Index No: 33624/2008

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Post-Trial Order

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

Schulman Family Enterprises, et.al.,	:	Esseks Hefter & Angel, Esqs.
	:	108 East Main Street
Plaintiff(s),	:	P.O. Box 279
- against -	:	Riverhead, N.Y. 11901
	:	
David B. Schulman, et.al.,	:	Wickham Bressler Geasa, P.C.
	:	13015 Main Road
Defendant(s).	:	P.O. Box 1424
		Mattituck, N.Y. 11952

The non-jury trial of this matter was conducted before the undersigned on May 19th, 20th, and 21st, 2014. Prior to the testimony, a number of items were pre-marked as either exhibits or directly admitted into evidence. In addition to those items, the parties relied upon the *viva voce* testimony of five (5) witnesses. Called by the plaintiff were: Doctors Martin L. Schulman, M.D. (Martin), Lee G. Schulman, M.D. (Lee), David G. Schulman, M.D. (David), as well as Julie Slann nee Schulman (Julie) and Mark Ives, C.P.A. During its case, the defense recalled David and, pursuant to CPLR § 3117 (a)(3), also offered portions of the deposition of David Gilmartin, Esq. At the conclusion of the proceedings and in lieu of summations, each side was invited to submit written factual and legal arguments as well as any requests for findings of fact pursuant to CPLR §4213 by June 27, 2014. Thereafter, upon their mutual request, the submission date was extended for two (2) additional weeks. Those memoranda having since been received and reviewed, the Court's decision is as follows:

The plaintiffs' amended complaint sets forth seven causes of action which sound in constructive trust, promissory estoppel, breach of contract, breach of a partnership agreement, breach of fiduciary duty, adverse possession and injunctive relief. Perhaps summarized, however, the main thrust of the plaintiffs' action is to

obtain a judgment declaring that certain property held by the defendants David and/or BSS (a partnership he formed) be reconveyed to the plaintiff Schulman Family Enterprises (SFE). The defendants have answered with a general denial but there are no counterclaims; defenses of purported violations of the statute of frauds and statute of limitations have also been raised.

As agreed by the parties and placed within the record, the chronological history of this matter is as follows:

In late 1992 and early 1993, the plaintiff Martin purchased 37.682 acres of vacant land (the "Seabreeze" property) in Sagaponack, New York. Martin is the father of the plaintiffs Lee and Julie as well as the defendant David. Martin originally took title in his name and in SFA, a partnership caused to be formed by Martin and which consisted of him and his children, Lee, Julie and David.

In essence, some six months later Martin formed SFE, a family partnership by which each of his children would hold an approximately equal or 32% ownership, and he the remaining 4%. He removed himself that December, wanting to divest himself of the property for estate and other purposes. In doing so, he transferred the property into the SFE partnership, and arranged the property to be subdivided into 11 lots as well as an additional agricultural reserve of approximately 23 acres[1].

Two months later, in early March of 1994, SFE then conveyed lots numbered 7 & 8 to Martin by a deed signed by Lee. Martin subsequently built a residence on those lots.

In July 1994, Lee signed the deeds as SFE conveyed the nine remaining lots to all of the siblings/partners as follows:

David, lots numbered 2, 4, 6, and 10;
David and Lee, lot numbered 11 (undivided half interests);
Lee, lots numbered 1 and 5;
Lee and Julie, lots numbered 3 and 9 (undivided half interests).

In 1996, Martin deeded to Lee a two-thirds interest in lots 7 & 8.

[1]The three children were, therefore, the equal and sole partners. As noted later during the trial, they gave no consideration in exchange for their initial interests in the partnership.

As a result, David received full interest in four lots, and shared a half of one other; Lee had full interests in two lots, shared in three others, and a 2/3 interest in lots 7 & 8 (with Martin); Julie shared half of two lots.

In 2005, David conveyed his interest in his four lots to BSS Real Estate, L.P. (BSS), a partnership that he created and of which his three children were equal partners.

The plaintiffs contend that the nine lots were distributed to all of the siblings as a convenience in order to "checkerboard" the property, and that David obtained title as a nominee for SFE. Specifically, it is their contention that the motivation for the July 1994 conveyance from SFE to all of Martin's three children/now-parties was "checkerboarding" *viz*, placing the various lots in different names for zoning purposes, so as to avoid merging ownership of those multiple lots into one owner. It was anticipated that by "checkerboarding" the various properties they would retain their single and separate status and thereby avoid the risk of the Town of Southampton up-zoning the property. It is also contended that the division resulted in Julie having but 11% of the property and Lee 39% while David has 50%.

It is David's contention is that the conveyance was absolute and that he was entitled to convey the property to BSS, and that he is now entitled to sell the lots for the benefit of his children.

Additionally, and during the course of the trial, it was also stipulated that as to certain items in evidence (pl[2] 22, 26, 27, and 30 as well as defendant's I), that David did not sign nor appear before the therein noted notary. It was similarly stipulated that Martin signed David's name to some of them (pl 22, 26, 27 and defendant's I) and that Lee signed David's name to one (pl 30) and that the notary was asked to acknowledge the same[3].

THE WITNESSES AND THEIR TESTIMONY

What immediately follows is an unassessed and condensed version of the testimony of the various witnesses regarding the relevant and germane events of

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[2] "Pl" followed by a number or numbers refers to plaintiff's item(s) in evidence.

[3] That obvious impropriety has been addressed in another forum.

this controversy as well as some background matter as was portrayed, purported and alleged by each.

Dr. Martin L. Schulman testified that he is a physician, certified in general and vascular surgery. He has been practicing part-time at the Schulman Vein and Laser Center with his son Lee, who owns the practice. Martin has been married to Suzanne M. Schulman since 1987. From a previous marriage to Malkah Schulman he has three children—Lee, Julie, and David—from whom he has nine grandchildren, three from each of his children. At his expense, all of his children have received undergraduate and graduate degrees.

Since 1988 or 1989, he has practiced medicine with Lee. Additionally, they socialize, vacation and attend sporting events together. He also has contact with Lee's wife and children. He has never stopped speaking to Lee, his wife, or Lee's children.

Julie holds a Master's Degree and has lived in Florida for the last nine or ten years. Prior to that, she lived in Charlotte, North Carolina, as well as having spent some time in Israel. She is not presently married, having previously divorced Guy Slann. Currently, she is unemployed and Martin provides her financial aid for her living expenses and those of her children. He speaks with her virtually every day and he frequently travels to Florida to visit. She also visits New York during the summer, and they ski together in March. As with his son Lee, Martin has never stopped contact or speaking with her or family.

His youngest son, David, resides in North Carolina and is married to Beth. Martin indicated that for the last ten years or so they "essentially" haven't spoken to each other. Prior to that time, Martin indicated he had a relationship with David and his two children and was as "close as his (David's) wife would allow." David, a dermatologist, worked for the Schulman Center for six months after he completed his residency. Martin's relationship with him ended about eleven years ago when Martin visited David and was made to feel very awkward and, thereafter, he received disturbing correspondence from David's wife. Martin decided he'd be better off without David. As a result their only contact was, essentially, through lawsuits (although they did speak on the phone once). Other than that, however, Martin has had no contact with David, his wife or children.

During the years before the relationship with David fractured, Martin had a practice which was "generally" to give each of his three children three assets: 1) equal or 1/3 ownership of a ski condominium in Vail, 2) equal 1/3 shares in VDL (Vascular Diagnostic Lab), and 3) a large portion of "Seabreeze" (the plot of land in Sagaponek) - less that portion of the plot occupied by his house.

The relevant history of the Seabreeze property (including the portion upon which his house now sits) began in1989 when he and his wife were looking for real property. In approximately1991, he found a 37 acre lot which at that time was all farmland. He was introduced to it by a broker and thereafter purchased it for 1.1 million dollars. When he acquired the property he planned to build one, single home and maintain the balance of the acreage as farmland. He told his plans to his friends, his wife, and probably his children. He signed on the SFA Partnership Agreement (pl 5) on November 23, 1992 on behalf of Julie as her Attorney-in-Fact; he had her Power of Attorney dated November 17, 1992 (pl 4).

After property was acquired, there were two significant events: a) Martin gave the Seabreeze property to his three children, equally, and b) a prior developer of the land had gone bankrupt after major subdivisions were two-thirds accomplished. Martin had transferred the property before he was aware of the subdivision efforts. He informed the children the property - at that time essentially farmland - was going to be theirs and that the transfer was a good way of passing the property to them. He also told them that it was in a sense their property but it was in his name. He proceeded with the prior builder's subdivision and retained David J. Gilmartin, Esq., to complete the subdivision. The subdivision was ultimately approved with the great majority transferred to a family partnership (he was unsure if it was SFA or SFE). He retained a Robert Donatelli, Esq., to set up the transfer and the SFE partnership and told him he wanted the portion of land not used for his residence to go to his children in equal shares. The witness stated he signed the SFE Partnership agreement (pl 10, dated 7/31/93) as attorney in fact for David and Julie; Lee signed personally. The witness stated he had the power of attorneys.

Thereafter, he managed the property with Lee. Martin had paid the 1.1 million dollars sale price and the various lawyers' and other fees but was never reimbursed or compensated by his children. He built the home and a pool, a pool house, as well as a tennis court and a garden. The home and its grounds were not intended to dominate or be the house for all of the plot's subdivisions. He also

caused the subdivision's infrastructure to be completed, i.e., the road bed, and installation of the cable, telephone, and water utilities. These tasks were completed between 1993 and 1995. He had had a fence installed in 1994 or 1995, and there was grass between it and the pool. In 1995 the lawn was destroyed, he believes by David. After the damage, he had the fence moved back and had the lawn restored. As to the construction costs of the house, he paid a third and Lee paid the balance.

He explained his understanding of "checkerboarding." He added that Gilmartin provided the deeds and Lee signed them. Martin stated he had never looked at the deeds and was not aware of the lots' distribution until some time thereafter. He stated that he had never instructed Gilmartin as to which lots were for whom. Additionally, he stated that he hadn't received any money for the distribution.

Since its completion, the house has been used mostly by him and his wife and visited by his children and grandchildren. Lee was there most often; David occasionally visited until 11 or 12 years ago.

Just before his 75th birthday celebration cruise Martin discovered David was claiming outright ownership of the lots. This was through a letter he received from David's attorney asking 23 million dollars for the properties.

Focusing on his grandchildren, he described his practice: upon the birth of a grandchild he would deposit money in a "Charles Schwab" custodial account. Initially, he was the custodian but later installed the child's parent while he continued to manage the account. As of the time of his testimony, he still manages six such accounts, but not those for David's two older children (Benjamin and Sydney) and he never began one for David's third and youngest child (Sam). He stopped contributing to David's two older children's accounts 11 years ago. At that time the accounts' value were $400,000.00 to $500,000.00 for the older child and $200,000.00 for the younger. After 2004, he received a letter from Schwab indicating that he was no longer custodian and that David had opted not to pursue criminal charges.

The ski house in Vail, Colorado is a condo, the middle unit of five, and has over 2000 square feet of floor space. He personally paid $360,000.00 for it in 1989 and then transferred its title to his three children, a third each. Since that time, he

uses it most often, going there in January with Lee and during visits with Julie. Lee owns it all now, having bought out both David and Julie. Julie transferred her share to Lee 14 years ago, David transferred his portion within the last few years. David had initially asked $650,000.00 for his share, eventually selling it to Lee for approximately $500,000.00.

Martin had established his lab in the mid-1970's and divided it equally among each of his children, a third each. He distributed its income to them until 2003 or 2004 when Lee's portion became a salary. The other portions went to the David and Julie as dividends but the amounts were essentially all equal. The lab ceased operations three or four years ago. David last received income in the early 2000's, it having ceased after the arose issues between him and Martin. Over the years, David's share was approximately two million dollars plus a small pension plan. David has since sued VDL.

During his cross-examination, Martin indicated that Julie hasn't been salaried in 15 years. He has annually contributed $70,000.00 to $80,000.00 to her support, plus in one year there was over $200,000.00 from VDL, as well as a lesser amount than that in another year. He would deposit the funds in her brokerage accounts and the statements came to his office. David was a half owner of VDL when he was cut off but Julie's money continued.

He and David had gone to a psychiatrist on two or three occasions to repair their relationship but Martin never demanded David return the land.

About 11 years ago, Julie's former husband, Martin's former son-in-law, told him he was $170,000.00 in debt; that figure was used to determine the price of Julie's share of the Vail condo.

As to the Seabreeze property, his only initial interest was erecting a house and not in conveying any property to his children. He had Gilmartin finish the subdivision application using the layout decided by the prior builder when he was doing the subdivision. Although at the time of the purchase subdividing was an incidental issue to Martin, he could not resist continuing it as it was so far along and appeared to be a good investment. He accepted the subdivision as it was, neither liking nor disliking it.

SFA was the first of the partnerships and it was used as the vehicle to convey a good portion of the property to his children. SFA became SFE, the difference being SFE was more structured. Martin gave up his small percent (1% or 4%) of SFA as he wanted to give all of the property to his children. He walked away from his interest, wanting to avoid estate tax.

It wasn't until recently that he found out how the lots were distributed; he had thought Julie had two. He stated he was aware that Lee signed deeds and when Lee informed him the distributions were uneven, Martin said it didn't matter. Although he was initially unaware of the disparity, it was consistent with checkerboarding. His recollection of his early knowledge of the unequal distributions is vague, and he stated that he only recently became aware of the exact distributions. He added that Gilmartin was never told how to allocate the lots among the family.[4]

As to SFE, Lee was essentially the *de facto* nominal managing partner. This was a matter of convenience and somewhat by the default of the others as Lee was here and no one else was. SFE's Management Committee had never been any meetings, nor were there any meetings during the partnership's existence.

Lots 7 and 8 (upon which the house now sits) weren't his initial choice for the home, but in the end their view became the determining factor. Lee had been working with him, and Lee's wife had been helping, so he wanted Lee in on the house. At that time David wasn't working or earning much so he wasn't added. Martin didn't know who filed for any agricultural tax exemption[5].

To expedite matters, on occasion he used David's power of attorney. As to the partnership's Assignment of Voting Rights, he signed it using David's power of attorney. He didn't know who prepared the document, admitted it was prepared in a bad moment when he was distraught, but stated it was never once used to David's detriment.

As to the other, non-subdivided or "farm" property, a person named "Forester" had leased it for farming ever since Martin owned it.

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[4] Apparently Martin did not energetically pursue contact with Gilmartin as he purportedly gave Martin "heartburn" and never returned phone calls.

[5] This was from the adjacent farmland explained *infra*.

The defense also presented a portion of Martin's deposition where he indicated he had first heard of the conveyance to David within a year or so before November of 2009.

Dr. Lee G. Schulman testified about his education and how he had practiced with his father. VDL had provided income to him and each of his siblings. When he became an employee, he was paid a salary. His brother was removed later, so the profits now go to him and Julie. Lee is now the owner of the Schulman Vein Center.

He never had discussions with Gilmartin about deeds for the distribution of the properties. He had spoken with father who said it was checkerboarding and no money was involved. The house on lots 7 and 8 is owned by him and his father, and he paid over $700,000.00 for the house's construction. He had never discussed the deeds with David or Julie until there were legal problems, nor did he discuss them with Ives, their accountant.

With respect to the partnership agreement, he indicated that it reflected that a majority vote was required for the sale or purchase of a substantial (over $20,000.00) partnership asset (pl 11, pg 7, para. 5.8). There had been no meeting before the deeds were signed, he hadn't consented to a transfer, nor had he received any consent from anyone.

After July 15, 1993, he personally paid the real property taxes. He signed the farm lease agreement for himself, Julie and David and did this to lower the taxes. As to an agreement with the Town, he signed it for himself and Martin may have signed for David.

After he received a bill from the Town, he saw that title for the property was now held by BSS Real Estate. He spoke with David in 2007, and during a meeting Julie arranged, met with her and David at a Starbucks. During this meeting, he and Julie said the distribution of the properties was unfair and it had to be returned. David said he agreed it wasn't fair but since his son Sam received nothing "so screw everybody else."

As to the March 17, 2005 deed from David to BSS, Lee indicated neither he nor the partnership authorized it. He also indicated he had never told Gilmartin

how to sub-divide the properties. Also, any tax papers he received were copied and given to Julie and David or their accountants.

In describing his relationship with David, Lee said that during the1990's he and David were very close but it came to an end in mid-2000's;

In response to a question from the Court, he indicated that there had been no consideration for the transfers of the lots to him, Julie and Lee.

On cross-examination he indicated that the written lease affidavit for farmland was notarized even though David hadn't appeared. As to the underlying lease, he didn't recall ever having seen a lease with the farmer but hadn't asked for permission from the partners to continue it as it involved less than $20,000.00[6]. He also stated that during the course of the partnership, both he and his father had often signed on behalf of his siblings and that they knew about it and they never objected. The tax returns, *et cetera,* were prepared by accountant but Lee didn't scrutinize tax returns as the partnership didn't do any substantial business.

As to the Vail townhouse, he had purchased his sister's portion for $175,000.00 or so. 12 years later, David wanted him to pay substantially over $750,000.00 for his, the remaining share; if not he threatened to be there every third day. David eventually sold it to him for approximately $500,000.00. Thereafter, Lee deeded the townhouse to his "Mogocotohoco" LLC.

Julie Slann testified that she currently resides in Florida. She has three children and is presently unemployed. Previously, she was a program director with Emory University. Her father has given her material and financial gifts and managed her children's Schwab accounts. She had had a one-third interest in the Vail townhouse and conveyed it to Lee about 12 years ago. She gave her father her power of attorney in November, 1992. Her father also had her authority to sign the partnership agreement.

Married in 1996, divorced in the early 2000's, she had visited her father's Sagaponak home when Lee and David and their families were also present. As to the property's history with her family, it began in the early 1990's when her father had become interested in a home in Hamptons. After its purchase, the family would often talk about the division of the property between and among all the

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[6] Partnership Agreement § 5.8 (B), (H).

siblings. She first became aware of disparity of holdings in the mid-2000's during a conversation with her father and Lee. In 1994 she wasn't aware of the deeds, nor had she discussed them with family - she had been told they were all getting a third. There was no formal meeting before the deeds were prepared and they never had any such meetings.

She added that when David deeded his January 17, 2005 to BSS, she hadn't authorized it, nor had the partnership, and that she was always told they couldn't do anything with the property.

Describing the 2007 Starbucks meeting, she indicated that Lee had said the lots were not distributed properly and that it was not what their father wanted. David stated he didn't care and that his son, Sam, was never going to get anything from his grandfather. He acknowledged that the distribution was unfair to his sister but said he didn't care. He called her father on the phone and said, "This is your son, David Schulman, I want to know why you are fucking my sister" and then he hung up. David repeatedly said the distribution wasn't fair but stated his son wasn't getting anything from Martin. Afterwards, following arguments about their parents and David's in-laws, their relationship ended. Prior to that they had been close, as were their sons. During that prior time David had been wonderful, very helpful, and she was closer to David than Lee. She had maintained some relationship with David even after he and their father had their difficulties.

During her cross-examination, Julie acknowledged that she had received $175,000.00 from Lee for the Vail townhouse. She had been part-owner of the lab but never employed by the medical practice. Her former husband had provided her with medical insurance but after their 2004 divorce, she obtained her own policy. She received about $77 a week from the lab as well as child support from her husband.

She also revealed that she has stage four cancer.

Regarding the property, she indicated her father's plan was to build one home for himself, and they were not to sell the land until his death. There had been no understanding as to the house. Lee had paid two-thirds of the costs and she always knew the house would go to him. She also indicated her focus was on what she was getting, not what she wasn't.

She stated that she, Lee and David had always agreed to their father's plan. They had always been told of it, and they all agreed "going in" (when the land was purchased). It was always discussed among the family, and there had never been any disagreement.

She stated she had never given David her power of attorney, or vice-versa, and only learned of SFE just before her deposition. She had always known they were getting equal lots and hadn't known of any unequal distribution.

Dr. David Schulman testified that in 1992, after graduating from Union College and New York University Medical School (all paid by Martin), he interned and fulfilled his residency. In 1996 he finished his residency, came back to New York, and worked at the Schulman Vein Center for a while, and then began his dermatology practice. On November 7, 1993, he was married and until 2002, he was close with his father and brother.

He had set up BSS for his children. On July 27, 1993, he signed the power of attorney (pl 9) appointing his father but hadn't discussed it with Lee. (There was an indication that during his pre-trial deposition David said Lee had told him to sign). In July 2009, he revoked it.

He acknowledged that Martin had paid 1.1 million dollars for the property. He stated that he had first learned of SFE when he saw something on his father's shelf, then learned about it next in 2002. In July of that year, after he learned SFE had ownership interests in real property, he ordered a title search. This was the first time he learned of any title documents in his name and had previously never heard of this.

On July 15, 1994, when Lee signed the deed (pl 16) from SFE to David (lots 2, 4, 6, and 10) and the other deed (pl 11) from SFE to Lee and David (lots 11), there had been no discussion nor would any discussion occur until 2007. Similarly, in July, 1994, he hadn't discussed the transfer with Julie or his father. Also, his transfer of four lots to BSS was never disclosed to his brother or father.

As to the September, 2007 Starbucks discussion with Julie and Lee, the meeting was called by Julie and at that time he was still on good terms with her. He and Lee discussed Julie's unhappiness with getting so little of the property and David said it wasn't his any more, as he had given it to children. Lee suggested

he'd give her one and a half acres to even out the distribution.

Thereafter, in March, 2009 he spoke with Lee over the phone, the "major part of the conversation" was "that a lawyer had done this" (the transfers) and they were standing by it. Lee said "Julie got screwed" by "the deal" that their father and the lawyer had set up.

He indicated he had never spoken to his father about the conveyance and only spoke to Lee at the Starbucks meeting and during their subsequent phone conversation.[7]

He also stated that he had never paid anything to SFE for the transfer, and he and a Richard Levine (a 1% owner of BSS) had authorized a letter from Jane Kratz, Esq. (exhibit 23). That letter offered his siblings the opportunity to buy out his Sagaponek property for 27 million dollars and the Vail townhouse for $650,000.00. He also indicated that he had never received any writings from Lee, Julie, or his father referencing the deeds for the transfer/checkerboarding of the Sagaponek properties. He also stated that Lee may have said it was it a gift in 2009 during a phone conversation, but he didn't know it was a gift from Martin. He also added that neither Julie nor Martin had ever said it was a gift.

His transfer to BSS was a gift and he reported the gift on his tax return. He had had it appraised and had only transferred the four lots he knew of, not the additional half lot.

During his cross-examination he indicated that the first time he had any knowledge that he had an interest in the property was in 2002. Specifically, on Friday, July 13, 2002, he went to a therapy center with his father. After that he went to a Schwab office and removed father's power of attorney. When they met the next Friday, he anticipated his father would know what happened at Schwab. His father angrily chastised him and said he was out of his will. When his father asked for the return of the lots, David didn't know what he was talking about. It wasn't until after the title search that he did and, in 2005, found out about the other half lot.

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[7] He indicated he recorded the conversation; during the trial it was produced as an exhibit but not offered into evidence.

As to the inequity in the division of lots, he indicated he wasn't surprised as Julie was at the "bottom of totem pole" and their father is a "misogynistic person" and his sister was the "third" child even though he had been born third. He stated that his father had kicked her in front of family members when she was growing up. He also she had it easy with her "dependency."

He indicated that he had offered his father the opportunity to see his grandchildren and that his father's removal of voting rights was listed as August 11th, 2004 - a Wednesday - but the father hadn't removed control until two days later. He also indicated from 1993 to 1996 he had spent most of his time in St. Louis.

At the end of the trial, when recalled during the defense's presentation, he added that at no time had he ever entered into agreement with his father regarding the development/transfer of the property. He also denied any similar agreement with his siblings. He stated that he had never discussed with them or his father any one-third/one-third/one-third division.

Called out-of-turn on consent, Mark Ives, C.P.A., testified that he is a member of Ives & Sultan, LLP. Since 1993, he has provided SFE provided with his services, including the annual tax returns. He knows the partners, Lee, David Julie, but only contact is with Lee. His review of the tax returns for1993 to 2013 all reflect percentage of ownership 1993- 2013 of a third for each partner, and that it never changed. He also reviewed a January 21, 1994 letter (pl 14) he sent to Lee which outlined the transactions as he knew them, including the possibility that martin might purchase an additional three lots besides those numbered 7 and 8.

His cross-examination indicated that he had spoken with attorney Robert Donatelli at a meeting with him, Lee and Martin. As to any supporting evidence for the entries he made on the documents, he has little recollection and only retains records for seven years. He reviewed certain tax documents for various years and indicated that the partnership's assets were cash and land. Returning to his January 21, 1994 letter to Lee, he indicated that he had no independent recollection of it not the facts contained therein.

The deposition of David Gilmartin was brief (and, unfortunately not very informative). He has been practicing law since 1964. He had been hired to sub-divide the property by its previous owner. After Martin Schulman became the

owner he was asked to continue. As to the subsequent deeds *vis-a-vis* the Schulman siblings, he had no recollection of preparing them or if they were prepared "under his instruction." In any event, he had no file. Indeed, he had little recollection of the events surrounding the deeds' preparation other than he had a telephone call from "Martin Schulman or Lee Schulman" and "they" (sic) wanted some transfers. He had no recollection of who decided which lots were to be assigned to whom but stated he would not have done it on his own. Additionally, he indicated that he might have recommended checkerboarding but didn't recall whether the deeds in question were drafted for that purpose.

LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, §1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter that which is less than reliable. Secondarily, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See e.g. Fisch on New York Evidence,* 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, the witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the opportunity and ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See e.g. N. Westchester Prof. Park Assn. v. Town of Bedford,* 60 NY2d 492 (1983); *Latora v. Ferreira,* 102 AD 3d 838 (2d Dept 2013); *Zero Real Estate Servs., Inc. v. Parr Gen. Contr. Co., Inc.,* 102 AD3d 770 (2d Dept 2013); *Hom v. Hom,* 101 AD3d 816 (2d Dept 2012); *Marinoff v. Natty Realty Corp.,* 34 AD3d 765 (2d Dept 2006). Indeed, as one unanimous appellate bench reiterated, "'[o]n a bench trial, the decision of the fact-finding court should not be disturbed on appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses.'" *Reichman v. Warehouse One,* 173 AD2d 250 (1st Dept 1991)(citing *Nightingdale Rest. Corp. v. Shak Food Corp.*, 155 AD2d 297 [1st Dept 1989], *lv denied* 76 NY2d 702 [1990]).

Also worthy of examination is any witness' interest in the litigation. *See e.g.*, 1 NY PJI3d 1:91 *et seq*., at p.172. The length of time taken by either side's case or any witness' testimony is, however, clearly non-conclusive. What can, however, be devastating to a witness' presentation is the fact-finder's determination that a witness testified falsely about a material fact. Under such circumstances and pursuant to the maxim *falsus in uno, falsus in omnibus,* the law has long permitted—but not required—the finder of fact to disregard those portions or even *all* of the testimony. *See Deering v. Metcalf,* 74 NY 501 (1878); *see also,* 1 NY PJI3d 1:22. Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See e.g. People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Also as regards evidentiary matters, there have been some arguments and inferences that the "Parole Evidence Rule" precludes the reception of certain information. That rule is not a bar to evidence demonstrating that what purports to be a contract is not and, when the issue of want of consideration is raised as a defense, it does not preclude evidence suggesting that deficiency. *Fairchild v. Fairchild, 64 NY471 (1876); Schneiderman v. Tollman*, 190 AD2d 524 (1st Dept 1993); *see also*, Jerome Prince, Richardson on Evidence, §§ 11-202, 203 (Farrell 11th ed 1995).

Those tasks and duties aside, there is also the purpose and goal of the trial, *viz*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it; if the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail. *See e.g.* 1 NY PJI3d 1:23.

More specifically with respect to the matter at bar and the particular legal claims presented, the focus begins with the seven causes of action: constructive trust, promissory estoppel, breach of contract, breach of the partnership agreement, breach of the duty of a fiduciary, adverse possession, and injunctive relief. Again perhaps summarizing the prayer for relief, the action essentially seeks a judgment declaring that certain property held by the defendant David and/or BSS be reconveyed to the plaintiff Schulman Family Enterprises (SFE).

Beginning with the law addressing the imposition of a constructive trust, the general rule includes the requirement of a sufficient demonstration that "'the property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest.'" *Sharp v. Kosmalski*, 40 NY2d 119 at 121 (1976)(citation omitted); *see e.g. Dee v. Rakower, supra.* "In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: 1) a confidential or fiduciary relation, 2) a promise, 3) a transfer in reliance thereon and 4) unjust enrichment." *Sharp v. Kosmalski, supra,* at 121(citations omitted); *see also Dee v. Rakower, supra; Depena v. Shocker,* 83 AD3d 885 (2d Dept 2011); *In re Wieczorek,* 186 AD2d 204 (2d Dept 1992). The remedy is somewhat flexible, and in this "spirit, the promise need not be express, but may be implied based upon the circumstances of the relationship and the nature of the transaction. Similarly, courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share some interest in property, even though no transfer actually occurred." *Moak v. Raynor,* 28 AD3d 900 at 902 (3d Dept 2006) (citations omitted). However, mere reference to property as "yours" is insufficient. *M. v. F.*, 27 Misc 3d 1205(A) (Sup Ct NY Cty 2010) (also insufficient, testimony all of the work "was for us and our future," they would "work as a team," work and build "for our future," "what's mine is yours, what's yours is mine," "we're working for our family"; while expressions such as these may create a moral obligation, they are insufficient for a constructive trust.) Equally insufficient is a father's remark to his son that the property was "your new home." *Carnivale v. Carnivale, infra.*

With respect to the transfer element, its satisfaction may require an inquiry to ascertain whether it was motivated by love and affection due to a personal relationship, or due to some other rationale—such as a business interest. *Id.; Booth v. Booth*, 178 AD2d 712 (3d Dept 1991). There must, of course be some proof of the transfer, and it has been held that where it purportedly included

improvements and/or maintenance, bills, receipts and other documentary evidence have been required. *Depena v. Shocker*, *supra.* Once again, however, and even when such proof has been produced, that evidence must be examined to determine whether it was part of such a relationship's "normal give and take." *Id.* at 887 (citations omitted); *see generally, Morone v. Morone*, 50 NY2d 481 (1980). Even where there was a promise—express or implied—and a transfer, there may be a question as to whether the motive for the transfer was the promise or "love and affection due to [a] personal relationship." *Moak v. Raynor, supra,* at 903.

Next, the elements of promissory estoppel are "'a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise.'" *Rock v. Rock,* 100 AD3d 614 at 615 (2d Dept 2012)(citation omitted). Indeed, the first element, that the promise must be clear and unambiguous is critical and the failure to satisfactorily prove that ingredient has been held to be fatal to such a cause of action. *Id.* Another caveat is that the tort is limited to those case where the promisee sustained an "unconscionable injury" and not where the promisee derived substantial benefit from years of reliance on the promise. *AHA Sales, Inc. v. Creative Bath Prods., Inc.,* 58 AD3d 6 (2d Dept 2008). Indeed, in such cases the constraints of the Statute of Frauds (GOL § 5-701) only apply where its application would not lead to an unconscionable result. *D & N Boening v. Kirsch Beverages*, 99 AD2d 522 (2d Dept), *aff'd,*63 NY2d 449 (1984).

As to the elements of a successful claim for breach of contract, they are that there is adequate proof that 1) a contract existed, 2) the plaintiff performed pursuant to that contract, 3) the defendant breeched the contract and 4) damages occurred as a result. *W. Park Assoc., Inc. v. Everest Natl. Ins. Co.,* 113 AD3d 38 (2d Dept 2013); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 AD3d 804 (2d Dept 2011); *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.,* 69 AD3d 802 (2d Dept 2010). Although typically the time set for the contracted performance must expire, that is not the case where one party repudiates its obligations; in such case the other party may claim damages for a total breach and be relieved of any future contractual obligations. *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, supra.*

Somewhat related is the claim of a breach of the partnership agreement. Such an action is also an matter of contract law and the principles which apply to contracts are also applicable to such agreements. *Bailey v. Fish & Neave,* 8 NY3d

523 (2007). Indeed, and as set forth by our Court of Appeals, there are a number of preliminary rules: 1) whether the agreement is clear and unambiguous is a question of law and extrinsic evidence is not to be considered unless the document itself is ambiguous; 2) if the parties set forth their agreement in a clear and complete manner, it should be enforced according to its terms; 3) any such agreement is to be read as a whole so particular words receive any no undue emphasis; 4) the court "'may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.'" *Id.* at 528 (citations omitted). As noted, a partnership agreement is considered a matter of contract law; therefore, the six-year statute of limitations applicable to contracts (CPLR § 213[1]) controls.

In an action which seeks to establish a breach of fiduciary duty, the plaintiff must "prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Guarino v. N. Country Mtge. Banking Corp,* 79 AD3d 805 at 807 (citation omitted); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, supra; see also Donovan v. Ficus Inv., Inc.,* 20 Misc3d 1139(A) (Sup Ct NY Cty 2008). The sole fact that there is a familial relationship does not create a fiduciary duty. *Juliano v. Juliano,* 42 Misc3d 1226(A) (Sup Ct NY Cty 2014); *Carnivale v. Carnivale,* 34 Misc3d 1232(A) (Sup Ct NY Cty 2012). In essence, a fiduciary relationship requires high level of trust or confidence in one which results in superiority and influence, but not where the parties are on equal footing. *See e.g. Royal Warwick, S.A. v. Hotel Representative, Inc.*, Inc.25 Misc3d 878 (Sup Ct Queens 2009). The *sine qua non,* basic and fundamental element of a fiduciary relationship is "that a fiduciary owes undivided loyalty to those whose interest the fiduciary is to protect.. *Birnbaum v. Birnbaum,* 73 NY2d 461 at 466 (1989). Partners, sometimes called co-venturers, of course, share a fiduciary relationship *viz-a-viz* each other. *Id.; Blue Chip Emerald LLC v. Allied Partners, Inc.,* 299 AD2d 278 (1st Dept 278); *In re T.J. Ronan Paint Corp.,* 98 AD2d 413 (1st Dept 1984). Any transaction which has been conducted in violation of the fiduciary duty may be set aside and the parties returned to their prior status (*Rose Ocko Foundation v. Lebovits*, 259 AD2d 685 [2d Dept 1999]) and that remedy has been long recognized. *Norwegian-Amer. Securities Corp. v. Schenstrom,* 124 Misc 235 (Sup Ct NY Cty 1924).

With respect to adverse possession, that cause of action is essentially a creature of statute. RPLPL § 501 provides:

> 1. Adverse possessor. A person or entity is an "adverse possessor" of real property when the person or entity occupies real property of another person or entity with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment.
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> 2. Acquisition of title. An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for an action to recover real property pursuant to subdivision (a) of section two hundred twelve of the civil practice law and rules, provided that the occupancy, as described in sections five hundred twelve and five hundred twenty-two of this article, has been adverse, under claims of right, open and notorious, continuous, exclusive, and actual.
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> 3. Claim of right. A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be. Notwithstanding any other provision of this article, claim of right shall not be required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, of the county where such real property is situated, and located by reasonable means.

Finally, it is hornbook law that a request for injunctive relief - a drastic and essentially equitable remedy - involves a series of considerations. Chief among them, and perhaps the most frequent, is that the application will be denied where there is remains available a legal remedy which is plain, adequate, appropriate, and complete, and, from a practical point of view, would be just as effective as an injunction. Siegal, New York Practice, § 398.

Besides those causes of action, there are other legal issues involved in this matter.

For example and with respect to the question of a gift of any property, every valid *inter vivos* gift has three simply stated elements: intent by the donor to give, delivery of the property pursuant to that intent, and acceptance by the donee. *Matter of Szabo*, 10 NY2d 94 (1961); *Mortellaro v. Mortellaro,* 91 AD2d 862 (4th Dept 1982). The burden of proof is borne by the party asserting a gift. *Id.; In re Harper's Estate*, 24 AD2d 681 (3d Dept 1965). "'The hallmark of a gift is that it is 'a voluntary transfer of property without consideration or compensation' and the inquiry focuses on the subjective intent of the donor at the time of the conveyance.'" *Batease v. Batease,* 71 AD3d 1344 at 1346 (3d Dept 2010)(citations omitted).

ANALYSIS

Focusing first on the issue of credibility, an objective observer might note that most of the essential facts are not in serious dispute. Indeed, that has been conceded within the plaintiffs' post trial memorandum. Upon that canvas, therefore, the competition for credibility is not a crucial as in most litigation. Clearly however, and as underscored by the defendants' submission, many of the acts and omissions of the parties were by no means laudable and clearly of questionable legality. While not condoning those missteps, and beyond peradventure the end never justifies the means, an objective view of the pre-litigation condition of the SFE partnership displays it to have been a family venture, conducted in a *laissez-faire*, laid-back fashion, run (due to the default, acquiescence or disinterest of the others) by the founder and/or senior sibling. While clearly the manager took shortcuts, the others appear to have been detached, indifferent and/or trusting enough not to intervene or participate in the business' affairs. Stated otherwise, they allowed it to essentially run itself under the father and/or brother and by their inaction, inattentiveness and acquiescence, they ratified the process. Under that tutelage and lack of participation (or interest), mistakes were clearly made by all, but they appear to be more mistakes of the head than of the heart. Moreover, and focusing upon gauging the witnesses' veracity, there did not appear to be any individual or concerted effort to conceal those mistakes during the trial. Additionally, as to issues of credibility and reliability *vis-a-vis* the fact-finding analysis, most of the documents are unimpeachable and speak for themselves, thereby establishing if not reinforcing the relevant facts. As such, the witnesses' character miscues aside, there is no need to reject their testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

First of all, the defendants' defenses of statute of limitations, statute of frauds/parol evidence are all rejected. *See* CPLR § 213[1]; *Fairchild v. Fairchild, supra; Schneiderman v. Tollman, supra;* Richardson on Evidence, *supra*. Indeed, as to the statute of limitations issue, the acts complained of arose in 2005; this action was commenced in 2008.

Equally clearly, there can be no dispute that the property began as an asset and the property of the partnership. Therefore, for David to transfer the property or any part thereof to BSS, he must, in some fashion have been the exclusive title holder. Or, absent such sole ownership, he must have had the transfer authorized by the partnership.

As to any claim of exclusive ownership, none has been demonstrated. Indeed, although the issue of the property being gifted has been raised, there has been no evidence sufficient to show the elements required. *See Batease v. Batease, supra; Matter of Szabo, supra; Mortellaro v. Mortellaro, supra; In re Harper's Estate, supra.*

The other alternative - that it was transferred by the partnership - also fails. For that to have occurred, the Articles of General Partnership specifically state that the conveyance of any asset requires approval by a majority of the partners (§ 5.8[A]) and any transfer 80% consent (§ 5.09[C])[8]. There has been no demonstration of any such approval, either by testimony or otherwise (see § 5.10). Indeed, as this litigation - brought in the name of the partnership and two of the three partners, more than demonstrates their opposition[9].

Moreover, not only was the BSS transfer of the property (for which the partnership had paid the taxes) was not approved by the partners—much less even discussed—the partnership did not receive any consideration for it.

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[8] In view of the value of the property (David's attorney demanded 23 million dollars), quite obviously, any reliance upon the less-than-$20,000.00 exemption (see, e.g., §§ 5.8 [B], [H]) would be misplaced.

[9] Martin held David's power of attorney until 2009.

Additionally, as to the 1994 deeds, it is hornbook law that they are not conclusive proof. *See Benham v. Hein, supra.* Rather, what is clear is that the intent of the conveyance was purely administrative and one of convenience so as to achieve the checkerboarding needed for tax avoidance (a business duty owed the partnership). There has been no credible evidence which provides any explanation—financial, logical, or otherwise—which would defend or support the manifestly inequitable and seemingly irrational and haphazard manner in which the checkerboarding assignments were made. (What also remains a puzzlement and an unanswered question is who—or what—determined or designed those assignments.) This, however, would seem to comport with the authority (§ 2.1 [F]) to hold the property as nominees. Indeed, to hold otherwise - that the deeds were actually meant to convey outright grants - would be to ignore what had been perpetually accepted and discussed between and among all of the partnership/family members: that, with the exception of the portion used for his home, Martin's intent was for his children to share *equally* in the property[10].

It is therefore, that in the absence of the other two partners acquiescence, there is no authority for David's apparently gratuitous the transfer to BSS and, by operation of law (Partnership Law § 21) is not binding. By that same law (§ 20), the partnership may recover the property.

Additionally, there is the question of whether David violated his fiduciary duty. Clearly, the answer is yes. He not only acted against the interests of the partnership, but also as to the remaining partners. *Schneidman v. Tollman, supra.* As such, that violation alone is sufficient to undue the transaction. *Rose Ocko Foundation v. Lebovits, supra; Norwegian-Amer. Securities Corp. v. Schenstrom, supra.*

Finally, and as contained within the defendants' post-trial brief (page 3), there is a question framed as follows:

> "As to the cause of action related to breach of contract and fiduciary duty, whether and to what extent agreement existed between the parties, the parties obligation under the partnership agreement, the

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[10] Additionally, there has been no demonstration that the requisite number of partners agreed to any such outright grant.

existence or non existence of a fiduciary duty, and the existence of a breach of the partnership agreement."

The answer which flows from the above legal and factual analysis reveals that there was such an agreement, they were obligated to follow that agreement, owing to each other and the entity a fiduciary duty, and by David's transfer, he breached their agreement and his fiduciary duty. The result of that determination is, therefore, that the plaintiffs have, by a preponderance of the credible evidence, demonstrated the validity of their third, fourth, and fifth causes of action (breach of contract, breach of the partnership agreement, and breech of fiduciary duty). As a result, the conveyances to BSS are stricken, and the property reverts to the partnership.

In view of that finding, the plaintiffs' other causes of action need not be considered.

It is, therefore, the determination of the Court that the purported transfers to BSS be set aside, and the property and the parties be returned to the *status quo ante* the attempted transfer.

The foregoing constitutes the decision and order of the Court.

Submit judgment on notice.

Dated: 2/3/14
Riverhead, N.Y.

Hon. Ralph T. Gazzillo
A.J.S.C.

Non-Final Disposition