaintiff alleges that on or about May 1, 2003, decedent and Marc, without plaintiff’s knowledge or authorization, entered into a “sweetheart” lease (the “Creative Lease”), leasing 65% of the

¹ Defendants contend that title was taken by Bert and Rita as tenants in common.

² The date of such transfer is open to dispute. Marc claims the transfer occurred on December 31, 2002, but decedent’s 2002 federal Gift Tax Return wasn’t filed until July 27, 2005.

³ Bert’s 1984 will provided that Rita would receive 50% of the Creative stock owned by Bert.

Mall Property to Creative. Defendants indicate that decedent had authority to act on plaintiff's behalf pursuant to a July 19, 1999 power of attorney issued by plaintiff to decedent with respect to the Greenpoint Loan (the "1999 POA"). Plaintiff contends that in early 2006 she learned that Creative had not been making payments on the Greenpoint Loan, but that unknown to her, such loan had been serviced with income from the Mall Property.

The original complaint contained seven causes of action, while the amended complaint pleads ten. They are for a declaratory judgment against the Estate and Creative that the Creative Lease was void ab initio [First Cause of Action]; for a declaratory judgment against the Estate and Creative that the Creative Lease terminated upon Bert's death [Second Cause of Action]; for an accounting against the Estate (for Bert's conduct) and Marc [Third Cause of Action]; for damages based upon fraud against the Estate [Fourth and Fifth Causes of Action]; for damages against the Estate for breach of fiduciary duty respecting collection of the rents from the Mall Property [Sixth Cause of Action]; for damages against the Estate and Marc for breach of fiduciary duty respecting a failure to maximize the value of the Mall Property for the benefit of plaintiff by reason of the lease terms with Creative [Seventh Cause of Action]; for breach of contract as against the Estate and Creative respecting non-payment of the Greenpoint Loan [Eighth Cause of Action]; for unjust enrichment as against all defendants with respect to the Greenpoint Loan and the lease from Bert to Creative [Ninth Cause of Action]; and against Creative for unpaid rent [Tenth Cause of Action].⁴ Prior to joinder, defendants, all represented by the same counsel, moved to dismiss the amended complaint based upon an alleged lack of

⁴ Defendants' motion to dismiss does not appear to address the Tenth Cause of Action. In any event, the court concludes that the claim for rent, limited to rent accruing within the six years preceding commencement of the action, is adequately plead.

jurisdiction over Marc (CPLR 3211[a][8]), failure to state a cause of action (CPLR 3211[a][7]) and upon documentary evidence (CPLR 3211[a][1]). Plaintiff cross moved for partial summary judgment on her first and second causes of action. By decision and order No. 332, dated June 10, 2009, the court advised the parties of its intent to address summary judgment with respect to defendants' motion to dismiss the first and second causes of action and plaintiff's cross motion under CPLR 3211[c].

A. *Applicable Legal Standards*

1. *CPLR 3211(a)(1)*

CPLR 3211(a)(1) provides for the dismissal of an action based upon documentary evidence. In order to obtain such a dismissal, the defendant must establish that the documentary evidence conclusively establishes a defense to the action as a matter of law (*Leon v Martinez*, 84 NY2d 83 [1994]; *see also*, *730 J & J LLC v Fillmore Agency, Inc.*, 303 AD2d 486 [2d Dept 2003]; *Berger v Temple Beth-el of Great Neck*, 303 AD2d 346 [2d Dept 2003]; *Estate of Menon v Menon*, 303 AD2d 622, 623 [2d Dept 2003]).

2. *CPLR 3211(a)(7)*

CPLR 3211(a)(7) permits the court to dismiss an action or a cause of action contained in a pleading that fails to state a cause of action. When deciding a motion made pursuant to CPLR 3211(a)(7), the court must accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (*511 West 232rd Street Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]). The court must also give the pleader the benefit of every inference which may be drawn from the pleading (*Leon v Martinez*, 84 NY2d 83 [1994]; *see also*, *Dye v Catholic Medical*

Center of Brooklyn & Queens, Inc., 273 AD2d 193 [2d Dept 2000]).

When considering a motion made pursuant to CPLR 3211(a)(7), the court must read the complaint to determine if the plaintiff has any cognizable cause of action and not whether the cause of action has been properly plead (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]; *see also, Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 [2d Dept 1997]; *Int'l Oil Field Supply Servs Co. v Fadeyi*, 35 AD3d 372, 375 [2d Dept 2006]; *Ladenberg Thalmann & Co. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000]). "In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction" (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). The court may consider affidavits submitted to remedy any alleged defects in the pleadings in determining whether the petitioners have a cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Haire v Bonelli*, 57 AD3d 1354 [3d Dept 2008]).

While the allegations in the complaint are deemed true and afforded every favorable inference, legal conclusions and facts contradicted on the record are not entitled to such a presumption (*In re Loukoumi, Inc.*, 285 AD2d 595 [2d Dept 2001]; *Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]). A cause of action may not be predicated on mere conclusory statements unsupported by factual allegations (*Kalmanash v Smith*, 291 NY 142, 153 [1943]; *Taylor v State*, 36 AD2d 878 [1st Dept 1971]).

Parties may plead alternative and contradictory theories of liability (*Raglan Realty Corp. v Tudor Hotel Corp.*, 149 AD2d 373 [1st Dept 1989]; CPLR 3014). The same conduct may constitute both a breach of contract and a breach of a fiduciary duty (*see Bender Ins. Agency, Inc.*

v Treiber Ins. Agency, Inc., 283 AD2d 448 [2d Dept 2001]; *Davis v Dime Savings Bank of New York*, 158 AD2d 50 [3d Dept 1990]).

In reviewing a motion to dismiss, the court must interpret the pleadings in favor of the party moved against (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]; *Ozdemir v Caithness Corp.*, 285 AD2d 961 [3d Dept 2001]). The court must determine whether, "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated" (*People v New York City Transit Authority*, 59 NY2d 343, 348 [1983]). A petition will not be dismissed where a cause of action may exist if the petitioner is given every benefit of the doubt (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]; *Hallman v Horowitz*, 160 Misc 2d 225 [Dist Ct, Nassau County, 1994]).

Where the motion is brought under §3211(a)(7) based upon documentary evidence, the court will consider whether the documentary evidence submitted in support of the motion "conclusively establishes a defense to the claims asserted as a matter of law" (*Ladenberg Thalmann & Co. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000]). Dismissal is only appropriate where "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

3. CPLR 3211(a)(8)

The burden of proof to establish in personam jurisdiction rests upon plaintiff (*Reed v Domenech*, 90 AD2d 844 [2d Dept 1982]); *Cato Show Printing Co., Inc. v Lee*, 84 AD2d 947 (4th Dept 1981). Plaintiff has the burden of proving proper service by a preponderance of the evidence (*Martini v Powers*, 105 AD2d 731 [2d Dept 1984]).

Where a defendant moves to dismiss the complaint on the ground of lack of personal jurisdiction, a plaintiff need only make a prima facie showing that such jurisdiction exists (*Lang v Wycoff Heights Medical Center*, 55 AD3d 793 [2d Dept 2008]; *Sipa Press, Inc. v Star-Telegram Operating, Ltd.*, 181 Misc2d 550 [Sup Ct, New York County 1999]). The affidavit of plaintiff's process server constitutes prima facie evidence of proper service (*425 E. 26th St. Owners Corp. v Beaton*, 50 AD3d 845 [2d Dept 2008]; *Swedish v Beizer*, 51 AD3d 1008 [2d Dept 2008]; *Olesniewicz v Khan*, 8 AD3d 354, 355 [2d Dept 2004]; *Matrix Fin. Servs. Corp. v McKiernan*, 295 AD2d 579 [2d Dept 2002]; *Manhattan Sav. Bank v Kohen*, 231 AD2d 499 [2d Dept 1996]).

However, a denial by defendant that he had been personally served shifts the burden of proof to plaintiff to substantiate her allegations of personal service (*DeZego v Bruhn*, 99 AD2d 823 [2d Dept 1984], *affd* 67 NY2d 875 [1986]).

Where the papers in the record indicate that the claim of lack of jurisdiction is substantial, the jurisdictional question should be disposed of at the threshold of the litigation (*Howard v Spitalnik*, 68 AD2d 803 (1st Dept 1979); *Hammond v Hammond*, 9 AD2d 615 [1st Dept 1959]). Where the papers are insufficient to determine whether the court has jurisdiction, ordinarily there should be hearing held where jurisdictional facts may be established (*Green Point Savings Bank v Taylor*, 92 AD2d 910 [2d Dept 1983]; *Cato Show Printing Co., Inc. v Lee*, 84 AD2d 947 [4th Dept 1981])

However, when a hearing is necessary, plaintiff would bear the burden of proof by a preponderance of the evidence (*Continental Hosts, Ltd. v Levine*, 170 AD2d 430 [2d Dept 1991]; *Frankel v Schilling*, 149 AD2d 657 [2d Dept 1989]).

4. *CPLR 3212(a) - Summary Judgment.*

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 (*Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). The party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Winegrad v New York University*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the party seeking summary judgment has made a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to establish through proof in evidentiary form that triable issues of fact exist or that the party has an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Davenport v County of Nassau*, 279 AD2d 497 [2d Dept 2001]; *Bras v Atlas Construction Corp.*, 166 AD2d 401 [2d Dept 1991]).

The court's function is issue finding, not issue determination (*Matter of Suffolk County Dept. of Social Services v James M.*, 83 NY2d 178 [1994]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence (*Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]; *Schuhmann v McBride*, 23 AD3d 542 [2d Dept 2005]; *Louniakov v M.R.O.D. Realty Corp.*, 282 AD2d 657 [2d Dept 2001]). If the court has any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Freese v Schwartz*, 203 AD2d 513 [2d Dept 1994]; *Groger v Morrison Knudsen Co., Inc.*, 184 AD2d 620 [2d Dept 1992]).

5. *Statute of Limitations.*

Statutes of limitation represent a balance between protecting individuals from stale claims and not imposing an undue hardship on a litigant with a meritorious claim (*Zumpano v Quinn*, 6 NY3d 666, 673 [2006]). “The test of a cause of action, for Statute of Limitations purposes, is its gravamen, and not the form in which it is pleaded” (*Wilson v Bristol-Myers Co.*, 61 AD2d 965 [1st Dept 1978]). “[T]he choice of the applicable Statute of Limitations depends on the substantive remedy which the plaintiff seeks” (*Loengard v Santa Fe Industries, Inc.*, 70 NY2d 262, 266 [1987]). In order to properly consider defendants' motion it is necessary to set forth generally the applicable limitations periods and the appropriate accrual dates with respect to each claim.

The statute of limitations for a fraud claim is either six years, or two years from the date of discovery, whichever is later (CPLR 213[8]). “[A] cause of action for fraud does not accrue when the fraudulent act is committed, but rather when the plaintiff suffers a loss, *i.e.*, ‘when a plaintiff with assumed knowledge of the fraudulent wrong may assert a claim for relief’ ” (*Asbeka Indus. v Travelers Indemnity Co.*, 831 FSupp 74, 81 (EDNY1993) (*quoting Cruden v Bank of New York*, 957 F2d 961, 974 [2d Cir 1992])).

“[B]reach of fiduciary duty claims based upon allegations of actual fraud are subject to a six year statute of limitations” (*Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Organization, Inc.*, No. 11647-04, 2006 WL 1982603, at 14 [Sup Ct, Nassau County 2006]). The six-year limitations period is subject to a “discovery rule” similar to that applied to fraud claims, and the manner of assessing the accrual of such a claim is similar to that used in assessing the accrual of a fraud claim (*see Kaufmen v Cohen*, 307 AD2d 113, 119-20 [1st Dept 2003]; *Dymm v Cahill*, 730 F Supp 1245, 1265 [SDNY1990]).

Other claims for breach of fiduciary duty are subject to either a three-year or six-year statute of limitations depending on the substantive remedy sought (*Loengard v Santa Fe Industries, Inc.*, 70 NY2d 262, 266 [1987]). The shorter time period applies where monetary relief is sought, while the longer time period applies where equitable relief is sought (*Cooper v Parsky*, 140 F3d 433, 440-441 [2d Cir 1998]; *Geren v Quantum Chem. Co.*, 832 F Supp 728, 735 [SDNY 1993]). Such a claim accrues when there is an open repudiation of the fiduciary's obligation (*Matter of Barabash*, 31 NY2d 76, 80 [1972] or the relationship has otherwise terminated (*Westchester Religious Inst. v Kammerman*, 262 AD2d 131 [1st Dept 1999]).

A claim for unjust enrichment is generally contractual in nature and a six-year limitations period applies (CPLR 213; see *Equitable Life Assur. Soc. of the United States v Branch*, 32 AD2d 959, 960 [2d Dept 1969]; *Helmand v Sessler*, 194 Misc.2d 38, 40 [Civ Ct, NY County 2002]). Where such claim is based upon a conversion of property it is arguably governed by a three-year limitations period (CPLR 214[3]; *Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept 2007]; *Lambert v Sklar*, 30 AD3d 564, 565 [2d Dept 2006]). A cause of action for unjust enrichment accrues “upon the occurrence of the wrongful act giving rise to a duty of restitution” (*Golden Pacific Bancorp v FDIC*, 273 F3d 509, 520 [2d Cir 2001] quoting *Congregation Yetev Lev D'Satmar, Inc. v 26 Adar N.B. Corp.*, 192 AD2d 501, 503 [2d Dept 1993]). In general, this refers to the time when the initial payment is made (see *Onanuga v Pfizer, Inc.*, 369 F Supp 2d 491, 500 [SDNY 2005]).

It is the rule in New York that a defendant may be estopped from pleading the Statute of Limitations where plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action (*General Stencils v Chiappa*, 18 NY2d 125, 127-128 [1966]; *Erbe v Lincoln*

Rochester Trust Co., 13 AD2d 211 [4th Dept 1961], *mot for rearg. and mot for lv to app den* 14 AD2d 509 [4th Dept], *app dsmd* 11 NY2d 754 [1961]; *see Fraud, Misrepresentation, or Deception as Estopping Reliance on Statute of Limitations, Ann.*, 43 A.L.R.3d 429). This rule is commonly known as equitable tolling. Equitable tolling applies where a plaintiff was blamelessly ignorant of his claim or there was “culpable action by the defendant” that concealed plaintiff’s claim (*Johnson v Nyack Hosp.*, 891 F Supp 155, 165 [SDNY1995]). Where a complaint alleges that a defendant intentionally concealed the alleged wrongdoing from plaintiff and falsely assured plaintiff of facts to the contrary, as a result of which plaintiff does not discover her injury until after the statute had run, principles of equitable estoppel are applicable to relieve plaintiff from the proscriptions of the statute. As noted in *Erbe v Lincoln Rochester Trust Co.*, (13 AD2d 211, 213 [4th Dept 1961]):

Fraudulent representations may play a dual role. They may be the basis for an independent action for fraud. They may also, in equity, be a basis for an equitable estoppel barring the defendants from invoking the statute of limitations as against a cause of action for breach of fiduciary relations.

Equitable tolling “is not strictly limited to fraud claims or to claims whose limitations period runs from discovery ... it conceptually applies to ... contract claims as well” (*Glynwill Investments, N.V. v Prudential Securities, Inc.*, No. 92-CV-9267, 1995 WL 362500, at 4 [SDNY 1995]; *see also Cestaro v Mackell*, 429 F Supp 465, 469 [EDNY1977], *affd without opinion*, 573 F2d 1228 (2d Cir 1977)). Equitable estoppel will preclude a defendant from using the statute of limitations as a defense “ ‘where it is the defendant’s affirmative wrongdoing ... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding’ ” (*Zumpano v Quinn*, 6 NY3d 666, 673 [2006], *quoting General Stencils v. Chiappa*,

18 NY2d 125, 128 [1966]). A plaintiff seeking to apply the doctrine of equitable estoppel must “establish that subsequent and specific actions by defendants somehow kept [him or her] from timely bringing suit” (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]). Equitable estoppel is appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant.

B. *Lack of Personal Jurisdiction over Marc.*

1. *Issues Presented.*

Marc urges that the court lacks jurisdiction over his person because only one copy of the summons and complaint was delivered to Creative’s place of business where Marc worked as president of Creative and that delivery was to Creative rather than Marc (*Raschel v Rish*, 69 NY2d 694 [1986]; *McCormack v Gomez*, 137 AD2d 504, 505 [2d Dept 1988]; *Kolodzinsky v Ferreiras*, 168 AD2d 431, 431-432 [2d Dept 1990]; *Beaver Universal Corp v 1111 Jamaica Ave. Queens leasing Corp.*, 163 Misc2d 1039, 1042 [Sup Ct, Queens, County 1995]). Plaintiff urges that the affidavits of service filed with the court unequivocally establish that two (2) copies of the Summons and Complaint were served at Creative’s business; and further urges that service of a single copy would have been sufficient (*T.E.A. Marine Automotive Corp v Scaduto*, 181 AD2d 776, 780-781 [2d Dept 1982]).

2. *Discussion*

The affidavits of the plaintiff’s process server constitute prima facie evidence of service as set forth therein (*425 E. 26th St. Owners Corp. v Beaton*, 50 AD3d 845 [2d Dept 2008]; *Swedish v Beizer*, 51 AD3d 1008 [2d Dept 2008]; *Olesniewicz v Khan*, 8 AD3d 354, 355 [2d Dept 2004];

Matrix Fin. Servs. Corp. v McKiernan, 295 AD2d 579 [2d Dept 2002]; *Manhattan Sav. Bank v Kohen*, 231 AD2d 499 [2d Dept 1996]). A defendant's bare denial of service is insufficient to rebut the prima facie proof of proper service created by the process server's affidavit (*see 425 E. 26th St. Owners Corp. v Beaton, supra; General Motors Acceptance Corp. v Grade A Auto Body, Inc.*, 21 AD3d 447 [2005]; *Mauro v Mauro*, 13 AD3d 345, 345-346 [2d Dept 2004]; *Household Fin. Realty Corp. of N.Y. v Brown*, 13 AD3d 340, 341 [2d Dept 2004]; *Carrenard v Mass*, 11 AD3d 501 [2d Dept 2004]). If the court is addressing a bare denial, no hearing is required (*see, 425 E. 26th St. Owners Corp. v Beaton*, 50 AD3d 845 [2d Dept 2008]; *Simonds v Grobman*, 277 AD2d 369 [1st Dept 2000]; *Sando Realty Corp. v Aris*, 209 AD2d 682 [2d Dept 1994]).

Here, the process server prepared and filed two affidavits of service, each dated March 31, 2008, one addressed to service on Marc and one addressed to service on Creative. The affidavit respecting service on Marc provides that the deponent:

served a true copy of a summons and complaint ... by delivering there at a true copy to a Richie, refusing to state his full name (Male, Light Brown-Tan skin, Baldheaded, Glasses, 30-35 years old, 5'9"-6'0", 170-200 lbs.) a person of suitable age and discretion as representative and/or authorized agent to receive legal documents to the establishment named and described below...⁵

In purported contradiction to the affidavit of the process server, Marc presents the May 9, 2008 affidavit of Richie Chetran, an employee of Creative, wherein it is stated:

On or about March 28, 2008, a person came to the offices of Creative Lighting and announced that he had legal papers to serve. He asked if there was anyone present who could accept service of

⁵ The additional statements concerning service by mail are not disputed.

the papers.⁶ I was paged, and when he asked me if I could accept service for Creative Lighting I said that I could. I was then served with a single copy of a summons and complaint. I was never asked if I could accept service for Marc Friedman, and the process server never advised me that I was being served on behalf of Mr. Friedman.⁷

Mindful that the jurisdictional issue addresses only Marc, we turn to CPLR 308(2) for guidance. That section provides in pertinent part:

Personal service upon a natural person shall be made by any of the following methods:

2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode **of the person to be served and** by either mailing the summons to the person to be served at his or her last known residence or **by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential”** and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other... [emphasis supplied].

Mr. Chetran is self described as a person “who could accept service of papers....” He was thus clearly “a person of suitable age and discretion at the actual place of business” of Marc (CPLR 308[2]), so that delivery of a copy of the summons and complaint to him, followed by mailing copies to Marc, constituted compliance with § 308[2]. Whether or not Mr. Chetran was asked to accept service on behalf of Marc is irrelevant.⁸ Chetran’s affidavit acknowledges such

⁶ The latter two statements are plainly hearsay.

⁷ The court notes that service on a corporation such as Creative is governed by CPLR § 311 and requires delivery “to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or law to receive service...”

⁸ When CPLR 308 was revised in 1970 (L.1970, ch. 852), the Legislature attempted to strike a balance between the need to ensure that defendants receive actual notice of the pendency of litigation against them and the need to build into the statute sufficient flexibility to discourage

delivery and accordingly confirms the material statement in the process server's affidavit as to service on Marc respecting delivery to a person of suitable age and discretion at the defendants' place of business. Plaintiff has thus made a prima facie showing of personal jurisdiction over Marc and Chetran's affidavit is insufficient to rebut the presumption of proper service on Marc. There is thus no need for a traverse hearing.

Assuming that the delivery of one rather than two copies of the summons and complaint has jurisdictional significance, it might affect personal jurisdiction over Creative. The rule under New York law is that service of a single document upon an officer of a corporation constitutes service upon the corporation itself as well as upon the individual officer, provided that there has been simultaneous compliance with the statutes governing both corporations and individuals (*Georgiu v Sterling Mounting and Finishing*, 1 Fed.Appx. 47, 49 [2d Cir 2001], citing *T.E.A. Marine Auto. Corp. v Scaduto*, 181 AD2d 776 [2d Dept 1992] and *Lac Leasing Corp v Dutchess Aero. Inc.*, 32 AD2d 949 [2d Dept 1969]). As Marc is the president of Creative, service of a single copy of the summons and complaint upon Marc at their common place of business⁹ would constitute compliance with both CPLR 308[2] and CPLR 311. Mr. Chetran is described as an employee of Creative, not as an officer, and it is unclear whether substituted service on Marc through employee Chetran, constitutes proper service on Creative under CPLR 311 (*T.E.A.*

cynical practices such as "sewer service" (*Feinstein v Bergner*, 48 NY2d 234, 240 [1979]). In that light, the employee's receipt of the documents as a person of suitable age and discretion, regardless of any words purportedly accompanying the delivery, is deemed sufficient to establish that Marc received actual notice of the suit through such personal delivery under CPLR 308(2).

⁹ The copy of the summons submitted with defendants' motion papers is addressed to both Creative and Marc at 460-468 Jericho Turnpike, Mineola, New York 11501.

Marine Automotive Corp v Scaduto, 181 AD2d 776 [2d Dept 1982]).¹⁰

The court, however, concludes that no evidentiary hearing is required, that service of Marc under CPLR 308(2) has been established and the motion to dismiss the amended complaint as against Marc for lack of personal jurisdiction is accordingly denied.

C. *First and Second Causes of Action - Declaratory Judgment.*

1. *Issues Presented.*

The first cause of action seeks a declaration that the Creative Lease is void ab initio and is premised upon plaintiff and the decedent owning the property as tenants by the entirety and plaintiff not having consented to or otherwise authorized the lease and rider. Plaintiff argues that the property was presumptively owned in the entireties (EPTL 6-2.2[b]) and defendants have not presented any documentary evidence that conclusively supports an alternate construction of the granting clause in the deed. Defendants attempt to use Bert's 1984 will to establish the intent that there be a tenancy in common. Assuming the court concludes in plaintiff's favor on the entireties issue, plaintiff argues that the lease and rider are void ab initio (*Mantella v Mantella*, 268 AD2d 852 [3d Dept 2000]) as Bert lacked authority to bind plaintiff.

The second cause of action also addresses the Creative Lease and is also premised on the Mall Property being owned as a tenancy by the entirety. It urges that upon Bert's death, plaintiff became the sole owner of the property and any lease of Bert's interest became null and void. Plaintiff thus seeks a declaration that the Creative Lease terminated on Bert's death as a matter of law (*Lum v Antonelli*, 102 AD2d 259 [2d Dept 1984]; *May v May*, 18 Misc3d 1129(A) [Sup Ct, Suffolk County 2008]).

¹⁰ That question, however, is not before the court as Creative has not filed a jurisdictional objection.

Defendants' motion urges that the declaratory judgment claims asserted by plaintiff against the Estate and Creative in the first and second causes of action are conclusively controverted by Bert's will and the 1999 POA and that the Mall Property was owned by plaintiff and the decedent as tenants in common rather than tenants by the entireties. As to the Creative's Lease, the power of attorney, which facially covered all "real estate transactions," granted Bert the power to encumber plaintiff's interest in the property regardless of whether or not the estate was one by entirety or in common. Defendants also contend that Bert's will [executed on June 23, 1984] and the 1999 POA, each constitute clear and conclusive documentary evidence of the intention to create a tenancy in common at the time of the 1982 purchase of the property.

As to the role of the 1999 POA, plaintiff contends that she did not initial sections "A", "D" and "F" when she signed the power; Bert had a fiduciary obligation covering the use of such power and such instrument did not empower Bert to engage in self dealing (*Matter of Ferrara*, 7 NY3d 244, 254 [2006]; *Campana v Campana*, 255 AD 1015 [2d Dept 1938]); and that the Creative Lease bears only Bert's individual signature and lacks a second signature as attorney in fact for plaintiff.

Plaintiff's cross motion seeks partial summary judgment on the same claims. In doing so, plaintiff sought to utilize a narrow exception to CPLR 3212(a)'s proscription against pre-joinder motions for summary judgment found in CPLR 3211[c] to the effect that "a grant of summary judgment on a pre-answer cross-motion is appropriate where both sides deliberately lay bare their proof and make it clear that they are charting a summary judgment course" (*Shah v Shah*, 215 AD2d 287, 288-289 [1st Dept 1995]).

Defendants responded to the cross-motion as follows. First, the motion is procedurally

defective inasmuch as made before issue is joined (CPLR 3212[a]; *City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). Second, the *Shah v Shah* factors are not present in the subject case. These issues have been mooted by the court's Dec. No. 332, dated June 10, 2009, wherein the court advised the parties of its intention to consider summary judgment with respect to the issues raised with respect to plaintiff's first and second causes of action, defendants having moved to dismiss them based upon documentary evidence and plaintiff having sought partial summary judgment.

After receipt of the court's 3211[c] order, defendants submitted opposition in the form of two affidavits¹¹ and a memorandum of law. Plaintiff elected to make no further submissions. In their supplemental memorandum, defendants argue that 3211[c] may not be used to grant reverse summary judgment. Defendants reading of 3211[c] and the decision in *City of Rochester v Chiarella*, 65 NY2d 92 [1985] are in error. Rule 3211[c] specifically provides, among other things, that: "whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment...." The court's giving of "adequate notice" is sufficient to grant summary judgment in favor of any party where there is no question of material fact (*Mary Markle Foundation v Manufacturers Hanover Trust Company*, 173 AD2d 784, 785-786 [2d Dept 1991]; *Valentine Transit, Inc. v Kernizan*, 191 AD2d 159 [1st Dept 1993]). In *City of Rochester*, the court was addressing a 3212[b] motion and there was no notice by the trial court under 3211[c]. Indeed, it was the appellate division that granted the summary judgment. In *Weinstock v Handler*, 254 AD2d 165, 172 [1st Dept 1998], the court deferred to the

¹¹ The affidavits constitute inadmissible hearsay and support reformation of the deed, a remedy that is time barred. See discussion below. They do not address the issue of construction of the deed's granting clause and their admissibility is further barred by the parol evidence rule.

three factors set forth in *Shah v Shah*, 215 AD2d 287, 289 [1st Dept 1995],¹² while noting their absence in that case. These factors are: “(1) where the action in question involves no issues of fact but only issues of law which are fully appreciated and argued by both sides; (2) where a request for summary judgment pursuant to CPLR 3211[c] is specifically made by both sides; and (3) where both sides deliberately lay bare their proof and make it clear they are charting a summary judgment course....” (*Shah v Shah*, 215 AD2d 287, 288-289 [1st Dept 1995]). Here factors 1 and 3 are present and appropriate notice has been given.

On the merits as to the tenancy issue, defendants urge that the 1984 Will, the 1999 POA, and the various leases produced by defendants and signed by Bert on behalf of Bert and plaintiff, all evidence that the Mall Property was held in common and not by the entirety. The joint tax returns before the court demonstrate that plaintiff knew or should have known that the Mall Property was being operated at a loss, which losses operated to plaintiff’s benefit. New York’s dead man’s statute (CPLR 4519) is invoked to disqualify plaintiff’s statements as to what Bert said (*Phillips v Joseph Kantor & Co.*, 31 NY2d 303, 313 [1972]). As to the request for turn over of documents appearing in the second cause of action, defendants argue that it should be denied because ownership of the property has not been determined and “the estate has already made available to [plaintiff] for inspection and copying all documents concerning the property in its possession.”

In reply, plaintiff reiterated that the 1982 deed on its face must be construed to have created a tenancy by the entirety and urges that any effort by the estate to reform the deed is time barred (*1414 APF, LLC v Deer Stags, Inc.*, 39 AD3d 329 [1st Dept 2007]; *Vollbrecht v*

¹² *Shah* was decided after *City of Rochester*.

Jacobson, 40 AD3d 1243 [3d Dept 2007]). Likewise, the Estate cannot establish that the granting clause constituted a mutual mistake or a unilateral mistake accompanied by fraud (*Herron v Essex Ins. Co.*, 34 AD2d 913, 914 [3d Dept 2006], *lv dismissed* 8 NY3d 856 [2007]).

As to the Creative Lease, plaintiff reiterates that if the property were owned in the entirety, the lease is cancelled as of Bert's death; and that Bert was prohibited from gifting any portion of plaintiff's interest in the property to himself or his son by use of the power of attorney obtained from plaintiff.

2. Discussion

The court's first duty on a summary judgment motion involves issue finding (*Matter of Suffolk County Dept. of Social Services v James M.*, 83 NY2d 178 [1994]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The first issue is whether the 1982 deed created a tenancy by the entirety or a tenancy in common.

a. Tenancy by Entirety or Tenancy in Common.

The underlying premise of the first two causes of action is that the 1982 deed for the Mall Property created a tenancy by the entirety rather than a tenancy in common.

The intent of a conveyance is manifested by the language used in the conveyance and only when that language is susceptible of more than one meaning can the surrounding circumstances be considered to ascertain the parties' intent (Real Property Law §240(3); *Matzell v Distaola*, 105 AD2d 500 [3d Dept 1984], *app den* 64 NY2d 608 [1985]; *Pacamor Bearings, Inc. v British American Development Corp.*, 108 AD2d 191, 192 [2d Dept 1985]; *see also Wilson v Ford*, 209 NY 186 [1913], *rearg denied* 209 NY 565 [1913]; *Blackman v. Striker*, 142 NY 555 [1894]; *Knowlton v Atkins*, 134 NY 313 [1892]; *Miner v. Brown*, 133 NY 308 [1892]; *Heath v*

Hewitt, 127 NY 166 [1891]; *Clark v Devoe*, 124 NY 120 [1891]; *Crain v Wright*, 114 NY 307 [1889]; *Bennett v Culver*, 97 NY 250 [1884]; *Byrnes v Baer*, 86 NY 210 [1881]; *Bridger v Pierson*, 45 NY 601 [1871]; *Mowbray-Tuttle Corp. v Freistadt*, 101 NYS2d 806 [Sup Ct, Suffolk County 1950]; *Ward v Stanard*, 82 AD 386 [2d Dept 1903]; *De Witt v Elmira Transfer R. Co.*, 55 Hun 612 [1890], *affd* 134 NY 495 [1892]). Whether the language used in a deed is ambiguous is for the court to determine as a matter of law (*Hurd v Lis*, 92 AD2d 653 [3d Dept 1983]). In the construction of deeds, the intention of parties should be taken from the whole instrument, and every effort should be made by the court to reconcile apparently inconsistent clauses (*Schwab v Schwab*, 280 AD 139 [4th Dept 1952]; *Richards v Crocker*, 20 NYS 954, 956-957 [4th Dept 1892], *affd* 143 NY 631 [1894]).

EPTL 6-2.2 (b) states that: “a disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common.” It thus provides that when husband and wife take title to real property, they take it as tenants by the entirety unless the disposition instrument specifies that they take as tenants in common or joint tenants.¹³ Real Property Law § 240(2) defines the term “conveyance” and subsection (3) provides that: “[e]very instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument and is consistent with the rules of

¹³ This provision was new to the statute in 1966 but it codified a long-recognized principal in the case law (*see Bertles v Nunan*, 92 NY 152 [1883] discussing this principle in the context of the Married Woman's Property Act). It had previously been held that where grantees in conveyance of real estate were husband and wife at time of conveyance, they owned and held the property as tenants by the entirety (*Medina v Medina*, 206 Misc 1100 [Sup Ct, Kings County 1954], *Petchanuk v Mohlsick*, 206 Misc 39 [Sup Ct, Kings County 1954]).

law.” The plain meaning of EPTL 6-2.2 (b) and RPL 240(3) is that the intent to convey a different estate must be expressed in the instrument creating the estate (*see Hiles v Fisher*, 144 NY 306, 312 [1895]; *Miner v Brown*, 133 NY 308, 313 [1892]; *Bertles v Nunan*, 92 NY 152 [1892]).

Here, the deed demonstrates that in 1982, the Mall Property was transferred to Plaintiff and Decedent, then husband and wife. The deed describes the “party of the second part”, *i.e.*, the grantee, as “BERTRAM R. FRIEDMAN and RITA FRIEDMAN, his wife, both residing at 5 Andover Lane, Woodmere, New York”. Defendants do not identify any language in the deed that purports to create an ambiguity respecting the nature of the tenancy created, relying solely on extrinsic evidence. Neither the decedent’s 1984 will, nor the 1999 power of attorney, nor the leases of the Mall Property executed by the decedent, nor the supplemental affidavits as to decedent’s intent nor any other extrinsic evidence has the power to change the unambiguous language in the deed (RPL § 240[3]; EPTL 6-2.5[b]). The court thus concludes that the deed constituted a “disposition of real property to a husband and wife” and accordingly created a tenancy by the entirety (EPTL 6-2.2 [b]; *Buddle v Buddle*, 53 AD3d 745, 746 [3d Dept 2008]), not a tenancy in common as contended by defendants.

Arguably, if a grantor intended to create a different tenancy and the scrivener neglected to do so, an aggrieved party could seek reformation of the instrument (*see Matter of Vadney*, 83 NY2d 885 [1994]; *Crawley v Shelby*, 37 AD2d 673 [3d Dept 1971]). Such a claim is suggested by defendants’ submission of extrinsic evidence attempting to show the decedent’s intention to create a tenancy in common and the suggestion that there is a need to depose the scrivener to determine if he made an error. A counter-claim for reformation of the deed, however, is governed

by a six-year time limitation accruing on the date of the mistake and would be time barred (*1414 APF, LLC v Deer Stags, Inc.*, 39 AD3d 329, 330 [1st Dept 2007]). The same rule applies to scrivener's errors (*id*; *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547 [1995]).

Since Rita and Bert were tenants by the entirety, as a matter of law, plaintiff was the surviving 100% owner of the Mall Property upon Bert's death (*V.R.W., Inc. v Klein*, 68 NY2d 560, 564 [1986]; *Kahn v Kahn*, 43 NY2d 203, 206-207 [1977]; *Lequerique v Lequerique*, 60 AD3d 504, 505 [1st Dept 2009]). Plaintiff is accordingly entitled to partial summary judgment granting a declaratory judgment to the effect that upon the death of her husband on December 20, 2007, she was the absolute and only owner of the Mall Property.

b. *Creative Lease: Void Ab Initio.*

The first cause of action seeks a declaration that the Creative Lease is void *ab initio* premised upon plaintiff and the decedent owning the property as tenants by the entirety and plaintiff not consenting to or otherwise authorizing the lease and rider. The court having concluded that the deed created a tenancy by the entirety, the remaining questions are: (1) Could Bert lease Rita's interest in the Mall Property without her signature or consent? (2) Did Bert properly use the 1999 POA to execute the lease on behalf of Rita? (3) Did Rita authorize Bert to sign the lease on her behalf? (4) Did Rita consent to or acquiesce to the lease? (5) Did Bert lease his undivided interest to Creative?

Plaintiff argues that Bert lacked authority to bind plaintiff and defendants urge, in the alternative, that the 1999 POA constituted Bert's authority to bind plaintiff to the Creative Lease, but in any event, Bert had authority to lease his undivided portion of the entirety property (*Lum v Antonelli*, 102 AD2d 258, 262 [2d Dept 1984]).

Construction of the Creative Lease establishes that plaintiff did not execute that instrument; that Bert did not utilize the 1999 POA to execute the lease on Rita's behalf; and Bert did not lease his undivided interest to Creative.

Leases are subject to the same rules of construction as other types of contracts (*Star Nissan v Frishwasser*, 253 AD2d 491, 492 [2d Dept 1998]; 1 Dolan, Rasch's Landlord and Tenant, § 6:11 [4th ed.]). If the lease is "complete, clear and unambiguous" on its face, it "must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is a fundamental principle of the law of contracts that words are to be given their ordinary meaning where there is no evidence that they are to be given another meaning (1 Dolan, Rasch's Landlord & Tenant, *Construction of Leases* § 6:5 [4th ed]). Where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law and no trial is necessary to determine the legal effect of the contract (*Bethlehem Steel Co. v Turner Const. Co.*, 2 NY2d 456, 460 [1957]; *Matter of Western Union Telegraph Co. (American Communications Ass'n)*, 299 NY 177 [1949]; *Brainard v New York Central R. Co.*, 242 NY 125 [1926]). As a general rule, "[a] lease is to be interpreted as a whole and construed to carry out the parties' intent, gathered, if possible, from the language of the lease" (*Cobalt Blue Corp. v 184 W. 10th St. Corp.*, 227 AD2d 50, 53 [1st Dept 1996], citing *Papa Gino's of Am. v Plaza at Latham* 135 AD2d 74, 76 [3d Dept 1988]; see also *Tantleff v Truscelli*, 110 AD2d 240, 244-245 [2d Dept 1985], *affd* 69 NY2d 769 [1987]).

Under New York law, whether a written contract is ambiguous is a question of law for the trial court (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 163 [1990]). An "ambiguous"

word or phrase is one capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business (*Fox Film Corp. v Springer*, 273 NY 434 [1937]; *Rochester Park, Inc. v City of Rochester*, 19 AD2d 776 [4th Dept 1963]). When the relevant language has a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion, no ambiguity exists (*Breed v Ins. Co. of North America*, 46 NY2d 351, 355 [1978]).

The court finds no ambiguity present. The Creative Lease states that it was made between “Bert and Rita Friedman party of the first part, hereinafter referred to as OWNER and Creative Lighting Fixture Co. Inc., Party of the second part, hereinafter referred to as TENANT.” The unwitnessed owner signature appears to be that of Bert Friedman and the unwitnessed tenant signature appears to be that of Marc Friedman. Neither signature is acknowledged. As to the rider, the owner signature appears to be that of Bert Friedman, and appears over the words: “Bert and Rita Friedman, Landlord by: Bert Friedman” and the tenant signature appears to be that of Marc Friedman, and appears over the words: “Creative Lighting Co Inc by: Marc Friedman, Tenant.” It is plain on the face of this document that Rita Friedman [Plaintiff] did not sign it and Bert Friedman did not purport to sign it as plaintiff’s attorney in fact. It would thus appear that Bert’s signature on the Creative Lease was insufficient as a matter of law to pass a leasehold interest to Creative in the absence of acquiescence by plaintiff (*Valentine v Healey*, 158 NY 369, 374-375 [1899]; *Hurant v Faerber*, 125 Misc 262, 263 [App Term 1st Dept 1925]).

The case of *Zornlein v Bram*, 55 Sickels (NY) 12 [1885] suggests that the conveyance by

Bert to Creative embodied in the Creative Lease was a nullity as a matter of law. In that case, the land at issue was conveyed to “Jacob Bram and Babeta Bram, his wife” in 1878, creating a tenancy by the entirety. On September 23, 1881, Babeta Bram executed a deed purporting to convey an undivided ½ of the premises to Zorntlein. On September 30, 1881, Jacob and Babeta Bram executed a deed to George Bram for the same premises. In an action for partition commenced by Zorntlein against George Bram, the court, relying on *Bertles v Nunan* (92 NY 47 Sickels 152 [1883]), concluded that the deed executed by Babeta Bram alone conveyed no title to Zorntlein. The demand for partition was denied.

The case of *Hurant v Faerber*, 125 Misc 262 [AppTerm, 1st Dept 1925], however, controls the outcome on this issue. It confirms that the Creative Lease is a nullity absent proof of acquiescence by plaintiff. In that case Faerber and Tuchfeld owned the property as tenants in common and jointly leased the property to a partnership. The lease term having ended and the lessee partnership having dissolved, one of the partners, Irving Hurant, negotiated a new lease with Faerber. Similar to the subject case, the new lease, on its face, was “between Max Tuchfeld and Moritz Faerber ... lessors, and Irving Hurant ... lessee” and was signed: “M. Faerber (L. S.)” It was not signed by Tuchfeld. First noting that the putative tenant was aware of the nature of the ownership of the property on a number of bases, including the quoted language from the new lease, the court, relying on *Valentine v Healy* (158 NY 369 [1899]), concluded that Faerber’s “signature on the instrument was insufficient to pass the interest claimed to the plaintiff [Hurant], in the absence of acquiescence or adoption by Tuchfeld.... The instrument was, therefore, not binding, because it was not executed by both the lessors named therein...” (*Hurant v Faerber*, 125 Misc 262, 263 [App Term, 1st Dept 1925]).

What about Bert’s ability to lease his interest and defendants’ other defenses? New York case law has consistently held that a tenant by the entirety can convey his or her own limited interest without affecting the right of survivorship. The only caveat is that such conveyance “could not in any way curtail the interest in the other” tenant (*Secrist v Secrist*, 284 AD 331, 334 [4th Dept 1954], *affd* 308 NY 750 [1955]; *Hiles v Fisher*, 144 NY 306, 315 [1895]; *Grosser v City of Rochester*, 148 NY 235, 238 [1896]). A cotenant may not by such conveyance exclude the other co-tenants from the exercise of similar rights (*Wood v Phillips*, 43 NY 152, 156 [1870]; *Zapp v Miller*, 109 NY 51, 57 [1888] where the court concluded “that the other tenants shall not be ousted from the possession of the premises...[a]nd in order to prove an ouster it is not necessary to prove a violent ejectment...” (*id.*, at 57). From the facts presented, an inference could be drawn to the effect that the Creative Lease ousted plaintiff from possession of the premises subject to such lease (*LaBarron v Roseboom*, 122 NY 153, 157 [1890]). Such rule, enunciated with respect to tenants in common, equally applies to tenants by the entirety (*Kullman v Wyrzten*, 266 AD 791 [2d Dept 1943]; *Limberg v Limberg*, 256 AD 721 [2d Dept], *affd* 281 NY 821 [1939]; *Minion v Warner*, 185 AD 246 [2d Dept 1918]). To maintain ejectment between persons having a common interest, there must be an ouster of the person seeking relief (*Gillman v Gillman*, 111 NY 265, 269 [1888]; *Finnegan v Humes*, 252 AD 385, 387 [4th Dept 1937]). Whether an “ouster” has occurred is a question of fact (*Gillman v Gillman*, 111 NY 265, 269; *Zapp v Miller*, 109 NY 51, 57; *see also Myers v Bartholomew*, 91 NY2d 630, 633 [1998], addressing actual and implied ouster in the context of adverse possession by a co-tenant).

While Bert was legally capable of leasing his entirety interest, converting his lessee into a tenant in common with Rita for the leased space subject to Rita’s right of survivorship, the

Creative Lease does not purport to convey such a limited interest. Here the Creative Lease identifies the lessor as Bert and Rita, not just Bert. Bert thus did not purport to lease just his interest to Creative, but attempted to lease his wife's interest as well.

Also, if Bert had signed the Creative Lease as Rita's attorney-in-fact using the 1999 POA as the basis, the terms of the Creative Lease, addressed to a corporate tenant that was either 100% owned by Bert or Bert's son from a previous marriage, are so plainly adverse to Rita¹⁴ as to negate the authorization implied by the 1999 POA (*Mantella v Mantella*, 268 AD2d 852 [3d Dept 2000]).

The Owner/Lessor signature on the Creative Lease, however, is solely that of Bert. He signed both the lease and the rider in his own name and neither signature contains any indication that he is also signing as plaintiff's attorney-in-fact.¹⁵ Thus, while the granting clause and signature headings in the Creative Lease indicates that Bert is attempting to encumber more than

¹⁴ The lease term and option periods create what plaintiff characterizes as a "sweetheart" lease. The court agrees with plaintiff's description if not the inference respecting its significance suggested by plaintiff. Not only is the lease being made to a corporation owned by a family member, but it provides for a 20-year initial term with three 20-year renewal terms. The renewal rent increases are small and the latter years provide for decreases. The lease is gross rather than net requiring the owner to bear increases in operating expenses. The rental is approximately \$11 per square foot while the other tenants are paying \$28-\$30 per square foot. The rental escalations are minuscule and substantially below the 4% to 5% annual increases in the other tenants' leases. It also grants Creative the right to assign or sublet without the landlord's consent (the other tenants do not have such right) without sharing the profits from such an assignment or sublet. A comparable appraisal submitted by Defendants indicates that the Creative Lease substantially decreased the market value of the Mall Property. It could easily be considered as an attempt to give Bert's son an economic advantage over Bert's co-tenant wife. Any one of these factors would require the conclusion that this was a sweetheart lease. The consequences of such a conclusion are another matter entirely.

¹⁵ This is in contrast to the documents respecting the Greenpoint Loan and note where Bert signed each instrument once in his own right and once as plaintiff's attorney-in-fact.

his own interest as a tenant by the entirety, the lack of Rita's signature coupled with the lack of evidence of Rita's acquiescence or consent render such an attempt a failure.

We next turn to the issue of acquiescence or consent. Rita's affidavit wherein she denies consent or acquiescence under oath, denies timely knowledge of both the Creative Lease and Bert's transfer of the Creative stock to Marc until 2006 and states unequivocally that she did not expressly authorize Bert to sign the Creative Lease on her behalf constitutes a prima facie showing on that issue and shifted the burden to the Estate and Creative to establish through proof in evidentiary form that triable issues of fact exist or that the party has an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Davenport v County of Nassau*, 279 AD2d 497 [2d Dept 2001]; *Bras v Atlas Construction Corp.*, 166 AD2d 401 [2d Dept 1991]).

Here, as in *Hurant v Faerber* (125 Misc 262 [App Term, 1st Dept 1925]), Creative and the Estate have not presented any evidence of Rita's acquiescence to or adoption of the Creative Lease to overcome such prima facie showing. Summary judgment is thus appropriate with respect to the first cause of action.

The court does not reach the question of whether this sweetheart lease is void or voidable on the basis of unconscionability¹⁶ or being otherwise violative of public policy. To the extent that it might be binding on plaintiff's interest in the Mall Property, it would support her claim of

¹⁶ The doctrine of unconscionability contains both substantive and procedural aspects, and whether a contract or clause is unconscionable is to be decided by the court against the background of the contract's commercial setting, purpose and effect (*Sabloskey v Edward S. Gordon Co.*, 73 NY2d 133, 138 [1989], citing *Wilson Trading Corp v David Ferguson, Ltd.*, 23 NY2d 398, 403 [1968]; see also *Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]).

Bert's breach of fiduciary duty and fraud (*Vermeer Owners, Inc. v Guterman*, 169 AD2d 442 [1st Dept 1991]). Whether Bert's entry into this sweetheart lease constitutes an "ouster" of plaintiff is a question of inference from facts that might be subject to diverse interpretation and would thus require denial of the motion for partial summary judgment if it were limited to that basis (*Sodexo Management Inc. v Nassau Health Care Corp.*, 23 AD3d 370, 371 [2d Dept 2005]).

The first two claims present the question of whether a sweetheart lease made by a tenant by the entirety to a corporation owned by his stepson of 65% of a commercial property curtails the co-tenant's interest or excludes the co-tenant from exercising her right to possession so as to prejudice such co-tenant's rights or oust such co-tenant from joint possession. Even if the court were not addressing a sweetheart lease, the issue is troublesome inasmuch as two commercial co-tenants cannot, on a practical basis, occupy the same space. The New York case law provides little practical guidance in this area. The law appears to be that the nonassenting tenant in common may then share possession of the premises with the lessee (*Infante v Sperber*, 271 AD. 896 [2d Dept 1926]). In that case, the Appellate Division held that a tenant by the entirety is entitled to possession of the premises jointly with a lessee who occupies the premises pursuant to rights acquired by him by reason of a lease executed by the other tenant by the entirety, concluding that the other cotenant was entitled to joint occupancy of the residential property with that lessee. While that court's solution might work in the context of the lease of a residence, it has no practical meaning in the commercial context where the lessee requires and is entitled to exclusive possession of the leased premises (*Feder v Caliguira*, 8 NY2d 400, 404 [1960]; *American Jewish Theatre, Inc. v Roundabout Theatre Co.*, 202 AD2d 155, 156 [1st Dept 1994]). The Creative Lease purports to grant Creative exclusive occupancy of the space identified in the

lease.¹⁷ It thus ousted Plaintiff of her possessory rights respecting the same space.¹⁸ However, the court need not decide that issue here.

For the reasons stated above, the court concludes that as a matter of law the Creative Lease is void *ab initio* and grants summary judgment in favor of plaintiff on her first cause of action.

c. *Lease Termination upon Co-Tenant's Death.*

The second cause of action seeks a declaration that the Creative Lease terminated on Bert's death as a matter of law.

A tenant by the entirety may convey the tenant's limited interest in property held by the entirety (Warren's Weed, New York Real Property § 27.57(1) [2009]; *Lawriw v City of Rochester*, 14 AD2d 13 [4th Dept 1961], *affd* 11 NY2d 759 [1962]; *Hiles v Fisher*, 144 NY 306 [1895]; *Torrey v Torrey*, 14 NY 430 [1856]) and for the purposes of this issue, the court assumes that Bert leased a portion of his undivided interest in the Mall Property to Creative pursuant to the Creative Lease.

Though a tenant by the entirety can convey his or her own interest, neither can dispose of the interests of the other (Warren's Weed, New York Real Property § 27.57(2) [2009]; *Mente v Wenzel*, 158 AD2d 775 [3d Dept], *app den* 76 NY2d 701 [1990]). Thus it was held in *Lum v Antonelli*, 102 AD2d 258, 262 [2d Dept 1984], that while a tenant by the entirety is not

¹⁷ The Creative Lease instrument contains the usual covenants including, at ¶22, the Owner's covenant to tenant of quiet enjoyment.

¹⁸ It has also been held that one tenant by the entirety cannot reduce a tenant's rent without the express consent of the other (*T.G.W. Realities v Long Island Bird Store*, 151 Misc 918 [Sup Ct, New York County 1934]).

empowered to dispose of the interests of the other cotenant, the tenant can convey his or her own limited interest (*see Lawriw v. City of Rochester*, 14 AD2d 13[4th Dept 1961], *affd* 11 NY2d 759 [1962]). Similarly, neither tenant by the entirety can lease the premises so as to effect the other's right of possession without the consent of the other (Warren's Weed, New York Real Property § 27.59(1) [2009]; *Infante v Sperber*, 271 AD 896 [2d Dept 1946]; *Cataldi v Cataldi*, 34 Misc2d 748 [Sup Ct, Queens County 1962]; *Baker v Westfall*, 30 Misc2d 946 [County Ct, Montgomery County 1961]).¹⁹ Each tenant may lease his or her individual interest to a third person making such lessee a tenant in common with the other tenant by the entirety and subject to the other's rights (Warren's Weed, New York Real Property § 27.59(1) [2009]; *Pastore v Hecker*, 26 Misc2d 43 [County Ct, New York County 1961]).

As the lessee's possession is derived from the lessor tenant it stands or falls with it (Warren's Weed, New York Real Property § 27.59(3) [2009]; *Torrey v Torrey*, 14 NY 430 [1856]). Since the lessee's rights are subject to the right of survivorship, the death of the lessor tenant will cut off the lessee's rights (Warren's Weed, New York Real Property § 27.59(3) [2009]; *Torrey v Torrey*, 14 NY 430 [1856]; *Lawriw v City of Rochester*, 14 AD2d 13 [4th Dept 1961], *affd* 11 NY2d 759 [1962]; see also *Lum v Antonelli*, 102 AD2d 259 [2d Dept 1984]; *May v May*, 18 Misc3d 1129(A) [Sup Ct, Suffolk County 2008]).

If the court assumes that the Creative Lease was not void *ab initio* (as alleged in the first cause of action) and constitutes a conveyance of a portion of Bert's interest as a tenant by the

¹⁹ The parties' papers present the court with the question of whether Bert's lease of his entirety interest in 65% of the Mall Property to Creative would adversely affect Plaintiff's right of possession to the same portion of the Mall Property. Having granted summary judgment on other grounds, the court will not decide that question.

entirety in the Mall Property to Creative, such lease terminated on Bert's death (*Torrey v Torrey*, 14 NY 430 [1856]). Unless Rita signed or consented to the Creative Lease, plaintiff is entitled to partial summary judgment on her second cause of action declaring that the Creative Lease terminated on December 20, 2007. As noted above, the court concludes that Rita neither signed nor consented to the Creative Lease so that summary judgment on the second cause of action is appropriate.

d. Summary.

For the foregoing reasons, respecting the first and second causes of action, defendants' motion is denied and plaintiff's cross motion is granted. The court grants partial summary judgment respecting the first two causes of action in favor of plaintiff and against the Estate and Creative, declaring: (a) the Mall Property was owned by Rita and Bert as tenants by the entirety; (b) the Creative Lease was void *ab initio*; and [c] the Creative Lease, if not void *ab initio*, terminated upon Bert's death. As a consequence of such conclusions, plaintiff is entitled to a turnover of all business records related to the operation of the Mall Property within the possession and/or control of the defendants, provided that the executor of the Estate shall be permitted reasonable access to such records for the purpose of performing his fiduciary duties.

D. Third Cause of Action - Accounting against Estate and Marc.

1. Issues Presented.

Defendants' motion argues that the amended complaint fails to state a cause of action for an accounting as against Marc²⁰ because no fiduciary relationship exists between plaintiff and

²⁰ While defendants urge that the amended complaint fails to state a cause of action for an accounting as against Creative, the amended complaint does not seek an accounting from

Marc (*Berke v Hamby*, 279 AD2d 491, 492 [2d Dept 2001]; *Grossman v Laurence Handprints-NJ, Inc.*, 90 AD2d 95, 1005 [2d Dept 1982]; *see also Merchants Importing, Inc. v Kuhn & Schneider, Inc.*, 27 AD2d 709 [1st Dept 1967]). Marc argues that the amended complaint alleges that he assisted Bert in operating and managing the property “in a very vague and conclusory way.” If Marc in fact managed the property, such a business relationship does not become a fiduciary relationship by mere allegation (*Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989]; *Oursler v Women’s Interart Center, Inc.*, 170 AD2d 407, 408 [1st Dept 1991]; *Holloway v King*, 361 F Supp2d 351, 360 [SDNY 2005], *affd* 161 Fed Appx 122 [2d Cir 2005]); and subjective claims do not give rise to such a relationship (*Societe Nationale v Salomon Bros. Int’s Ltd.*, 251 AD2d 137, 138 [1st Dept 1998]). Marc claims that the mere allegation that he managed the property is insufficient to state a claim for an accounting and that a cause of action may not be predicated on mere conclusory statements unsupported by factual allegations (*Kalamanash v Smith*, 291 NY 142, 153 [1943]; *Taylor v State*, 36 AD2d 878 [1st Dept 1971]). Further, the allegation that Marc continued to manage the property after Bert’s death is conclusively controverted by documentary evidence, to wit, certain correspondence, nor do subjective claims of reliance give rise to such a relationship (*Societe Nationale D’Exploitation v Salomon Bros. Int’l Ltd.*, 251 AD2d 137, 138 [1st Dept 1998] and the court should not create a fiduciary relationship where none exists.

As to Marc, plaintiff urges that her allegations are sufficient that if proven they would establish that she entrusted Marc with management of the Mall Property, thereby creating a fiduciary relationship. A fiduciary relationship arises from the parties’ conduct and exists where

Creative and that issue will not be addressed by the court.

a party entrusts another party with property thereby binding the other party to reveal its dealings (*LoGerfo v Trustees of Columbia Univ.*, 35 AD3d 395, 397-398 [2d Dept 2006]; *Keating v Weinberger*, 160 AD2d 675 [2d Dept 1990]). A fiduciary relationship exists where “one party occupies and controls property of which both parties share ownership” (1 NY Jur 2d, Accounts and Accounting § 34).

It is also urged that the accounting action as against the Estate is barred by the statute of limitations and by the doctrines of account stated and quasi estoppel (CPLR 213; *Evangelista v Mattone*, 44 AD3d 704, 705 [2d Dept 2007]; *Dancy v Aldhous*, 279 AD 1066, 1067 [1st Dept 1952]). Relying on *Mersereau v Bennet*, (62 Misc 356 [Sup Ct, New York County 1909]),²¹ the Estate claims that the doctrine of account stated serves as a complete bar to a cause of action for an accounting because the Schedule E’s on the joint tax returns filed by plaintiff and the decedent constitute an account stated and the principle of “quasi estoppel” bars plaintiff from taking a position contrary to that set forth in such returns (*United States v Matheson*, 532 F2d 809, 819 [2d Cir 1971]).

Plaintiff urges that the statute of limitations does not begin to run until the termination of the fiduciary relationship (*Evans v Perl*, 19 Misc3d 1119[A], at 6 [Sup Ct, New York County, 2008]; *Goergen v Maar*, 2 AD2d 276, 280 [3d Dept 1956]; *Rokeach v Zaltz*, 112 AD2d 209 [2d Dept 1985]). With respect to the Estate’s obligation to account for Bert’s actions, that event was Bert’s death in December 2007. With respect to Marc it would be when he ceased managing the property just before commencement of the suit, thus openly repudiating the relationship (*Estate of Barabash*, 31 NY2d 76, 80 [1972]).

²¹ As stated below, that case is inapposite.

Plaintiff also contends that the doctrine of an account stated does not bar the claim for an accounting as the doctrine only governs where there is an agreement among the parties as to the balance remaining due and the indebtedness of the parties to each other (1 NY Jur 2d, Accounts and Accounting § 26) and the joint tax returns relied on by the Estate as the account stated “are devoid of any indication as to the division of the property’s rent proceeds and expenses among plaintiff, decedent and/or Marc....” It is further contended that the portions of tax returns submitted were incomplete; a signatory spouse is not always bound by a joint tax return (IRC § 6015); and plaintiff qualifies as an “innocent spouse.”

Plaintiff also argues that the doctrine of quasi estoppel, which precludes a party from advocating inconsistent factual positions in different judicial proceedings (*Excelsior 57th Corp v Kern*, 218 AD2d 528, 529-530 [1st Dept 1995]), does not apply where the same facts have different legal consequences in different settings (*PL Diamond, LLC v Becker-Paramount, LLC*, 16 Misc3d 1105[A], at 10 [Sup Ct, New York County, 2007]), as in the subject case.

In reply, defendants urge that quasi estoppel provides that a person who gains financial benefits on the basis of a representation or asserted position in her income tax returns is thereafter estopped from taking a contrary position in an effort to escape the legal consequences of that representation (*United States v Matheson*, 532 F2d 809, 819 [2d Cir 1971]). Defendants list additional case law in support of that proposition. Further, defendants urge that “innocent spouse” is not a defense to quasi estoppel and Plaintiff cannot meet the requisites of an innocent spouse defense were it applicable (*Hayman v Comm’r of Internal Revenue*, 992 F2d 1256, 1262 [2d Cir 1993]; *Rubin v Tax Appeals Tribunal*, 29 AD3d 1089, 1090-1091 [3d Dept 2006]; *Beatty v Comm’r of Internal Revenue*, 93 TCM 1422 [TC 2007]; *Wiener v Comm’r of Internal Revenue*,

96 TCM 227 [TC 2008]). The joint tax returns showed the loan payments as deductions from their joint income from the property.

As to account stated, the Estate repeats its position that the joint tax returns amount to an account stated constituting an annual accounting from Bert with respect to the Mall Property which plaintiff received without protest (*Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]); *SportsChannel Assocs. v Sterling Mets, LP*, 25 AD3d 314, 315 [1st Dept 2006]).

2. Discussion.

a. Fiduciary Relationship.

The elements of a fiduciary relationship were set forth in *EBC I, Inc. v Goldman Sachs & Co.*, (5 NY3d 11, 19-20 [2005]):

A fiduciary relationship “exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (Restatement [Second] of Torts § 874, Comment *a*). Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions (*see Northeast Gen. Corp. v Wellington Adv.*, 82 N.Y.2d 158, 162, 604 N.Y.S.2d 1, 624 N.E.2d 129 [1993]). Generally, where parties have entered into a contract, courts look to that agreement “to discover ... the nexus of [the parties’] relationship and the particular contractual expression establishing the parties’ interdependency (*see id.* at 160). “If the parties ... do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them” (*id.* at 162). However, it is fundamental that fiduciary “liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation” (Restatement [Second] of Torts 874, Comment *b*).

A fiduciary relationship arises from the parties’ conduct and exists where a party entrusts

another party with property thereby binding the other party to reveal its dealings (*LoGerfo v Trustees of Columbia Univ.*, 35 AD3d 395, 397-398 [2d Dept 2006]; *Keating v Weinberger*, 160 AD2d 675 [2d Dept 1990]). A fiduciary relationship exists where “one party occupies and controls property of which both parties share ownership” (1 NY Jur 2d, Accounts and Accounting § 34 [2009]).

A fiduciary relationship may also be based on principles of agency. An agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority (*Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1992]) and such agent has a fiduciary relationship with his principal as “[a]gents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality” (*Elco Shoe Mfrs. v Sisk*, 260 NY 100, 103 [1932]; *see also Sokoloff v Harriman Estates Development Corp.*, 96 NY 409 [2001]; *Wechsler v Bowman*, 285 NY 284 [1941]; *Lamdin v. Broadway Surface Advertising Corp.*, 272 NY 133 [1936]). An agent “is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. The agent must account to his principal for profits...” (*Id.*, at 136).

A tenant in common has an obligation to account to his co-tenants under a trust or quasi trust or fiduciary relationship theory whether or not a classical fiduciary relationship exists (*Minion v Warner*, 238 NY 413, 417-418 [1924]; *Valentine v Healey*, 158 NY 369, 374 [1899]). It has been held that no confidential or fiduciary relationship exists as a consequence of the mere existence of a tenancy in common (*Street v Schultz*, 127 NY 652 [1891]), but “it does not follow that a fiduciary relationship does not exist where there is something in addition to the existence

of the mere tenancy in common” (*Berghaus v Berghaus*, 255 AD 851 [2d Dept 1938]). In *Dolan v Cummings*, (116 AD 787, 789 [2d Dept 1907], *affd* 193 NY 638 [1908]), it was held that a relation of confidence and trust exists between brothers and sisters who are tenants in common of land.

Under the circumstances presented, the court concludes that the amended complaint sufficiently pleads that Bert had a fiduciary relationship with plaintiff and Bert had a duty to account based upon his status as a cotenant and his management of the jointly owned property (*Valentine v Healey*, 158 NY 369, 374 [1899]). Bert’s estate is responsible for Bert’s obligation to account.

The court likewise concludes that the amended complaint sufficiently pleads facts, that if established at trial, could establish that Marc had a fiduciary relationship with plaintiff involving a higher level of trust than a mere arms length business relationship and therefore fiduciary in nature. It is for the ultimate trier of fact to draw the proper inferences from the facts established at trial.

b. *Statute of Limitations.*

The statute of limitations to compel a fiduciary to account is six-years (*Matter of Barabash*, 31 NY2d 76 [1980]; *Matter of Seaman*, 146 Misc2d 563 [Sur Ct, New York County 1990]). “The claim does not begin to accrue until there is either an open repudiation of the fiduciary’s obligation or a judicial settlement of the fiduciary’s obligation to account” (*Matter of Meyer*, 303 AD2d 682, 683 [2d Dept 2003]). With respect to the Estate, the fiduciary relationship between plaintiff and Bert was never repudiated and terminated at Bert’s death. With respect to Marc, the alleged fiduciary relationship terminated with plaintiff’s 2006 letters to Marc. The

claims having accrued within three years of the commencement of the action, the statute of limitations for breach of fiduciary duty has not run. The accountings would cover the entire period in which the fiduciary served in that capacity.

Thus the statute of limitations for an accounting has not run as against either the Estate or Marc.

c. *Account Stated.*

The Estate asserts that plaintiff's cause of action for an accounting is barred by the doctrine of an account stated. Such doctrine, when applicable, rests on the principle that if a party receives a statement of account showing a balance, the recipient must examine the statement and notify the sender of any objections within a reasonable time (*Milstein v Montefiore Club of Buffalo, Inc.*, 47 AD2d 805, 806 (4th Dept 1975); *Lockwood v. Thorne*, 11 NY 170 [1854]).

The Court of Appeals has described the elements of the cause of action for an account stated as follows:

As a general rule where an account is made up and rendered, he who receives it is bound to examine the same or to procure someone to examine it for him. If he admits it to be correct it becomes a stated account and is binding on both parties. If instead of an express admission of the correctness of the account, the party receiving it keeps the same by him and makes no objection within a reasonable time, his silence will be construed into an acquiescence in its justness, and he will be bound by it as if it were a stated account. An account stated is conclusive upon the parties unless fraud, mistake, or other equitable considerations are shown which make it improper to be enforced.

(*Rodkinson v Haecker*, 248 NY 480, 485 (1928). *see also Philips v. Belden*, 2 Edw Ch Rep 1, 13-

14 [1833]).

An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249 [1st Dept 2007]). An account stated assumes the existence of some indebtedness between the parties or an express agreement to treat a statement of debt as an account stated (*Gurney, Becker & Bourne, Inc. v Benderson Development Company, Inc.*, 47 NY2d 995 [1979]; *Grinnell v Ultimate Realty, LLC*, 38 AD3d 600 [2d Dept 2007]). A cause of action alleging an account stated cannot be used as simply another means to attempt to collect under a disputed contract (*id*; *M. Paladino, Inc. v J. Lucchese & Son Contracting Corp.*, 247 AD2d 515 [2d Dept 1998]).

Evidence that an un-itemized bill issued by a creditor and held by the debtor without objection for an unreasonable period of time may, under certain circumstances, provide a basis upon which to find an implied assent so as to constitute an account stated (*Legum v Ruthen*, 211 AD2d 701, 703 [2d Dept 1995]). However, mere silence and failure to object cannot be construed as an agreement upon the correctness of the accounts (*id*; *see also Corr v Hoffman*, 256 NY 254 [1931]). Whether or not a bill or statement has been held for a period of time sufficient to give rise to an inference of assent is ordinarily a question of fact (*Legum v Ruthen*, 211 AD2d 701 [2d Dept 1995]).

Account stated is generally a contract cause of action and not an affirmative defense. However, “it has been held that an account stated is a good plea in bar of an action for an accounting” (*Mersereau v Bennett*, 62 Misc 356, 359 [Sup Ct, New York County 1909], *citing Weed v Smull*, 7 Paige Ch 573 [1839]). Both of these cases involved situations where the

defendant had previously accounted to the plaintiff and the defense was the fact of the prior accounting. The facts before this court are more akin to those in *Joseph v Herzig* (198 NY 456, 461 [1910]), where, noting that *Wood v Smull* was not in point, the Court of Appeals held that the accounting was not a defense since the “account stated” did not result from plaintiff’s demand that defendant account.²² There is no documentary evidence presented as to such a demand in the instant case.

Further, it is not clear to this court that the joint tax returns constitute an account stated.²³ It is not apparent that they were made up and rendered as a statement of the balance due as between Bert and Rita on the operations of the Mall Property. Moreover, according to the amended complaint, “other equitable considerations” appear to be present. The doctrine of account stated does not support dismissal of the accounting claim against the Estate based upon documentary evidence presented under CPLR 3211(a)(1).

d. *Quasi Estoppel.*

“Quasi estoppel” or “estoppel against inconsistent positions” is the legal doctrine which forbids a party from accepting the benefits of a transaction or a statute and subsequently taking an inconsistent position to avoid the corresponding obligations or effects (*Mahoney-Buntzman v Buntzman*, 13 Misc3d 1216(A) [Sup Ct, Westchester County 2006], citing *Matter of Davidson*, 947 F2d 1294 [5th Cir. 1991]; *All Terrain Props. v Hoy*, 265 AD2d 87 [1st Dept 2000]). The

²² The court noted that “the account stated between the partners in 1902 would be competent evidence on the accounting of the respective interests of the partners, but it would nowise relieve the defendant from his liability to account as the surviving partner” (*id.*, at 461).

²³ Whether the joint tax returns constitutes admissible evidence with respect to the accounting claim is a question for another day.

courts of New York have consistently applied the quasi-estoppel doctrine because its judicial system cannot tolerate litigants who play fast and loose with the courts (*Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435 [2d Dept 1995]).

The Estate appears to be arguing that since plaintiff obtained some economic advantage by filing the joint tax returns showing a loss from the operation of the Mall Property that reduced her tax liability on other income, her claim for an accounting from her husband's estate requires her taking an inconsistent position. This "documentary evidence" is far from conclusive and does not establish a defense as a matter of law.

The doctrine of quasi estoppel coupled with the joint tax returns proffered by defendants does not support defendants' 3211(a)(1) motion for several reasons. The unauthenticated and incomplete copies of tax returns submitted by defendants are not signed by Rita or Bert and some of the Schedule E's are incomplete on their face. Such documents do not conclusively establish a defense of quasi estoppel as a matter of law in part because different inferences can be drawn from them and there is no evidence that Bert intended them as a statement of account.

e. Conclusion.

The motion to dismiss the third cause of action is accordingly denied.

E. Fourth and Fifth Causes of Action - Fraud Against the Estate.

1. Issues Presented.

Plaintiff's fourth and fifth causes of action seek recovery from Bert's estate on the basis of fraud. The fourth cause of action is premised upon Bert's representation that he would maximize the value of the Mall Property and that he would cause Creative to pay the Greenpoint

Loan. Plaintiff alleges that these representations were false when made, made with intent to defraud plaintiff, that she relied upon them in providing Creative with the proceeds from the Greenpoint Loan and accordingly suffered substantial damages. The fifth cause of action incorporates the allegations in the fourth and also alleges that Bert represented that he would cause Creative to provide plaintiff with an income after his death as a further condition to plaintiff's agreement to provide Creative with the proceeds from the Greenpoint Loan. Plaintiff alleges that this representation was false when made and made with intent to defraud plaintiff, and she subsequently suffered substantial damages when Bert transferred the Creative stock to Marc.

Defendants contend that the amended complaint fails to state a cause of action for fraud. Where fraud is claimed, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]). Defendants urge that nothing is stated about when or under what circumstances the alleged promises were made and the amended complaint does not state facts sufficient to show that at the time Bert purportedly made the representations at issue he never intended to honor or act on the statement (*G&F Assocs. Co. v Brookhaven Beach Health Related Facility*, 249 AD2d 441, 443 [2d Dept 1999]; *Crafton Bldg. Corp. v St James Constr. Corp.*, 221 AD2d 407, 409 [2d Dept 1995]). In reply, it is noted that the non-performance of a promise is insufficient to establish that the promissor never intended to perform (*Abelman v Shoratlantic Dev. Co.*, 153 AD2d 821 [2d Dept 1989]; *McGovern v T.J. Best Bldg & Remodeling Inc.*, 245 AD2d 925, 927 [3d Dept 1997]).

Plaintiff, in turn, urges that the facts alleged are sufficient to establish the fraud counts against Bert, and the "heightened pleading standard" of CPLR 3016[b] only applies where the

pleading fails to provide the defendant with notice of the transactions intended to be proved and the elements of the claim (*Chaundryy v Abadir*, 261 AD2d 499 [2d Dept 1999]; *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 493 [2008]). Each of the fourth and fifth causes of action make out a prima facie claim of fraud against Bert (*Foley v Dagostino*, 21 AD2d 60, 64 [1st Dept 1964]), each alleging that Bert knowingly uttered a falsehood intending to deprive plaintiff of a benefit and thereby deceived and damaged plaintiff (*CPC Int'l Inc. v McKesson Corp.*, 70 NY2d 268, 285 [1987]). Plaintiff further notes that where it is almost impossible to detail the circumstances because they are peculiarly within the knowledge of the tortfeasor, such a deficiency might be cured later (*Jered Contracting Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]; *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 491-492 [2008]). Plaintiff also notes that a fraud claim may be predicated on promises made with an intent not to perform them in the future (*Deerfield Comms. Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 955 [1986]; *Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995]).

2. Discussion.

The elements for a fraud claim are: (1) the representation of a material fact by the defendant; (2) the falsity of the representation; (3) defendants' knowledge that the representation was false when made; (4) reasonable reliance by the plaintiff on the defendants' representation; and (5) injury (*Small v Lorrillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). In addition, CPLR 3016[b] states, among other things, that "[w]here a cause of action ... is based upon a misrepresentation, fraud, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Something more than a "notice pleading" is required. "This provision [3016(b)] requires only that the misconduct complained of be set forth

in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud (*Jered Constr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 1968)" (*Lanzi v Brooks*, 43 NY2d 778, 779-780 [1977]). The requirements of Rule 3016(b) may be met when the facts alleged are sufficient to permit a reasonable inference of the alleged conduct (*see Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 55 [2001] (alleged facts were sufficient to permit a jury to “infer (defendant's) knowledge of or participation in the fraudulent scheme”); *Jered Constr Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]; *Lanzi v Brooks*, 43 NY2d 778, 780 [1977]).

As stated in *Graubard Mollen Dannett & Horowitz v Moskovitz*, (86 NY2d 112, 122 [1995]):

A cause of action for fraud may arise when one misrepresents a material fact, knowing it is false, which another relies on to its injury (*see Ochs v Woods*, 221 NY 335, 338). A false statement of intention is sufficient to support an action for fraud, even where that statement relates to an agreement between the parties (*Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956; *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407; *Sabo v Delman*, 3 NY2d 155, 160; Prosser and Keeton, Torts § 109, at 763 [5th ed]).

“[A] promise ... made with a preconceived and undisclosed intention of not performing it, ... constitutes a misrepresentation” (*Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 955 [1986]; *Sabo v Delman*, 3 NY2d 155, 160 [1957]).

“[I]t is well settled that an allegation of fraud based upon a statement of future intention must allege facts sufficient to show that the party, at the time the promissory representation was made, never intended to honor or act on those statements” (*Abelman v. Shoratlantic Development*

Co., 153 AD2d 821 [2d Dept 1989]; *Pope v New York Prop. Ins. Underwriting Assn.*, 112 AD2d 984, 985 [2d Dept 1985]; *see also*, *Boylan v Morrow Co.*, 63 NY2d 616, 619 [1984]; *Lanzi v Brooks* 54 AD2d 1057, 1058 [3d Dept 1976], *affd* 43 NY2d 778 [1977], *mot to amend remittitur granted* 43 NY2d 947[1978], *mot for rearg den* 44 NY2d 733 [1978]; *Grossberg v Grossberg*, 104 AD2d 439, 440 [2d Dept 1984].”

Applying these rules on a motion to dismiss (CPLR 3211[a][7]), “the allegations of a complaint, supplemented by a plaintiff’s additional submissions, if any, must be given their most favorable intendment” (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]; *see Jered Constr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1976] [“It is almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of the party against whom the (fraud) is being asserted”]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]), and this court concludes that valid causes of action for common-law fraud are stated (*CPC Intern. Inc. v McKesson Corp.*, 70 NY2d 268, 285 [1987]).

In order to sustain a cause of action to recover damages for fraud, a party must prove (1) that the defendant made a representation, (2) as to a material fact, (3) which is false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity, (8) to his injury. Absent an intent to deceive, mere unfulfilled promissory statements as to what will be done in the future are not actionable as fraud (*see Brown v Lockwood*, 76 AD2d 721 [2d Dept 1980]; *see also P. Chimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385 [1st Dept 1994]; *Mechanical Plastics Corp. v Rawlplug Co.*, 119 AD2d 641

[2d Dept 1986]).

The Estate's motion is predicated upon a lack of detail as to when and under what circumstances Bert made the allegedly false representations and facts supporting the allegation that Bert never intended to perform such promises. As read by the court, it is alleged that Bert caused Rita to agree to mortgage the Mall Property and provide the proceeds of the resulting loan to Creative based upon each of three distinct representations, each of which was untrue when made and made with an intent to defraud. As the date and circumstances of the Greenpoint Loan are plead the requirements of 3016[b] are met in terms of what was represented and when the representations were first made.

The amended complaint alleges that Bert repeatedly and falsely represented to Rita his intent to maximize the value of the Mall Property and to cause Creative to repay the Greenpoint Loan (fourth cause of action) and to cause Creative to provide an income to Rita after Bert's death (fifth cause of action) as a predicate to Rita's participation in the Greenpoint Loan where the \$350,000 borrowed by Rita and Bert was advanced to Creative, then 100% owned by Bert. It is also alleged that the subsequent actions taken by Bert in derogation of those promises was concealed from Rita. A cause of action based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory statements were made, never intended to honor or act upon his statements (*see Lanzi v Brooks*, 54 AD2d 1057, *affd* 43 NY2d 778 [1977]; *Crafton Bldg. Corp. v St. James Constr. Corp.*, 221 AD2d 407, 409 [2d Dept 1995]).

Plaintiff's amended complaint sufficiently alleges both a present intent not to carry out the promises of future action, and factual assertions from which this conclusion can be drawn, and thus states causes of action for fraud based on a misstatement of future intentions (*Lanzi v Brooks*,

43 NY2d 778, 779 [1977]). Taking these allegations in the light most favorable to Rita, the court concludes that under the circumstances, sufficient facts are alleged to permit a fact finder to infer that Bert had no intent to fulfill those promises at the time they were made. The court recognizes that plaintiff may ultimately have difficulty persuading a fact finder of her assertions by clear and convincing evidence. But whether plaintiff can ultimately establish that Bert had no intent to fulfill those promises when they were made cannot be determined at the pleading stage. The court concludes that two causes of action for common law fraud have been stated sufficiently to survive a 3211(a)(7) motion (*Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995]). The motion to dismiss the fourth and fifth causes of action is denied.

F. *Sixth and Seventh Causes of Action - Breach of Fiduciary Duty against the Estate and Marc.*

1. *Issues Presented.*

Marc contends that the amended complaint fails to state a cause of action for breach of fiduciary duty as against him because of the failure to plead facts that would create a fiduciary relationship between plaintiff and Marc; and the claim as to his management of the property, if relevant, is controverted by “undisputed” documentary evidence (*Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530 [2d Dept 2007]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). The documentary evidence consists of a letter from plaintiff to Marc and an email from plaintiff’s counsel to Marc. These documents, according to Marc, demonstrate that immediately following Bert’s death plaintiff took steps to insure that she would manage the property.

Further, to the extent the claim for breach of fiduciary duty seeks monetary damages as

opposed to equitable relief, the statute of limitations is three years commencing from the date of the act constituting the breach of fiduciary duty (*Heffernan v Marine Midland Bank*, 283 AD2d 337 [1st Dept 2001]; *Svenska Finans Int'l BV v Scolaro, Shulmann, Cohen, Lawler & Burstein, P.C.*, 37 F Supp2d 178, 184 [NDNY 1999]; *Merine v Prudential Bache Utility Fund, Inc.*, 859 F Supp 715, 725 [SDNY 1994]). If the May 1, 2003 lease to Creative was the wrongful act and the suit was commenced on March 24, 2008, nearly five years later, such claim is barred as against both Marc and the Estate by the three year limitation period.

As noted with respect to the accounting claim against Marc, plaintiff urges that a fiduciary relationship between Marc and plaintiff is adequately plead and the court should not go beyond the pleading at this stage of the proceeding (*Int'l Oil Field Supply Servs. Co v Fadeyi*, 35 AD3d 372, 375 [2d Dept 2006]; *Alevy v Uminer*, 49 AD3d 301, 301-302 [1st Dept 2008]). The letters proffered as documentary evidence do not “utterly refute” the facts alleged in support of the existence of a fiduciary relationship (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Addressing the limitations issue, plaintiff urges that where a breach of fiduciary duty claim is asserted in conjunction with a fraud claim, a six year period applies (*Unibell Anesthesia, P.C. v Guardian Life Ins. Co. of Am.*, 239 AD2d 248 [1st Dept 1997]). Assuming applicability of the three year period, the claims didn't accrue until there was an open repudiation of the relationship or the relationship otherwise terminated (*Int'l Oil Field Supply Servs. Co v Fadeyi*, 35 AD3d 372, 375 [2d Dept 2006]; *Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 131-132 [1st Dept 1999]). Further there were a number of continuing breaches including every time that Marc and/or Bert collected rents from the Mall Property and applied them to payment of the Greenpoint

Loan, restarting the statute (*Navarone Prods., N.V. v HSBC Gibbs Gulf Ins. Consultants Ltd.*, 22 Misc3d 1104[A], at 2 n.3 [Sup Ct, New York County 2008]; *Kerr v Brown*, 283 AD2d 343, 345 [1st Dept 2001]).

In reply, Marc reiterated that because plaintiff seeks monetary damages as opposed to equitable relief a three year limitation is appropriate (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]) and accrues when the damages are suffered (*id.*). He contends that the alleged damage accrued when the Creative Lease was entered into. It was also urged that the claim is duplicative of the claim for an accounting and suffers from the same infirmities.

2. Discussion.

The court concluded above that the pleading adequately sets forth a cause of action as against Bert's estate and Marc for accountings respecting: (a) the collection of rents from the Mall Property and applying such monies to payments against the Greenpoint Loan; and (b) their failure to maximize the value of such property, particularly with respect to the Creative Lease. In doing so the court concluded that the amended complaint adequately plead a fiduciary relationship between plaintiff and Marc and plaintiff and Bert. The sixth and seventh causes of action are claims for money damages based upon breach of fiduciary duty in the first instance, recurring every time one of the putative fiduciaries applied proceeds from the Mall Property to payments on account of the Greenpoint Loan.

The limitation period for a cause of action for breach of fiduciary duty is six years (*Matter of Winne*, 232 AD2d 956, 957 [3d Dept 1996]) and the claim begins to accrue when there is an open repudiation of the fiduciary's obligation (*Matter of Barabash*, 31 NY2d 76, 80 [1972]) or the relationship has "otherwise terminated" (*Westchester Religious Inst. v Kammerman*, 262 AD2d

131 [1st Dept 1999]). With respect to the Estate, the fiduciary relationship between plaintiff and Bert was never repudiated and terminated at Bert's death. With respect to Marc, the alleged fiduciary relationship terminated with plaintiff's 2006 letters to Marc. The claims having accrued within three years of the commencement of the action, the statute of limitations for breach of fiduciary duty has not run whether it be three years or six.

The documentary evidence addressed to these claims acts as a cut off for the accrual of new claims for breach of fiduciary duty and no more. It demonstrates a termination of Marc's management role in 2006 and thus a termination of his putative fiduciary responsibilities. The documents are not relevant to the question of whether Marc had a fiduciary relationship with plaintiff prior to delivery of the documents.

3. *Conclusion.*

The motion to dismiss the sixth and seventh causes of action is denied.

G. *Eighth Cause of Action - Breach of Contract against Estate and Creative for Non-Payment of Greenpoint Loan.*

1. *Issues Presented.*

The Eighth Cause of action seeks damages from Bert's estate and Creative for breach of an alleged oral contract made by Bert on behalf of Creative and himself to have Creative repay the Greenpoint Loan. The Estate and Creative move to dismiss this claim for failure to state a cause of action for breach of contract urging that such claim is barred by the Statute of Frauds (General Obligations Law § 5-701[a]) and the underlying contentions are conclusively contradicted by

documentary evidence, *i.e.*, the joint tax returns filed by plaintiff and Bert.²⁴

Plaintiff responds by urging that the contract to repay the loan could be performed within one year of its making (*Mar-Bond Beverage Corp v Dublin Distributors, Inc.*, 9 AD2d 951, 952 [2d Dept 1959]; *Kremer v Kremer*, 243 AD 66, 67-69 [1st Dept 1934]; *Constantini v Bimco Industries, Inc.*, 125 AD2d 531 [2d Dept 1986]) and is accordingly not barred by the statute of frauds; that the joint tax returns do not conclusively establish a defense to the contract claim as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

2. Discussion.

The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage (*Furia v Furia*, 116 AD2d 694 [2d Dept 1986]; *Ascoli v Lynch*, 2 AD3d 553 [2d Dept 2003]). In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based (*Sud v Sud*, 211 AD2d 423 [1st Dept 1995]; *Atkinson v Mobil Oil Corp.*, 205 AD2d 719 [2d Dept 1994]).

a. Statute of Frauds.

The Statute of Frauds provides that an agreement will not be recognized or enforced if it is not in writing and subscribed by the party to be charged when the agreement by its terms is not to be performed within one year from its making or is not to be completed before the end of a

²⁴ Such defendants also argue that the amended complaint expresses an additional contract claim to the effect that Plaintiff would receive income from Creative after Bert's death. Plaintiff denies making such a claim. The court accepts Plaintiff's interpretation of her own pleading. If the amended complaint can be construed to include a breach of contract claim premised on Bert's promise that Rita would continue to receive income generated by Creative after his death, such claim is waived.

lifetime (General Obligations Law § 5-701[a][1]). To satisfy the statute of frauds, a writing must identify the parties, describe the subject matter, state all the essential terms of the agreement, and be signed by the party to be charged (*Durso v Baisch*, 37 AD3d 646 [3d Dept 2007]; *Urgo v Patel*, 297 AD2d 376 [2d Dept 2002]). The purpose of the Statute of Frauds is to prevent fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury (*Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 560 [2004]). It “is a device designed to prevent, not to perpetuate fraud” (*Matter of Melia’s Estate*, 98 NYS2d 941, 945 [Sur Ct, Westchester County 1950]).

The Statute of Frauds has been interpreted to encompass only those contracts that, by their terms, have absolutely no possibility in fact and law of full performance within one year (*D & N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 454-455 [1984]; *Foster v Kovner*, 44 AD3d 23 [1st Dept 2007]; *Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404 [2d Dept 2003]; *Hynes v Griebel*, 300 AD2d 628, 629 [2d Dept 2002]; *Air Masters, Inc. v Bob Mims Heating and Air Conditioning Service, Inc.*, 300 AD2d 513, 515 [2d Dept 2002]; *Kestenbaum v Suroff*, 268 AD2d 560, 561 [2d Dept 2000]; *Radnay v Charge & Ride, Inc.*, 266 AD2d 194, 196 [2d Dept 1999]; *Hydro Investors, Inc. v Trafalgar Power, Inc.*, 6 AD3d 882 [2d Dept 2004]; *Lowinger v Lowinger*, 287 AD2d 39 [1st Dept 2001]).

The court concludes that it was possible for full performance of the purported contract to repay the Greenpoint Loan to occur within one-year and concludes that the pleading adequately sets forth a cause of action as against Bert’s estate and Creative for breach of a contract to repay the Greenpoint Loan and such claim is not barred by the statute of frauds.

b. *Documentary Evidence.*

As to defendants' argument that such claim is barred by documentary evidence, to wit, the joint tax returns filed by decedent and plaintiff, the court concludes that the partial tax returns submitted in support of defendants' motion do not conclusively establish a defense to the contract claim as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *730 J & J LLC v Fillmore Agency, Inc.*, 303 AD2d 486 [2d Dept 2003]; *Berger v Temple Beth-el of Great Neck*, 303 AD2d 346 [2d Dept 2003]).

c. Conclusion.

For the foregoing reasons defendants' motion to dismiss the eighth cause of action is denied.

H. Ninth Cause of Action - Unjust Enrichment.

1. Issues Presented.

Plaintiff's ninth cause of action seeks a monetary recovery against all three defendants on a theory of unjust enrichment based upon the 1999 loan to Creative, the use of the Mall Property income to repay the Greenpoint Loan and entry into the Creative Lease. Defendants urge that the ninth cause of action fails to state a cause of action for unjust enrichment (*Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281 [1st Dept 1989]), arguing that such a claim would be barred where there is an express contract governing the same subject matter (*Metropolitan Elect. Mfg. Co. v Herbert Constr. Co.*, 183 AD2d 758 [2d Dept 1982]), that Bert had a right to lease his interest in the property to Creative without his wife's consent (*V.R.W., Inc. v Klein*, 68 NY2d 560, 565 [1986]) and the other spouse has no standing to object unless she is ousted from possession

by the lessee (*Kullman v Wyrzten*, 41 NYS2d 682, 684 [2d Dept 1943])²⁵ and the allegation in the Amended Complaint that the Creative Lease “effectively excluded her from possession of the Property” is inadequate.

Plaintiff responded that the claim meets the liberal pleading requirements of CPLR 3013 and provides adequate notice of the transactions and occurrences to defendants and that even if Bert had a right to lease his interest in the Mall Property, he had an obligation to do so for plaintiff’s benefit (*Matter of Ferrara*, 7 NY3d 244, 254 [2006]).

In reply, Marc and Creative reiterate that this cause of action fails on a number of grounds. First, whether as a tenant in common or by the entirety, Bert had the absolute right to convey, mortgage or otherwise encumber his interest in the Mall Property and plaintiff has no standing to object unless she is ousted from possession. Second, there is no allegation that any proceeds from the Greenpoint Loan went directly to Marc or that Marc induced plaintiff to enter into such loan; and Marc did not acquire Creative until December 31, 2002. Third, the claim is barred by the doctrine of quasi estoppel. Fourth, the limitation period is at most six years and probably three years and accrued upon the occurrence of the wrongful act (*Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept 2007]; *Congregation Yetev Lev D’Satmar, Inc. v 26 Adar N.B. Corp.*, 192 AD2d 501, 503 [2d Dept 1993]; *Elliott v Qwest Communications Corp.*, 25 AD3d 897, 898 [3d Dept 2006]). Fifth, plaintiff had constructive notice that Creative was not paying the Greenpoint Loan.

2. Discussion.

²⁵ The court has granted partial summary judgment in favor of plaintiff and against to the effect that the Creative Lease does not purport to lease Bert’s interest in the Mall Property but the respective interests of Bert and Rita, and in the absence of Rita’s signature or acquiescence, the Creative Lease was void *ab initio*.

Unjust enrichment is based upon quasi-contract (*Waldman v. Englishtown Sportswear, Ltd.*, 92 AD2d 833 [1st Dept 1983]). “A cause of action for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another” (*Menthe v Wenzel*, 178 AD2d 705 [3d Dept 1991]; *see also Parsa v State of New York*, 64 NY2d 143 [1984]). The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another (*see Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415[1972]; *Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983 [3d Dept 2006]). Causes of action for recovery in breach of contract and quasi-contract may be pled in the alternative (*Auguaston v Spry*, 282 AD2d 489 [2d Dept 2001]). The Statute of Limitations for unjust enrichment is six-years (*Matter of Lamb*, 145 AD2d 935 [2d Dept 1988]) and such period commenced to run “upon the occurrence of the wrongful act giving rise to a duty of restitution” (*Golden Pacific Bancorp v FDIC*, 273 F3d 509, 520 [2d Cir 2001]), often meaning the time when the initial payment was made (*see Onanuga v Pfizer, Inc.*, 369 F Supp2d 491, 500 [SDNY 2005]).

In this case, Rita's cause of action for unjust enrichment is founded upon the 1999 loan by Bert and Rita to Creative; payment of the Greenpoint Loan from Mall Property revenue rather than by Creative; and the terms of the Creative Lease, which allegedly created a gift of Rita's interest in the property leased to Creative. These allegations state a claim of unjust enrichment to the extent that plaintiff has plead facts that if proven would establish that each of the three defendants has obtained a benefit that in equity and good conscience they should not have obtained or possessed because it belonged to another and such claim is not time barred.

The 1999 Loan to Creative does not fall within that category and since the benefit of that

loan was received and therefore accrued in 1999 when the money was paid to Creative, any claim that such payment created an unconscionable benefit for Creative or its shareholders is time barred by the six year limitation period (CPLR 213[2]) absent grounds for equitable tolling. Such a claim would not lie against Marc as he was not a shareholder of Creative at that time. Equitable tolling does not apply because Rita willingly made the loan and the gravamen of her claim is either fraud or breach of contract.

The use of Mall Property income by Bert and/or Marc to pay back the Greenpoint Loan is based on the same factual foundation as the cause of action for breach of contract so plaintiff cannot recover for unjust enrichment on that basis (*Metropolitan Elect. Mfg. Co. v Herbert Constr. Co.*, 183 AD2d 758 [2d Dept 1982]).²⁶

The Creative Lease is another matter. Plaintiff has alleged that Bert's creation of such lease ousted her from possession of the leased premises. The Creative Lease arguably conferred a benefit on Creative and its owner [see discussion re first two causes of action] and, inasmuch as there is some question raised as to when Bert gifted the Creative Stock to Marc, a claim is stated as against all three defendants in that respect. That benefit could be deemed unconscionable by the trier of fact and belonged to plaintiff in part before Bert's death and in toto thereafter. Such claim accrued on May 1, 2003 and accordingly is not barred by the six-year limitation period.

²⁶ It also accrued in 1999 and is time barred by the six year limitation period (CPLR 213[2]) absent application of equitable tolling. While, the allegations of reliance by plaintiff on the alleged misrepresentations as to the source of the periodic payments on the Greenpoint Loan as the cause of her failure to sooner institute the claims for unjust enrichment, breach of contract and fraud and the justification for such reliance, necessarily to be established by her, are sufficiently plead to invoke the shelter of the equitable tolling rule and preserve these claims in the face of a 3211 motion based solely on the statute of limitations, it does not overcome the other infirmity.

The same analysis would apply if the ninth cause of action were construed to allege a cause of action for restitution. To establish a cause of action for restitution, the plaintiff must establish that the defendant received money or property from the plaintiff that in good conscience and equity the defendant should not be permitted to retain (*Wiener v Lazard Freres & Co.*, 241 AD2d 114 [2d Dept 1998]; *Bello v New England Financial*, 3 Misc3d 1109(A) [Sup Ct, Nassau County 2004]). To the extent the rent under this sweetheart lease was under market, the finder of fact could find that Plaintiff was damaged by Bert's entry into this lease.

3. Conclusion.

The court thus concludes that the pleading adequately sets forth a cause of action as against all defendants for unjust enrichment and/or restitution respecting the alleged benefits received by each of them under the Creative Lease. As to the claim based upon the 1999 Loan, it is time barred. The claim respecting the use of Mall Property income by Bert and Marc to pay the Greenpoint Loan is barred based upon the survival of plaintiff's breach of contract claim.

I. Conclusion.

The court has determined defendants' motion and plaintiff's cross motion as set forth above.

Defendants shall serve their answers to the balance of the amended complaint within 10-days following service of the order to be entered with respect to this decision with notice of entry (CPLR 3211[f]).

The proceeding is set down for a preliminary conference on Wednesday, September 23, 2009 at 9:30 A.M.

Settle order in accordance with decision, such order to provide for severance of the first and second causes of action and entry of a declaratory judgment with respect thereto.

Dated: August 18, 2009

JOHN B. RIORDAN

Judge of the
Surrogate's Court